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Constitutional History of England

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PREFACE

I have endeavored in writing this book to keep constantly in view the needs of the general reader and of the college student. I have to join in the recurring lament of those who attempt to write a small book on a large subject that they are obliged to omit so many details and that the task of selection is so difficult. In this book I have especially regretted the fact when I have thought it necessary to omit details which one teacher of English history or another has urged me to include. It seemed to me certain, however, that the chief thing to keep always in mind was to make the continuous growth of the constitution from generation to generation as clear as possible. Details in this line, or which help to make it clear, must be included. Details which are not in the direct line may be omitted, if space demands, and must be if their inclusion would tend to confuse the larger view. I am sure that some teachers will not agree with my selection, but they will not find it a disadvantage that considerable opportunity is given for the expansion of the narrative by the teacher. I believe the book will be found to include those matters which all teachers agree are essential.

It will be especially useful, I think, to expand the Introduction into a more full description of the present English government, in order that the student may know from the beginning "how the play is going to end," and what the important differences are between the American and English constitutions. It is desirable also that the student should be well grounded in English political history, which is here taken for granted, or that he should follow the account closely in some manual of the political history.

I wish to acknowledge my especial indebtedness to the

kindness of the Yale University Press, the publishers of my *Outline Sketch of English Constitutional History*, for permission to use parts of that book in the present one. The important steps in the development and the results are indicated there, and that book will be found valuable for review and for a summary statement. I am also greatly indebted to many scholars who have made me valuable suggestions and especially to Professors A. L. Cross of Michigan, Wallace Notestein of Cornell, and R. L. Schuyler of Columbia Universities, as well as to Professor C. H. Haskins of Harvard University, the general editor of the American Historical Series. I am sorry that I have not had the advantage of Professor A. F. Pollard's *Evolution of Parliament*, which is not yet available here.

G. B. A.

New Haven,
October 16, 1920.

GENERAL BIBLIOGRAPHY

Of the compendious general histories of the English constitution, T. P. Taswell-Langmead's is the most satisfactory on the whole for American use, but numerous revisions have affected practically only the most recent periods, and much of the narrative depends too exclusively on the statutes. Its great advantage is that it presents a continuous chronological account and that the detail is full. D. J. Medley's is more accurate in the earlier portions and has been kept abreast of recent legislation, but it treats the subject topically rather than in its chronological development. F. W. Maitland's is based on the lectures given by Professor Maitland at Cambridge in 1887 and 1888, and is full of suggestion for the teacher. It presents the subject in cross sections at five important epochs. J. Hatschek's *Englische Verfassungsgeschichte* is valuable as giving the views of a foreign scholar and treats of many topics not usually covered elsewhere. It has full bibliographies. R. Gneist's *History of the English Constitution*, translated by P. A. Ashworth, is still useful, especially for facts not commonly given. J. A. R. Marriott's *English Political Institutions*, though concerned chiefly with present institutions, is helpful in tracing their historical antecedents.

More detailed on the general subject, or on special features of it, are William Stubbs *Constitutional History of England*, in 3 volumes to 1485, which should be used with the two supplements by Petit-Dutaillis published in translation by the Manchester University Press. Henry Hallam, from 1485 to 1760, is still helpful in many details and has been continued by T. E. May to 1860, and May in a third volume by F. Holland to 1911. F. W. Maitland's *Collected Papers* should be used on a number of topics. The special histories of law, Pollock and Maitland, 2 volumes, to the beginning

of the fourteenth century, and W. S. Holdsworth, 3 volumes, for the whole history, and the *Select Essays* in *Anglo-American Legal History*, 3 volumes, are of constant help, as are also F. Makower's *Constitutional History of the Church of England*, W. Cunningham's *Growth of English Industry and Commerce*, and E. Lipson's *Economic History of England*. The general political histories, that edited by W. Hunt and R. L. Poole, in 12 volumes, that by Charles Oman in 7 volumes, and the *Cambridge Modern History* in 13, give much constitutional information and contain valuable bibliographies. C. Gross's *Sources and Literature of English History* to 1485 should be constantly consulted for bibliographical assistance.

The chapter bibliographies that follow are not intended to be complete but are in general limited to the most recent books and articles and to those having a special relation to the subjects of the chapter. For the medieval period they should be supplemented by Gross and for the modern by the bibliographies in the general histories named.

ABBREVIATIONS

A. and S.	Adams and Stephens, Select Documents of English Constitutional History. 1901.
A. H. R.	American Historical Review.
Cheyney, Readings.	E. P. Cheyney, Readings in English History from the Original Sources. n. d.
E. H. R.	English Historical Review.
Gardiner, Documents.	S. R. Gardiner, Constitutional Documents of the Puritan Revolution. 1906.
G. and H.	Documents Illustrative of English Church History. 1896.
Penn.	Translations and Reprints, University of Pennsylvania.
Prothero, Documents.	G. W. Prothero, Select Statutes and Constitutional Documents. 1558–1625. 1913.
Robertson, Statutes.	C. G. Robertson, Select Statutes. Cases and Documents. 1919.
Stubbs, S. C.	W. Stubbs, Select Charters. Ed. H. W. C. Davis. 1913.

INTRODUCTION

When William, duke of the Normans, set up his tent on the battlefield of Hastings from which the Saxons had been driven beyond power to rally, one of the great transformations of history had begun. For what was decided in that one day's fight was not so much who should be king of that little island realm, then scarcely larger than the state of New York and much below the world's standard of advancement. Nor was the chief question at stake whether England should remain cut off from the ancient sources of civilization, and live out her history touching and touched by the larger currents of world affairs as little as her close relatives the Scandinavian states. The really great decision of that day was that a union should take place between two peoples that should awaken a new constitutional life of which neither alone seemed capable. Within a generation, quite as early as we can detect signs of the uniting of the two peoples, we find the beginnings of that new growth under a government which was an almost ideally complete absolutism, and from that day to this without a break that growth has gone on to ever larger results and to ever broadening influence upon the world. In the seventeenth century the line of progress divided into two branches, each developing a distinct type of government, but each drawing its special characteristics and all its life and power of growth from the main trunk.

One retained the office of king: the other in the simpler conditions of colonial life established republican government, and thus was created the most striking difference between

them. But if we compare their constitutions in detail, we find other marked differences in the working out of what are now in both branches democratic governments. To state in brief the side with which we are less familiar: In England the executive is not elected by the people but is in form appointed by the king: in reality he is selected from the leaders of the party which has the majority in the lower house of the national legislature. He is not chosen for a definite term but retains office so long as he can retain his majority in the house. The result is a very close union between the executive and legislative departments of government, so that the prime minister and his cabinet are really, as they have been called, a third house of the legislature.

In England the people exercise their power in government through their elected representatives in the legislature to a greater extent than in the United States, and the representatives assembled in the house of commons are the supreme authority in the state. The upper house, the house of lords, has a very limited power and must give way in the end on any measure which the house of commons is determined to carry. The same thing is even more completely true of the king, who is supposed even to have no opinion on any political question except that of the cabinet in office, and who never expresses an opinion except through his ministers. The house of commons also, as the supreme authority in the state, is the constitution making body, and every other authority is bound by an act of parliament, even though it changes fundamentally the powers or functions of any part of the state machinery. There is no written constitution, adopted by direct act of the people, and no document of any kind which lays out the different departments of government and defines their functions, powers, and limitations. The constitution is an unwritten body of custom and precedent, the result of unpremeditated growth; but certain statutes, constitutional in character, do exist which for the most part give sanction to

limitations which experience at some time proved it necessary to place upon the exercise of one power or another.

Though the house of commons appears from these facts to possess a power in the government of England far greater than is lodged in any one part of the American government, it is in practice more directly and immediately under popular control than any American legislature. The dependence of the cabinet on a majority in the house of commons makes the issue in an election general policy or specific measures rather than men and gives to it the character of a referendum. The fact also that the new parliament goes into session at once after an election makes the popular decision immediately effective. The progress of democracy during the last fifty years has also evolved very efficient methods of bringing public opinion to bear directly upon the members of the house, so efficient indeed that one may begin to question if the representative character of the member is not in danger of disappearing in the character of a mere delegate.

We may have before us then in very simple terms the problem of English constitutional history. It is to show how the absolute government of the eleventh century, which centred all power in the king and provided no way in which any will but his could be expressed, was gradually transformed into the democracy of today, in which the king has no will and the expressed opinion of the people controls all. It has to show also how more than two hundred years ago the way had been prepared for republican government of the people and by the people, and how the line of growth was then divided into two branches each leading to a result fundamentally similar to the other but differing from it in many superficial aspects. It is the story of a movement slowly beginning, slowly gathering momentum, until at last it becomes irresistible. It involves also an account of the institutions in which, in successive stages of the progress, the government of the state was embodied.

conquered Gaul and established a Frankish Roman Empire. In consequence this new source, though it was primarily Teutonic, was Teutonic strongly modified and developed by contact with Roman political civilization through five centuries of union in the Frankish kingdom. The modification of the original Teutonic was so great by the date of the Norman Conquest that the differences strike us as more significant that the resemblances, except in a few particulars, and the processes of union between Saxon and Norman into an indistinguishable whole takes nearly a hundred years really to begin and another hundred really to complete itself.

So striking do the differences seem to us that universally we regard the Norman Conquest of 1066 as closing one great epoch in English history and beginning another, though students of the history do not agree in their interpretation of it and emphasize one feature or another of the change according to the point of view from which they regard it. In constitutional history, in the history of the general government of the state as distinguished from the local, the change was decisive. It was so sweeping that it is no exaggeration to say that the origin of some important features of the constitution of the state must be sought in Frankish, not in Saxon institutions. In the field of local government the change was not so great and in some particulars scarcely noticeable. While king and barons constituted the national government in a new way and a new national law governed important relations, the territorial divisions and sub-divisions of the state and the law administered in the local courts continued for a long time without apparent change.

Much study has been given by scholars to early Saxon institutions and to the history of their development during the period of Saxon rule in England, but the material from which we must obtain our knowledge is so scanty and so difficult to interpret with certainty that about many essential matters we have to confess our ignorance. A scholar reaches a conclusion which seems sound to himself, but the amount

of evidence which he can bring to its support, or the method which he has followed, are not convincing to others. One kind of material, codes of law, we have in unusual abundance, but the object of the makers of the codes does not seem to have been so much to write down the whole body of the law as to make a record of changes and memoranda of points that might easily be forgotten.[1] We are consequently in the study of this material also largely shut up to conjecture. Like all primitive people, the Saxon paid no attention to the needs of the future student and recorded, either in documents or in books, only what he had some need of himself or some special interest in.

As we draw nearer to the time of the Norman Conquest, the amount and fulness of the material increases, and of the institutions of the Anglo-Saxon kingdom on the eve of the Conquest we have a much more trustworthy knowledge. For the purposes of this study, it seems likely to be more satisfactory if we attempt a description of the constitution as it then existed, adding so far as possible some account of how its various features came to be what they were, than to attempt any detailed picture of a development in which so much must be uncertain.

In entering upon a study of Anglo-Saxon institutions, the warning which is given to every beginning student of early civilization must be repeated: not to attribute to the minds of that time ideas which are the results of historical growth and experience since their day. The temptation is almost irresistible to assume that they understood by certain terms the same things that we do, and to apply the technical terms by which we characterize practices and customs to similar practices and customs among them. In the study of the early history of our own government, the constantly besetting temptation is the word "constitutional." If we could use it only in what is its primary meaning, the way of doing things, and in no other, we should be perfectly justified

[1] Extracts, Stubbs, *S. C.*, 66–88.

in using it, for there were certainly recognized ways of doing things in government, though perhaps less stereotyped than ours. But it is almost impossible for us to use the word in that sense alone. It means to us a consciously recognized fixed procedure, which is known to all men, departure from which is either by law or by convention made impossible, instantly detected and denounced by watchful guardians of the constitution. In the Anglo-Saxon state we find such fixity of forms, such conscious exercise of rights and enforcement of obligations, in a field where we are not tempted to use the word constitutional, in judicial procedure, but not in the field of government. In reference to government the word must be used, and interpreted when used, with the greatest caution, or we shall suppose a degree of regularity about government and political procedure, and of conscious thinking about them, which did not exist. Men did things but they did not reason about their doing, nor did the boundary lines between one function of government and another, nor the distinction between one way of doing a thing and another, seem to them important, and we shall be deceiving ourselves if we fall into the way of thinking otherwise.

On the eve of the Conquest England was a single kingdom. Its union had been brought about, however, by a long and slow process in which various independent colonies and kingdoms had been amalgamated into one, and this process had left visible traces not merely in the geography of the state but also in its government. The shires into which the kingdom was divided represented in many cases earlier colonies or tribal kingdoms, as in the case of Surrey, Sussex, Essex, Kent, Norfolk and Suffolk for example. Details of local law differed quite distinctly in different parts of the kingdom. West and North still retained something of their ancient independence which had to be recognized in the arrangements made for the local representation of the central government.

The Teutonic tribes which began to take possession of

Britain soon after the withdrawal of the Roman troops in the fifth century were from the lowland districts of northern Germany and the Danish peninsula along the shores of the North Sea. In their original homes they seem to have been in their political development among the more backward of the German tribes. They had no tribal unity, no kings or common government, but appear to have been divided into small related groups more or less closely allied with one another. Indeed when they were forced to submit to Charlemagne at the beginning of the ninth century, they were still in this political condition and had not yet developed a king nor any settled government of the tribe as a whole. In one respect this political condition was reflected in the organized settlements established in Britain, whatever may have been the way in which the Saxons conducted their conquest. No common government was created. Apparently each war band, or perhaps each of the older tribal groups, set up an independent colony of its own, and no effort was made to unite them into one state, nor does any idea seem to have been entertained that such a result would be desirable. Almost from the start, however, the process of union must actually have begun, really a process of conquest among themselves, the swallowing up of the original settlements one by another, which went on for many generations, until first each of the seven historic kingdoms, known as the Heptarchy, was formed and finally the kingdom of England itself under the West Saxon Kings.

One result of the conquest we may imagine was immediate. The war chief, who may have been originally chosen, as Tacitus intimates was the case, for his nobility of birth or for his proved abilities, became a king. In the conditions of the settlement upon conquered territory, bordering upon hostile tribes, in almost constant war, this office must have become permanent. At first in all probability it was little if anything more than a permanent war leadership. By degrees it would assume the character and functions of the

kingship, of the supervision of the tribe in its more general concerns, in a more orderly and settled state. Whether this was truly the origin of definite government and constitutional development in these Saxon colonies or not, at any rate soon after the beginning of the conquest real political organization is to be found in the emerging states, and the institutional details, of which we begin to get traces, link themselves naturally with those described by Tacitus as possessed by the Germans with whom Rome had come in contact in his time.

While the origin of the Saxon kingship sketched in the last paragraph is conjectural, there is no doubt but that the continued warfare which existed through almost the whole of Anglo-Saxon history, in the slow process of conquest which formed a single kingdom and in the long and fierce struggle with the new Teutonic colonization of the Danes, led to a steady development in the office of king after it had once come into existence. The state also grew more definite as it increased in size, its problems multiplied, its machinery was improved and more carefully operated, and the body of law became larger and more complex. The kingship, which seems to have been the most natural form of early political organization in times of recorded history, considered as the center of the machinery of government and as the directing head responsible for the going on of all processes, inevitably grew in power as the state grew in definiteness.

It was the kingship which became strong. Whether any given king was powerful or not depended upon himself, upon his abilities and strength of will. In the last century before the conquest, there is an alternation of weak and strong kings with no change in the possibilities of power but only in the character of the king. But the Anglo-Saxon kingship never became absolute. It never obtained the degree of power of the Carolingian Frankish monarchy nor ruled over so centralized a state as that in its best days. It never

felt, or felt only slightly, the influence of Rome as a model, nor the temptation of the Roman idea of Empire, nor the necessity of borrowing governmental machinery to solve the problems of a small state suddenly become a great one. In consequence the Saxon monarchy developed in power more slowly than the Frankish. It followed very much the same road. It is possible to point out many details in which their history seems alike. But when the end of the Saxon monarchy came in the eleventh century, it was still some generations of development behind the point which had been reached by the Frankish in the ninth. Some of the ways in which the king was limited will be pointed out later, but here it may be said in general that he was limited by custom. As has been said: "His power was subordinate to the customs of his people; he could touch no freeman's heritage or life without a process at law, which gave the freeman the right of defending his cause before his fellow-freemen; he could make no law without his people's deliberate consent; he habitually acted by the advice of his counsellors and wisemen, who formed his privy council as it were." This is limitation by an interpretation of his relation to the other elements of the community which had grown customary, by habit and common understanding, not by law. A strong king might push perilously near to an overriding of such limitations, a weak king might have scarcely any initiative at all.

In a sense the monarchy was elective, but not in quite the sense which the phrase "an elective monarchy" has for modern ears. Many of the Teutonic tribes that formed states after the fall of the Western Roman Empire give evidence in their later practices that the primitive German king had been elected. Traces of the fact lingered as long in the French state as in the English, and are more decided still in the kingdom of Germany. But in no one of these states did there exist what the modern constitutional lawyer

would term an elective monarchy, as he would use the term of the eighteenth century kingdom of Poland. In the Saxon kingdom of England the crown was hereditary in a particular family, and only in the most extreme case was there any departure from this line, once as the result of conquest and once in the face of a threatened conquest. Some choice was not infrequently exercised within the limits of this family in departure from the line of strict succession. Apparently when it occurred, it was not the deliberate exercise of a recognized right always consciously felt to exist, but the determination of a more or less vague body of leading men, whose decision could not be resisted, or who had influence enough to control the community, to acknowledge one member of the family as king rather than another, not always on grounds of fitness. What seems most nearly like deliberative action occurred when a wide departure had to be made from the strict line of succession, or when a new dynasty had to be chosen. But these are contingencies which may arise in the history of any state under any form of constitution. What is significant in such cases is not the act of choice, but the ground of right upon which the actors in the given case suppose themselves to be acting. The same qualifications apply to the cases of deposition of the king which occasionally occur in Anglo-Saxon history, with the proviso that deposition is a more extreme act and therefore likely to be more deliberate.

The Anglo-Saxon church early showed an interest in the monarchy and, in so far as it could be, it was an ally in its advancement. Roman Christianity was introduced among the Teutonic conquerors but little more than a century after their real settlement began. Its beginning and spread in England owed much to the patronage of the kings, and on its side the church, as in other of the forming states of Europe, favored to the extent of its ability union and a strong central government. In its own organization it tended to

regard all the Anglo-Saxon settlements as a single people, whatever political separation might exist.[2] The head of the church took the leading part in the coronation of the king, anointing him with holy oil after the manner of the Old Testament and receiving from him his coronation oath. At the end of the tenth century this oath is recorded as follows: In the name of the Holy Trinity, three things do I promise to this Christian people my subjects: first, that God's Church and all the Christian people of my realm hold true peace; secondly, that I forbid all rapine and injustice to men of all conditions; thirdly, that I promise and enjoin justice and mercy in all judgments, that the just and merciful God of his everlasting mercy may forgive us all. The coronation oath sworn by the English kings continued this form almost unchanged for two hundred years after the Conquest.[3]

Associated with the king in the general government was an assembly of the chief men of the state, lay and clerical. The Anglo-Saxons called this assembly Witenagemot, the court of the wise men, and the name undoubtedly indicates the principle of its composition. Its membership was not official nor designated in any way that we should call constitutional in the modern sense. No officer nor individual possessed a right to attend. It was not a representative assembly, nor were its members elected. As nearly as we can tell the king determined what persons should attend any given meeting, but it seems probable that his choice was not always free. That is, there would always be holders of certain high offices, archbishops and earls, who could not well be omitted, and certain other persons, so intimately associated with the government of the moment, officers of the king's household and others, that they must be present. Besides these there would always be, it is likely, others, both lay and clerical, so prominent in the country that they could not be passed over, whose aid was needed or displeasure feared. Apart from

[2] Gregory I's letter on English dioceses, A. D. 601, G. and H., 9.

[3] Stubbs, *S. C.*, 69, 94; Cheyney, *Readings*, 105.

these the king's choice seems to have determined who should come, guided perhaps by the business to be done or the convenience of the place of meeting. That the witenagemot consciously represented the nation in any action which it took is highly improbable. It spoke for itself, for the class which its members constituted, and there was no one else in the nation whose opinion was of any consequence. In this sense its voice was the voice of the nation.

In capacity and function the witenagemot was like many primitive institutions undifferentiated, that is, it was accustomed to perform, without making an apparent distinction between them in its action, a variety of functions, which we believe should be separated and assigned to different institutions. It was at once the highest legislative and the highest judicial body in the kingdom, but in saying this we must be careful not to suppose that the Anglo-Saxons attached such definite ideas to these terms as we do. The same body could be at once legislature and court because the ideas expressed by these words were somewhat indefinite. The idea of judicial action was more clearly defined than of legislative. Practically all law was custom. Legislation consisted less in making law that was entirely new, though no doubt that was sometimes done, than in modifying or interpreting existing law. If this was legislation, it was quite natural that the highest court in the land should be also the national legislature, for a judicial decision was the interpretation and application of the same customary law. The witenagemot was also the king's council and gave him advice on questions of policy and of action in particular cases, like a modern cabinet council, though without independent power of decision unless there was no king or a powerless king. But the approval and consent of the witenagemot, as that of the ruling class in the state, gave sanction to any act of the king's whether it was the proclamation of a new code of laws, the making of a treaty with another king, or a royal grant of lands. Ecclesiastical matters were as much subject to

its approval as those concerning the state, and the church did not possess in the fullest sense an independent right of legislation, or of judicial action, in Saxon times.

In his account of the tribal assembly of the primitive Germans, Tacitus speaks of the meeting of two bodies,[1] one a smaller council of chiefs which decided by itself matters of minor importance and prepared for submission to the larger assembly of all the freemen those of greater importance. Apparently the chiefs presented these matters to the full assembly and explained the policy which they thought ought to be followed. The account looks as if they presented a decision they had themselves already reached, and as if the larger assembly had only a voice to accept or reject. At any rate in the later Teutonic states this, or even less than this, was the only function remaining to such traces of a national assembly as survived in them. The assembly applauded the decision of the council of magnates, never rejected it. Faint traces of this assembly remain in the Saxon, as in the Frankish, state, when something called masses of the people together at a muster of the army or at a coronation, but there is no evidence that it possessed in either state any real influence on legislation, or any independent power of decision.

In relation to the ordinary business of the central government, there developed in the Frankish state a small council-court, alongside the greater assembly of all the magnates or, more accurately, one performing the functions of the larger body during the intervals between its infrequent sessions. It was composed primarily of the officers of the king's household with the count of the palace at their head and of such magnates as happened to be with the king or as had occasion to attend. In Carolingian times a very large share of the judicial business which fell to the central king's court was done by this body. Of the existence of such an institution in England before the Norman Conquest, we get only faint

[1] Tacitus, *Germania*, c. 11; Stubbs, *S. C.*, 61.

traces, not distinct enough to warrant description. Special local king's courts formed on the basis of the ordinary local courts, and created and commissioned by royal writs, seem also to have been wanting, though there is evidence to show that there was no clear boundary of jurisdiction between the witenagemot and the shire court, that in some instances at least cases were tried before shire courts which do not seem distinguishable in character from those tried at another time before the witenagemot.[5]

On the eve of the Conquest, there existed in the office of sheriff a bond of connection between the central and the local governments which was destined later to be of the greatest importance. In exactly what way the office of sheriff originated, it is now impossible to say with certainty. It seems most probable that its earliest form was a stewardship of the king's financial interests, the care of his domain lands and his local revenues, in the territorial divisions, or perhaps only in the subdivisions of the state. When we come to know more of it in the last century of Saxon history, it is an office which had plainly developed out of something filling a less important place in the government, and it was as plainly still increasing in importance. A part of the increase in power of the sheriff seems to have been due to the growth in power of the king and in the definiteness of government under him, and a part to changes in the functions of another Anglo-Saxon officer, the alderman, whose history we shall consider later and whose earlier functions in part fall to the sheriff. As the state grew in size, population and business, the interests which the king had to look after increased in number and complexity. The representative of the king's interests in the smaller state naturally developed his duties into the guardianship of similar things in the larger state. It is probably in connection with the expansion of the state's territory if it had not been true earlier

[5] H. Adams, *Essays in Anglo-Saxon Law*, 309–383, gives, with translation, cases before both courts.

that the sheriff became the king's reeve in the shire, shire-reeve, that is in the largest division of the state.

If this history of the sheriff's office is correct, it indicates the character of his duties on the eve of the Norman Conquest. His care of the king's revenue in his district was undoubtedly, as it remained for some time afterwards, his most important responsibility. To see that the king's lands were well let and properly stocked and cultivated, and that their returns came in at the proper times, was probably the largest part of his duty. But he had also to collect and pay over certain judicial fines and fees which belonged to the king from the local administration of justice. These two sources made up, sometime after the Conquest, the larger portion of the county ferm or annual rent which the sheriff paid for his county. There is some evidence to indicate that in Saxon times a beginning had been made towards fixing a lump sum which the sheriff should pay, as a kind of speculation, for these two sources of revenue, but we are not able to say that the process had gone very far. It is a question whether in the most important of his other duties the sheriff did not represent the alderman rather than the king, but even if so the fact remains that the change means the slipping of local responsibilities and powers into the hands of an officer more under royal control than the alderman had been. In this way most likely the sheriff came to be the presiding officer with the bishop in the shire court, not as judge but as chairman or moderator, to have some responsibility even in the lower courts for the arrest of criminals and the punishment of crime, and to proclaim and enforce laws and royal commands throughout his district. In this way also he assumed some of the military duties of the alderman in calling out and commanding the local levies.

Although the office of sheriff was still undeveloped and in process of making, the position which it occupied in the state was plainly to be seen before the Norman monarchy took hold of it. A royal officer, appointed by the king and

under his control, not yet seriously affected by the universal medieval temptation to turn a local office into a local principality, and generic in character, concerned at once with financial, administrative, judicial and military functions, the sheriff's office furnished in days of simple and undifferentiated government a most effective means of centralization. He was a leading man of the locality, thoroughly familiar with local persons and affairs, concerned officially with all the chief activities of the day and entrusted with the care of all the interests of the central government from which he took his orders. He was a close connecting link binding the king with every locality in the kingdom. In this respect the office of sheriff was the most important contribution made by the Saxon state to the later Norman central government.

Not much more than these things can be said of the Saxon central government. There was no national taxation in the modern sense. Early in the eleventh century a general levy of money had been made to buy off the Danes, and this had been collected at later intervals and called the Danegeld. If it presented the possibility of developing into a modern national tax, no appreciable progress had been made in that direction by 1066, and the state was supported, as the local magnate supported his household, by the proceeds of domain lands and of judicial rights. There was no system of national courts, rising in graded ranks to a supreme court having the right of correcting the errors of lower courts. The national court, the witenagemot, might see to it that a man's case should get a trial, if the local courts refused to hear him, but there was no appeal from one court to another in our sense of the word, and no way of reopening a case once decided. Courts of a regularly graded series were not characteristic of the Saxon system of things, but courts of concurrent and overlapping jurisdictions which are puzzling to us. Nearly the same peculiarity characterized the body of the law itself. There was as yet no really na-

tional law, though we can see it beginning to form. Rather the tribal law of the three great Teutonic peoples which had made the settlement of England still divided the country between them, as they had once divided the political power: the Saxon in the south, the Mercian in the central west, and the Danish in the northeast. Over these local customs the legislation of the kings made slow progress towards a national law.

It is in the field of local government that the most extensive and by far the most lasting contribution was made by the Anglo-Saxons to the future constitution of their race. All Anglo-Saxon local government was based on a territorial division and sub-division of the kingdom which is particularly interesting to us because it has continued with only slight modification in England to the present time and has been reproduced with even more exactness in some of the American states. In a word and taking no account of minor exceptions, the division was this: the kingdom was divided into shires, also called after the Norman Conquest counties; the shires were divided into hundreds, a name manifestly derived from some early numerical use and replaced in some parts of the country by other names, like the Danish name wapentake in the northeast and north; and the hundreds were divided into towns. The early history of all these territorial divisions is obscure and need not be here considered. Their character and their place in government at the middle of the eleventh century is the essential matter.

At that date all England which was subject to the king was divided into shires, but the shires of the different parts of the kingdom look to us as if they had no common history behind them. Those of the north are larger and seem less settled in character as if they had been more recently formed, indeed they were not all given their present form until after 1066. Those of Wessex seem the most normal and settled as divisions of the state and may represent the tribal settlements of which the original kingdom was formed. Those

of the southeast, Kent, Sussex, Essex and others seem plainly to stand for earlier kingdoms or independent colonies. These local distinctions, however, were rapidly disappearing in the last century of Saxon history and none of them survived in a way to affect the unity of the Norman kingdom.

The chief function of the shire in local government, if we limit ourselves to the Saxon evidence which we have and remember what has been said above of the relation of the legislative and judicial, was judicial. It was the district of the most important court below the witenagemot, the shire court, the court for the most important cases arising locally.[6] As such the shire court was an assembly court, using the term not with reference to the way in which the court was formed but to the way in which it operated. We have no evidence from Saxon times to tell us how the assembly which formed the court was brought together. We can only guess that the method was the same, or was at least tending to be the same, as in Norman times, and it is then that an account of it will be most in place for then this court begins to be of greater significance in history. We know, however, that the court was made up of a considerable assembly which may have descended in some cases from an earlier folkmote. Present in it as its most conspicuous members were the bishop of the diocese, the alderman or earl, and the sheriff. As there were no independent church courts in the Saxon kingdom, it was the duty of the local courts to interpret and enforce ecclesiastical law as well as secular, and this fact explains the presence in the shire court of the bishop who very probably assumed a leading place, perhaps as presiding officer, when such cases were tried. The regular president of the court was the alderman, if he was present, if not his place was taken by the sheriff, who was inheriting in the last Saxon age many of the alderman's peculiar functions. It is not likely that there would be in any session a three headed, or a double headed presidency, as some text-books seem to imply.

[6] Cheyney, *Readings*, 77; Penn., I. 2. 21.

In the case of the alderman, we have again an office whose early history is obscure but which as an office did not survive the Conquest. It is certain that between the eighth and the eleventh centuries this institution underwent great transformation. As nearly as we can make out, it represents in early times the headship of a local unit which stands over against the central government, in contrast with, but perhaps not in opposition to it. Certainly if it was ever in opposition, that feature died out of its history as time went on, and the increasing power of the king drew the office more and more under his control. In historical times the king appointed the alderman, though in practice he often recognized hereditary claims and had only a limited power of removal. That the king was less bound in either of these ways in the case of the sheriff, indicates a different origin and history for that office. The alderman was the natural head for the shire community, the natural president of its assembly, the natural commander of its military levy. Normally he seems to have looked after all those interests of the locality which were not directly associated with the government of the king. These latter interests were the sheriff's normal field. As official head of the local judicial system, the alderman received in some parts of the country one third of the proceeds of court fines and fees, called the third penny of the county, and this payment, together with an association of the title with some particular county, continued for generations after the Conquest to show that "earl" had once been the name of an officer. In the last Saxon century, however, a great change was taking place. The alderman was ceasing to be what he had once been and coming to be something new. The change in character was accompanied with a change of name: the alderman comes to be called the earl, and the change seems in some way to be associated with the occupation of England by the Danes, from whom the new name comes. The earl of Edward the Confessor's reign was less the representative of a local com-

munity than the ruler, governor or viceroy, of a shire, or two shires, or even a larger group of shires. His functions were vague; his power from his position was large. The change looks like the beginning of the shift from the Saxon alderman to the Norman earl with its power derived not from office but from rank, dignity and wealth. As this change went on, older functions of the alderman fell to the sheriff, and we find the latter not merely commanding the local levies but somewhat more regularly presiding in the shire court.

The president of the shire court was not a judge. He was a chairman or moderator only. The judgment was always made by the assembly itself, or by a group of its members which we should call a committee, to whom it assigned the duty, and because it reached its conclusions in this way I have called it an assembly court. The judgment of the assembly alone was not, however, final. In all the early Teutonic courts, and in the courts derived directly from them, the president had the power of absolute veto on all its acts, and the decision of a suit at law was not legally valid until accepted and pronounced by him to be the judgment of the court. Sometimes the pronunciation of such a judgment is given us in the records and chronicle accounts as if it were the independent judgment of the president of the court, declaring his own opinion rather than that of the court, and we cannot be absolutely sure that this was not sometimes the case, but such detailed accounts and descriptions of judicial action as we have render it highly improbable. How the assembly reached its decision we do not know. In some way it got at the majority opinion, and such glimpses as we get later of the action of similar courts imply some free discussion and an opportunity at least for a good deal of influence of the president on the decision before it was made, and undoubtedly the leading members also exercised a decisive influence. Judgment by something like a committee seems to have been very common, but never became official. From the judgment once made no appeal was pos-

sible, though those who had made it might be sued for damages, or if they had taken an oath in the process, they might be put on trial for perjury.

The hundred court was almost exactly like the shire court, except that it was the court of a subdivision of the shire.[7] It was formed apparently by the same method, whatever that was, may also have represented an earlier folkmote, was presided over by a hundred man or hundred alderman, and in some of its functions by the sheriff, and it was an assembly court operated in the same way. Still more important is it to note that, so far as its judicial action is concerned, it was of concurrent jurisdiction with the shire court, and it enforced and interpreted the same body of law. Apparently any case which was brought in one of these courts might be brought in the other. What determined the court into which a particular case should go was the wish of the parties, especially of the plaintiff, and the importance of the case. An insignificant action, or one concerning people of low rank, would not ordinarily be brought in the shire court. As between the two courts, the hundred court was in much more frequent use in litigation, and was the normal and habitual court for all ordinary commercial and police business.

The shire court was occasionally used by the central government for administrative purposes. We have a few letters addressed by the king to its officers and apparently through them to it. If the Saxon kingdom had gone on, it would very probably have developed in time larger use of the shire assembly in this kind of business. But for maintaining local order, and punishing crime, and exercising control over individuals, it was the hundred court that was most frequently used. This was preëminently the police court of England, in so far as police matters were the care of the general government. About the middle of the tenth century

[7] Stubbs, *S. C.*, 80–84.

under King Edgar a famous law was made for the pursuit and arrest of thieves, using the hundred as a unit and similar in character to a Frankish arrangement for the same purpose of much earlier date. Edgar's legislation also required that every man should have a *borh*, or some one of standing in the community who should produce him for justice, if he should do wrong, or be responsible for his punishment, bearing it himself if the accused escaped.[8] About the same time also we get evidence of the existence of the tithing, an institution connected originally, it is probable, rather with the town than with the hundred, in which a small number of men, usually ten or twelve, were grouped under a tithing man and held to collective responsibility for the capture of criminals. These two institutions form the basis of the frankpledge system of Norman times.

One institution common to the early German states of whose constitutional history we have some knowledge should not be overlooked in any account of Anglo-Saxon criminal law, especially because of its importance in the development of the later law — the king's peace. An offence or misdemeanor was a breach of the peace, an ordinary offence a breach of the nation's peace, or the peace of the shire, or of the sheriff, but offences committed against the king, or on his property, or in his immediate vicinity, as being a breach of his peace, were punished with heavily increased penalties. An extension of this special, protective king's peace might be granted to a locality to be proclaimed through the hundred or county by the sheriff, serving as an addition to the general peace of the nation and carrying these increased penalties. Special protection of the sort might also be extended by the king by formal oral or written act to individuals, or places like highways, or to special occasions like feast days. Punishment of a breach of the king's peace was specially reserved to the king himself, that is it did

[8] Stubbs, *S. C.*, 83–85.

not belong among the pleas falling to the sheriff as administrator of the county, and was subject to special penalties which went to the king.

The town as a territorial subdivision shows signs of being a more primitive and earlier institution than the hundred or the shire. While it is normally a division of the hundred, this is not true without exception, for there were towns which formed parts of more than one hundred, and other towns which were parts of no hundred. But in the hierarchical gradation of local government and justice, the statement is accurate enough. The township community was smaller than the hundred and of a subordinate place, and its police responsibility was less extensive. In the great majority of cases the town was actually as well as normally a constituent part of the hundred and seems in Norman and probably in Saxon times to have been the unit of the hundred organization. If the free village community existed among the early Saxon settlers, as it probably did, the town of later times is its descendant and represents in England the village or *dorf* of which we get occasional glimpses on the continent, even in the same relation to the hundred. Scholars have not agreed upon the existence of a town court as a minor community court, but the evidence inclines strongly in its favor, both *a priori* from the necessity of a mutual regulation of community affairs and positively from the character of the business done by the later domanial court of the manor. It is into the manor of post-Conquest days that the town disappears, and it is the domanial manor court that continues the functions of the town court. These concerned affairs of very minor if any importance to the state as a whole: the regulation of cultivation and the care of stock, disputes as to the boundaries of tenements wholly within the town and title to them, and minor misdemeanors and police offences. Any case of importance would go directly into the hundred, not into the town court.

The regular subdivision of the state as a matter of police

jurisdiction and supervision by public authorities had been to a considerable extent broken into by the time of the Conquest by the growth of private institutions. The rise of private lordships, the extensive practice of commendation, by which poorer men placed themselves in a relation of personal dependence upon the more powerful in return for protection, and the growth of forms of dependent land-holding which remain rather obscure to us, were evidently common features of middle and later Saxon times.[9] With these lordships, which seem in many cases to have corresponded in area with a town or perhaps with two or more towns or even with a hundred, local rights of jurisdiction and responsibility for local police became united. The process of such union was simple and easy, for the lord of many serfs would have naturally, without attention to the matter by the state, the duty of seeing that their disputes with one another about their rights were settled, and that their offences against one another and against good order were punished. When the lordship came to agree in territory with the town, it was almost inevitable that the original town court should be absorbed into the lord's court and the two become one. It would instinctively be felt to be absurd to hold two courts doing the same kind of business for the same community of people. Perhaps the process of unsanctioned absorption occurred in the same way when the lordship extended over a hundred, but the interest of the state was not so easily overlooked in this case and the agency of the king is often manifest. He conveyed into private hands in a number of instances by formal act the jurisdiction of a hundred, or of a fraction of a hundred, and so gave a legal recognition to a result which had taken place outside the law.[10] In consequence numerous private lordships and private jurisdictions cut into the normal organization of local government and formed a substantial foundation for a

[9] Penn., IV., 1, 3, 5.

[10] Penn., IV., 3, 13. *Cf.* Stubbs, *S. C.*, 122.

manorial system and for the royal grants of "liberties" so extensively developed after the Conquest.

In all these courts, public or private, the forms of procedure by which a case was tried were alike. They seem to us primitive and crude but, as applied by the common judgment of the community, they probably secured a rough justice, at least they continued in use in these local courts for two hundred years after the Conquest and remained possible of use for centuries longer. The Anglo-Saxon courts stood in a middle position between the early days of private vengeance, when the individual secured justice for himself with the aid of his kinsfolk, and modern times when the state takes charge of the whole process to the exclusion of private action. The individual still did many things which today he would not be permitted to do: he summoned his opponent into court, appointed the day of trial, and in some cases he executed for himself the judgment of the court. But the state had taken possession of the major portion of the process, and it stood behind the individual in his portion, regulating and enforcing what he was still permitted to do.

The oath played a great part in all these early trials, and in passing judgment on it as a means of securing justice, we must remember two things.[11] First, that these were the courts of small communities. The men who formed the courts were neighbors of one another; every man's character was well known; their business concerns were simple also and well known to each other. Second, there was a genuine belief in the constant occurrence of miracles. An oath was an appeal to heaven and such an appeal, if false, was likely to be terribly punished on the spot or later. Stories of the tragic vengeance of heaven upon such sinners were in common circulation and commonly believed. It was a very hardened reprobate who could take an oath he knew to be false in the presence of people who knew him well, without betraying by some nervousness, hesitation or change of

[11] Penn., IV., 4, 3–18.

color, his sense of the awful risk he was consciously taking. If he showed any of these symptoms, or mispronounced the formula of the oath, he lost his case.

The parties being before the court, the first step was a foreoath by the plaintiff in which he stated his case, sometimes with others to support him, called his suit or *secta*, and then an oath in rebuttal by the defendant, if he could take it, in which he denied the plaintiff's facts. Then followed a judgment of the court declaring which of the two parties should make proof. This judgment indicated, as a preliminary judgment, the opinion of the court as to where justice lay between the two. Almost always, if the defendant had successfully taken the oath in rebuttal, the proof was awarded to him, because there was a kind of natural presumption in his favor. But in special cases, which do not seem to have been of common occurrence, the court might judge otherwise and award the proof to the plaintiff. Proof was made in the following session of the court. Sometimes proof consisted in the production of witnesses who could swear to their principal's statement of the case as of something which they had themselves seen and heard. Usually it consisted in another oath of the one who had been awarded the oath, but now with oath-helpers or compurgators, who swore not to the justice of their principal's case but that they believed his oath. Generally the number of oath-helpers whom a man must find was fixed by custom and varied according to the rank of the parties, but the court might fix the number for the particular case or decide that they must be found, not from the community at large, but from a limited list of names which it drew up. If the number required was found, the case was won. It is not difficult to see the reasons which underlay the apparent formalism of this procedure. The judgment of the court awarding proof indicates the opinion of the community about the case, but the process of finding the oath-helpers tests that judgment still further and in a more specific way. Theoretically at

least a heavy responsibility for his opinion on the case lay upon the oath-helper. A man might easily be willing to agree to a general judgment in the defendant's favor and yet not be willing to take the more specific oath as oath-helper. Almost always, however, the party to whom the oath was awarded found the required number of helpers. With the increase of population and the growing complexity of business, the knowledge of the communal assembly became less and less able to furnish any real check on false swearing, and in the last stages of its use this system of proof was subject to many abuses.

A criminal trial was the same in form as a civil trial, a suit between the injured party, or his kindred, and the accused and the procedure was the same, but in a criminal case resort was more often had to another form of proof, which might also be used in a civil case, the ordeal. The ordeal was in theory a formal and solemn appeal to the judgment of heaven in cases where the court was too much in doubt to make a decision, or where a doubt might still linger in a case that was otherwise sure to go against the accused. Ordinarily in both these groups of cases, the party went directly to the ordeal without first going through the compurgation process, probably because that process was seen to be practically certain to fail, but among the Franks certainly, and it is highly probable that among the Saxons also, if we may trust later evidence, a person who had failed to find the required number of oath-helpers might sometimes be allowed a further chance to prove his case by the ordeal. In a considerable list of crimes, the accused was by law deprived of the compurgation procedure and ordered directly to the ordeal. This was no doubt upon the somewhat common popular judgment, which expresses itself for instance in "lynch law," that a man accused of a heinous crime is probably guilty, so that an appeal to the compurgation procedure would be useless. The Saxons used in their common practice two ordeals, both accompanied with

solemn religious services, the ordeal of water in which the person was bound hand and foot and thrown into a pool, and his innocence established if he sank out of sight, and the ordeal of hot iron, in which the person carried a hot iron of prescribed weight a measured distance, and his guilt or innocence was determined by the character of the wound after a certain number of days.[12] The ordeal passed out of use early in the thirteenth century, but other of the old forms of procedure continued in use for a longer time in criminal trials than in civil and only slowly gave way to newer forms.

The death penalty was inflicted only occasionally and in later Anglo-Saxon times, and imprisonment was still more rarely used as a punishment, but in general all crimes could be atoned for by a money payment made to the family of the injured person, the *bot*, accompanied with a fine to the state for breach of the peace, the *wite*. Every freeman had a *wergeld*, or valuation in terms of money, fixed by law according to his rank in the country, which was paid by the guilty party if he was killed and also sometimes used to measure a fine for his own offences, that is, he was called on to redeem his life. Amounts to be paid were fixed also for other offences and varied according to the character of the offence and according to the rank of the injured or offending party, and differed in different parts of the country.[13] In some cases a criminal who refused to answer to the charge against him was declared an outlaw, which rendered him liable to be killed at sight or left him exposed to the old system of blood revenge. These criminal punishments, as was the case with compurgation, became unsuitable as the kingdom ceased to be a group of primitive communities, and they disappeared soon after the Norman Conquest.

In addition to the lordships with their private jurisdic-

[12] Cheyney, *Readings*, 79.

[13] Stubbs, *S. C.*, 70–72; Cheyney, *Readings*, 81–82.

tions, another local variation broke into the regularity of the Saxon territorial organization—the borough, or town in the commercial sense. The origin of the English borough, both as a separate organization and as a center of population, has long been a subject of debate and is not likely ever to be conclusively determined. It seems most probable that as a center of population the borough had more than one kind of origin and that, whatever attracted people to settle at a given spot, whether a fortified post that offered protection, or the meeting point of commercial highways, or the need of providing supplies for the pilgrims to a popular shrine, the final result in the character of the community and its constitution would be the same. More important historically than the question of origin is the fact that the forms of Saxon local organization gave the borough an opportunity to become a self-governing unit very easily and without setting it apart from the general scheme of local government. Before the Norman Conquest this fact had determined the direction in which the English borough was to develop in relation to the state. Probably in the majority of cases it was in origin a town in the territorial sense, or a part of a town, and it was as a town that normally the borough appears to have been organized and to have obtained its local self-government. In some cases from size and importance, or from historical relation to the surrounding territory, perhaps from both in the case of London, the borough organization was that of a hundred instead of that of a town. The practical result was the same in both cases, entire local self-government, but self-government of such a kind that it lent itself to incorporation with other similar units in the larger government of hundred or shire instead stead of to isolation or separation. Within the larger towns, the wards had some degree of local self-government and stood to the borough as a whole in a relation not unlike that of the town to the hundred, while the private jurisdiction appears in the borough also in the "sokens" of neighboring

lords, portions of the borough territory belonging to them and occupied by their dependents, over which they exercised the same rights of jurisdiction (sake and soke) as in their lordships. Though there seems to have been in the last period of Saxon history a considerable development of urban interests, the borough never attained the relative importance in the national life that it acquired in the first Anglo-Norman age, an importance which shows itself in the numerous town charters, especially those of the reigns of Richard and John.

The population of England was as sharply divided into graded ranks as was the territory which it occupied.[14] We are confronted here, however, with the difficulty that there seems to have been in this case even less regularity between different parts of the kingdom than in the territorial divisions. Having regard to general characteristics, without reference to minor differences of condition or of technical terms, there were four well-marked classes of men in the Saxon state, nobles, common freemen, partially free men, and slaves. It must be noticed, however, that while sharply distinguished from one another as generic classes, these four ranks, if we regard individual men, were bound together by many intermediate grades of right and privilege and position, which indicate clearly that the society of the Saxon age was in a state of flux, that social classes were not fixed by any rules of caste, and that movement of individual families up and down the scale was easy and of frequent occurrence. The fluid condition of family position was reflected in many cases in the numerous gradations of service in the tenures by which lands were held within a given manor.

All the Anglo-Saxon states possessed a distinctly marked nobility, deriving its rank, if we regard the whole period of Saxon history, clearly from two sources: birth and service of the king. While the evidence for Kent is more convincing than for the other states, it is highly probable that all the

[14] Stubbs, *S. C.*, 88–89.

Teutonic colonies brought with them into England a nobility of birth which goes back for its origin into the earlier history of the tribe. As the new conditions established the monarchy where none had existed before, and strengthened its hold upon the state and upon all public life, so personal connection with the king and position in his service gave distinction to a man and rank which was reflected in the law codes by a higher *wergeld* than for the common freeman. Doubtless those personally connected with the king would include from the beginning, besides new men, many who belonged to the old nobility and the two, old and new, would easily melt into one class in origin indistinguishable, save in the case of those families which had risen within a generation or two. It is a nobility of this sort which we find on the eve of the Norman Conquest.

The Anglo-Saxons used two terms to designate the nobility of service, *gesith* and *thegn*. *Gesith* is the earlier term and seems to denote a class distinctly military in character and connected with the king by the personal tie of the *comitatus* which Tacitus describes in the thirteenth and fourteenth chapters of his *Germania*.[15] Soon after the settlement these men appear to have been endowed by the king with considerable gifts of land and to have become a territorial nobility, but still under a special obligation of military service. Their place in the personal service of the king, both as members of the *comitatus* and in other duties at the court, to some of which perhaps the *gesith* had not been held, was taken by the *thegn*, who passes through in the course of time somewhat the same transformations, though rather more slowly and in a later stage of the history, so that the use of the word survived the Conquest. It is used, however, in a considerable variety of senses in different parts of the country.

The Anglo-Saxon noble had some, but not many, legal privileges which distinguished him from the common free-

[15] Stubbs, *S. C.*, 62, 63.

man. His *wergeld* was six times as much, his oath in a court of justice carried six times the weight; he was exempt from enrollment in a tithing and he might personally become pledge for the good behavior and for the appearance in court of his dependent. Private jurisdiction even over some freemen went almost necessarily with the lands which formed his lordship. Though there was no legal requirement to that effect, the higher offices in church and state were apt to be filled from this class, and noble birth commanded in office as elsewhere additional respect. No right to membership in the witenagemot went with nobility, but it was from the nobles that the king summoned those who attended any meeting in addition to the official class. In general while the nobility formed a well defined social class, they occupied no independent place in the Saxon state at the expense of the government and never became a caste closed against families rising from below.

If we may trust the impression which the sources of our knowledge of early Anglo-Saxon society make upon us, the normal member of the community was the free man. We call him often the common freeman to distinguish him from the noble who came to be considered, especially in feudal days, the preëminently free man, the *liber homo*. The class was one intermediate between the noble above and the wholly or partially unfree below. It was known like the noble class by a variety of names—*ceorl*, *sokeman*, *villanus*—which in different parts of the country and at different dates had varying shades of meaning. In the earlier periods of the history this class seems to have been the most numerous in the state and its main dependence and to have been considered the typical class from which the position and legal value—*wergeld*, oath, etc.—of the other classes were reckoned. The members of the class are represented to us as living in villages from which they went out to work their holdings scattered in the neighboring fields. Some of these villages were still free villages in 1066, managing their own

affairs in their *tun* motes, but the majority appear to have passed under the control of some lord and become dependent upon him. Normally the holding of the fully free man, who was not regarded as a noble, seems to have been one hide, that is on the average 120 acres, with the live stock and tools naturally going with so much land. But the size of the holdings of the freemen varied greatly, and it was recognized that the common freeman might rise into the class of nobles by the possession of five hides. Legally the freemen were enrolled in the tithing groups, and they were the chief dependence for carrying on regularly the local government in shire and hundred courts and for the army of the state. Though drawn in large numbers into the organization of agriculture which was steadily forming in Saxon times, the manorial system, the new relation into which they were brought was economic in character and did not, certainly in most cases, affect their legal status. There is no doubt, however, but that, if the whole Saxon age is taken together, the class as a whole was losing significance and sinking slowly, economically, socially, and politically. It seems clearly of much less importance relatively in the state at the time of the Norman Conquest than it is pictured to have been in the early laws. It was, however, by no means extinct as a class and plainly survived even as late as Domesday Book, in some if not in large numbers, in the possession of land not dependent upon any higher lord.

When we turn to those who were not fully free men, the case is still more difficult and the number of gradations of right and position more numerous.[16] If we begin at the bottom and define the slave as one who has no rights at all, as we must technically, as one who is a chattel, a thing, who may be sold by his master in the market as a piece of live stock, there is evidence for the existence of such a class among the Saxons, and the slave trade and the exportation of slaves were not brought to an end until some time after the Con-

[16] Cheyney, *Readings*, 69–73; Stubbs, *S. C.*, 89–90.

quest. The domestic supply of slaves did not cease during the period. Capture in war, even of one Saxon tribe against another, and economic misfortune more or less constantly reinforced the class. On the other hand it is clear that the general tendency of things worked here, somewhat more slowly than on the continent apparently, against the continuance of slavery. The church taught that the emancipation of slaves was an act of virtue and urged that the right of the slave to property of his own earning and to a legal family should be recognized. But in England as elsewhere it was probably economic causes that worked most strongly against slavery. The master found that the most profitable use to which he could put the slave was to give him a cottage and a small piece of land to cultivate for himself in any time that might be left after the master's demand for labor had been met. In fact at first, and in theory till the end of the Middle Ages, the house and land and all the chattels he might collect, were the master's property, not his; but in reality the first step had been taken in the extinction of slavery, that is, in the transformation of the slave into the serf, when he was allowed to occupy permanently a house and a bit of land. He and others came to look upon them as *de facto* his own. They passed on to his son, and soon the manorial custom began to recognize that they could not be taken away so long as the services to the lord were regularly rendered, the services, the custom began to say, by which the land was held. Before very long the manorial court began to concern itself with the disputes among heirs over the inheritance of these servile holdings, as the hundred and county courts did with the disputes of heirs to free holdings, and to recognize a right of transfer and sale to be proved by the entries on its own records. The custom was law within its own sphere, customary law, manorial law, and under it in process of time the slave acquired rights which he could protect, that is, the slave had become a serf.

The serf differs technically from the slave in that he has

some but not all the rights of a fully free man. Medieval serfdom is the intermediate stage through which the slave labor of the ancient world passed into modern free labor. It is in other words a transitional stage and, viewed as a whole, its most characteristic feature is that at different times and in different places almost every conceivable intermediate condition between the slave and the fully free man was represented; as a matter of fact many stages of right and of economic advantage often existed together at the same time and in the same manor. Hardly more than this need be, or indeed can be, said of the partially but not wholly free class in England until we come to the more full evidence of Norman times. To some extent the public law took account of the serf's existence as a man. He had a small *wergeld*, the physical violence or mistreatment of the master was restrained, the right of marriage recognized, and his responsibility to the criminal law maintained either directly or through his master. It should be remembered also that this class was being added to constantly throughout Saxon history by the sinking into more and more complete economic dependence of those who had been originally fully free, and these men not merely brought with them some rights which they still retained, but their decline tended to bridge the gulf between those who had risen from below and those who remained free.

Forms of land holding among the Saxons show perhaps less variety than the classification of persons, but they correspond roughly to the gradations of personal rank. There were two great classes of land tenure, free and servile, but they as well as the kinds of personal status underwent changes in the course of the period. There are indications in the economic and legal institutions of more than one German tribe, Frank as well as Saxon, that at the time of their settlement in the Roman provinces they had not been many generations in the settled agricultural stage of development. The free village community with communal ownership and

coöperative cultivation existed side by side with villages which were in the domain of some lord and dependent on him and, in England at least, some of these communal villages survived the date of the Norman Conquest. The organization of agriculture in them formed a natural foundation on which the later manorial organization could easily be built. The cultivated land of the village was divided into two or three great fields, each field being cultivated in the same way each year. These fields were divided into strips for individual cultivation, and a certain number of these strips were held by each family of the village. The holding of the family would thus be scattered about the fields in comparatively small strips, and the use made of them would be regulated by the common plan for the great fields in which they lay, and their inheritance and transfer would be controlled by the custom of the village. Besides the cultivated land the village possessed also extensive common pasture lands, of great importance to the community in those times, and common woodland, the right of each inhabitant in these being determined by the size of his cultivated holding.

One can imagine how easily in turbulent times such a community might be led to put itself under the protection of some powerful lord, and how easily also in course of time the sums or services paid for such protection might begin to be regarded as resting upon the land and elements of the tenure by which it was held, so that land originally free became by degrees dependent or servile. It seems also certain that in some parts of England, in the west for instance, and possibly everywhere communities were formed dependent from the beginning on a lord and composed mainly of unfree tenants. The tendency towards this form of community seems to have been very steady, checked only in the north and northeast by the new Teutonic settlement of the Danes, a temporary reversion to more primitive conditions. As a result at the time the Normans became the ruling race, the lordship was the rule everywhere and the free village

the uncommon exception. The manor, however, whether regarded as a lordship, as a legal community, or as an agricultural organization, does not seem itself to have been so perfectly developed or in such complete possession of the country as it came to be after the Conquest.

Looked at from above, as the state might look at it, if the state could in those times regard the subject as a matter of general law, all the land of England was held by one or the other of two titles. It was either folkland or bookland. Folkland was land not held by any written title or formal evidence but by the customary law of the community, by folklaw or folkright. The evidence of its possession was the knowledge or memory of the community, and disputes as to title were settled in the local community courts of shire or hundred. Even when regarded as the settled property of a householder, folkland still retained traces of something like original community ownership. It could not be bequeathed by will, its inheritance was determined by the custom, and it could not be alienated without the consent of the folk directly interested, unless it were land which the individual had acquired during his own lifetime and not a part of that which he had inherited. This increment he could dispose of as he pleased.

In contrast bookland was land held by a written title, a landbook or charter, and it could be alienated as the holder pleased, or left to his heirs by will. It was created by a grant of the king's, a grant which was recorded in the charter and made with the consent of the witenagemot, whose consent perhaps corresponds to that of the local community to the alienation of folkland. These grants conveyed large estates of land, generally to churches or monasteries but sometimes to nobles; they often granted with the land freedom from public burdens, except the *trinoda necessitas*, and also rights of local lordship and jurisdiction; and there is evidence that they sometimes granted to the holder land which was already his own as folkland in order

that he might be free to alienate it or bequeath it. On the extinction of the holder's line, land held in this way escheated to the king. Bookland was manifestly a later form of land title than folkland—something learned by the Saxons after their original settlement, as they learned the use of the charter to constitute a written record.

Land of either of these two kinds could be conveyed by the holder to another person for a limited term by a written document which specified the conditions on which it was to be held and the time at which it should revert to the donor.[17] The period of holding was often three lives, that is, three successive holders. Such land was called *lacn* land or loan land. As concerns the state or the folk such a loan of land made no change in the ownership, the grantor was still the owner. As a consequence of this fact, the new holder became responsible for such duties as rested in the Anglo-Saxon system on the land to the grantor and not to the state, because the state still regarded the grantor as the responsible owner. As one of these duties was military service, the new arrangement created a relationship in surface appearance not unlike that of feudal tenure by military service, and it has sometimes been considered feudal. The identification is due, however, to pressing an analogy too far, for the Saxon tenant did not hold by the service, but merely asumed an obligation already resting upon the land, and the new relationship created no difference between this land and any land in the kingdom, whether folkland or bookland. The case is exactly equivalent to the fee-farm holding in feudal days when the tenant assumed the forinsec services resting upon the land, i. e., the services due to the king over and above those due to the immediate lord, but did not thereby become a feudal tenant.

In considering the question of the existence of the feudal system in England before the Norman Conquest, it is first necessary to determine the sense in which the word feudal

[17] Penn, IV. 3, 8.

is used. In ordinary practice the term is most commonly used somewhat loosely and vaguely to include all kinds of dependent relationships, economic or political, without reference to their institutional character. If we use the word in this sense, there is no doubt but that some of the practices which have been described above may be called feudal. But the student of institutions cannot be contented with the vague and general. He must make distinctions and determine the exact character of institutions or his knowledge will be of little value, and many things will be misunderstood. And first of all in regard to the use of the word system. If the word carries with it the meaning systematic, it is a wrong word to use, for there was always much of variety in the details of feudalism as seen in different countries, or even in different parts of the same country. But feudalism did bring together the relationships which belonged to it, from top to bottom, into something like an organized whole which may be called in that sense a system.

But little study of the feudalism of Western Europe in the eleventh and twelfth centuries is necessary in order to see that it united in itself two quite different sets of relations and interests. On one side we have the feudalism of lords and ladies, of knights and vassals, of courts and castles and tournaments. But the main business in the world of this sort of feudalism was not chivalry which reached its highest development when this sort of feudalism had almost disappeared. Its real business was to furnish some degree of political organization to society at a time when the lack of common ideas and the break-down of the means of intercommunication made a centralized government in a large state an impossibility. This side of feudalism was essentially political. The services which the vassal paid to his lord for the fief which he had received from him were political. By putting these services together the army was formed, and the law court, council and legislature constituted. As defence was the one great need of the time, the

aspect of this side of feudalism was strikingly military, but providing for defence was by no means its only function. The baron was also the active agent by whom all the operations of government were carried on. From his class the administrative officers were drawn, and the justices, and the great officers of the crown, when a real central government began to be reconstituted. It was during the time when a central government could exist in scarcely anything more than name that the great service of feudalism was performed and then, if order was maintained and law enforced, it was due to the local baron whose allegiance to those above him in rising tiers of mesne lords to the king kept alive the idea and formal existence of the state for better times. This sort of feudalism grew out of Roman institutional practices at the time when the Empire was falling to pieces. They developed by very slow degrees, and it is only towards the end of the ninth century that we can say that feudalism as a political system had really been formed. It was finally perfected in the tenth century, and the great feudal age of Western Europe was the eleventh and twelfth centuries. It declined rapidly in the thirteenth and disappeared in the fourteenth century, leaving as its social legacy to the future the modern systems of nobility.

On the other hand, this political organization, when it began to take possession of society, found already existing an organization of agriculture which had been formed during the same period as itself and under the influence of the same general causes but out of original elements and institutions quite unlike its own, and upon this agricultural organization it based itself. This was the manorial organization which has been referred to above as one which could easily be founded upon the village community and its lands, and which will be described later more in detail. Many features of this organization seem superficially parallel to features of political feudalism. It made much of dependent land tenures and of persons in dependent relations to a lord; and it en-

forced the private jurisdiction of the lord over his unfree tenants and occasionally over some freemen. But the essential institutional characteristics and the purposes sought were wholly different. Agriculture was the chief investment of capital possible to the time; it was almost the only form of industry that had survived; and it was the agriculturist who kept society alive during the feudal age. The baron who paid the rent for his fief in political services to the state obtained the income which enabled him to perform them and to maintain his rank from the economic returns of his domain manors, and the king at the head of the state obtained his chief income in the same way from his domain manors.

These two sides of feudalism had not merely a different origin in institutions of the later Empire which were distinct from one another, but they remained distinct in institutions and law so long as they existed side by side. The feudal age never confused them. It always maintained sharply the difference between military tenure and economic tenure, between noble tenure and the servile holding. A given piece of land was as a rule held at the same moment under both kinds of tenure by two different men. The baron held the manor from the king as a knight's fee by the service, let us say, of one knight at his own expense. The greater part of the same manor was held at the same time by servile and free tenants whose economic tenures furnished the labor by which the manor was cultivated and its income obtained. But each tenure was easily distinguished from the other, and each was regulated by its own rules of law, enforced in its own distinct courts. As these two sides of feudalism were distinct in origin and remained distinct during the great period of their history, so their ultimate fate was different. Political feudalism had begun to disappear by the middle of the thirteenth century because the state was discovering better methods of getting its business done, and it did not survive the fourteenth cen-

tury. Better methods of agricultural organization were discovered more slowly, and the manorial system remained in existence with its law and its courts for two hundred years longer. It was even brought over into some of the American colonies in the seventeenth century, and we now have the printed records of colonial manor courts.

In Anglo-Saxon England the arrangements for cultivating the land and for servile land-holding which have been described above were so closely parallel to those of economic feudalism that we may say that this side of the feudal system had been established in England before the Norman Conquest. The conditions which had favored its growth throughout the Roman Empire had existed also in Britain and, it is likely, also the institutions from which it was derived. It may perhaps be true that the manor in its complete constitution was not generally in existence, the name certainly was not, but what did exist is to be distinguished from it only with difficulty, and but little was needed to complete the manorial organization of the country, certainly no important institutional change. Manorial private jurisdiction was fully developed and the jurisdiction of local public courts so extensively absorbed into it, or attached to it, that the Normans found nothing to do as affecting these courts, unless it was to check their growth.

On the other hand political feudalism, the transformation of the public duties of the citizen, military service, service in the court and legislature, into private obligations which he owes to another man as a kind of rent he pays for the land he has received from him and because of his personal relation to him, is not to be found. We do find, however, primitive and uncombined elements out of which it might have grown in time. The personal relationship of the royal *comitatus* referred to above seems to have continued until rather late in the Saxon state and the members of it as a rule to have been settled on the land under something of a special obligation of personal loyalty and service

to the king. Personal commendation and the commendation of land were considerably developed and created many dependent relationships of free men and of free land. In some cases the man took an oath of fealty to his lord which comes near to the vassal's oath. This relationship has been sometimes called vassalage, and the term cannot be objected to because it was actually in use in the contemporary Frankish kingdom for closely similar relationships which were equally undeveloped. But the term should not be understood to mean the existence of the later institution. Political feudalism was created only by the union of personal vassalage with the holding of land upon condition of public service. When the fief was given to the vassal because he was a vassal, and when he was held to his military and other services because he had been given a fief, then the feudal system of Western Europe was in existence. However far one may think that one side or other of this composite result was developed in Saxon England, there is no evidence of a union between them in that age. The fief as the vassal's normal reward with its conditions of special loyalty, and service as the tenure by which it was held, were introduced into England by the Norman Conquest.

In the means and processes of getting the public business of the state performed, the Saxon government was but little developed beyond the tribal state first organized in England after the original settlement. In theory military service at his own expense was still due from every free member of the community, enforced by the heavy fine called *fyrdwite*. In practice the settlement of the freemen on the land and the enlargement of the state in size had brought on in some degree the problems which had proved so serious to the Carolingian rulers of the larger Frankish kingdom, and the attempt had been made to solve them in much the same way. The dependent relations into which many freemen entered with the growth of territorial lordships, and the serious cost of a summer campaign to a people which had

now become agricultural, made a general levy of freemen a less secure dependence and more difficult to enforce. The tendency was strong in later Saxon times to rest all obligation of service upon the land and to make the owner responsible for an amount of service corresponding to the size of his holding, or to allow communities to become responsible for a fixed amount, all the members of the community sharing in common the expense of their soldiers. But these expedients were not carried so far as in the pre-feudal Frankish state, and the problem of securing an adequate military service was still unsolved when the Conquest occurred.

In the matter of public revenue, the machinery of the state was even more undeveloped. There was no regular taxation in the modern sense. The "Danegeld," which comes the nearest to taxation in form, was begun at the end of the tenth century, as has been said, to raise money to buy off the Danish invaders. It was continued at frequent intervals in the eleventh century, except during the reign of Edward the Confessor, at the rate of two shillings on the hide of land, but it did not become a regularly recurring annual tax until after the Conquest. The larger part of the income of the crown, which was not yet distinguished from the income of the state, was made up from two sources: the revenues from the royal domain lands and the sums derived from the king's share in fines and forfeitures in the local courts of shire, hundred and borough. If we cannot prove that these two sources of revenue had been combined to form a regular sheriff's ferm before 1066, some progress at least towards such a system of collection had been made. The combination seems to have been made in local districts and occasionally it is probable in counties and the collection farmed out to local administrators, perhaps to sheriffs. Besides the fines for offences which formed a part of the later sheriff's ferm, there were some criminal offences specially reserved to the king, known later as pleas of the crown and

separately accounted for by the sheriff. Of these at least three go back into Saxon times: breach of the king's peace, breaking into a house, and interference with justice, like the protection of an outlaw, and very possibly other offences should be added to the list, at least for parts of the kingdom. The fines for these crimes went entirely to the king, and they entailed very heavy fines or complete forfeiture.

There were not many other sources of income which we can say with certainty were possessed by the Anglo-Saxon kings, and such as existed were not infrequently granted away to churches and favored individuals: tolls of various kinds in boroughs and markets and at seaports; the profits of coinage, then comparatively little developed; the medieval right of shipwreck; and fees for the grant of special royal protection and for various rights and privileges. The state was relieved of some expenses by payments and services in kind, of which the best known is the *trinoda necessitas*, a duty resting upon the land of keeping bridges in repair, maintaining and defending fortresses, and serving in war. The exchequer system of receiving the sheriff's payments and checking his accounts does not seem to have been yet in use, but there was a formal treasury accounting which was probably the basis of the later practice, and some exchequer methods were employed like the determining of the bullion value of the coins paid in, called "blanching."

At the moment when the Saxon kingdom was overthrown, the outlook for the future development of national government was not promising. The power of the earl as a local viceroy had been increasing rapidly for a generation at the expense of the royal power; a large part of the earldoms had been gathered into the possession of the rival houses of Godwine and Leofric; and in the twenty-five years' reign of Edward the Confessor the nation had been taught to regard the king as weak. Local as well as family rivalries were making themselves felt, and the establishment of a

strong government by William the Conqueror undoubtedly made for a more rapid and secure constitutional development.

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CHAPTER II

THE NORMAN CONQUEST

The military success of William I in 1066, which we call the Norman Conquest, was so great that the country lay entirely at his disposal. No extensive colonization was necessary in order to hold it under control, and none took place, though there was first and last a considerable introduction of French speaking settlers. Accepted as king by London and the leading men of the nation within a few weeks of the battle of Hastings, and opposed later only by scattered and local, never by organized or general resistance, William apparently could have done what he pleased in changing the government of the country. As a matter of fact he seems to have had no intention of making changes. Perhaps even he consciously wished to make none at all, or at least the fewest possible. Indeed it seems accurate to say that the most extensive changes which he brought about were not made by deliberate purpose but because he could not help himself. That is, they were incidental to the only methods of carrying on government which he knew anything about. It is probably also true that they seem much more violent and far-reaching to us than they did to him or to anyone else at the time. Many of the details of institutional practice were alike in England and Normandy so that no change was required. In a few more important cases changes were necessary which we can see were far-reaching in their effects. In all these latter cases, however, tendencies which had been going on for a long time had been bringing the Saxon state more and more nearly to institutional results similar to those which had earlier been reached in Normandy. The Norman Conquest merely carried the development suddenly forward

to a result practically the same as that which would have been naturally reached in time. The actual dislocation, except in the ownership of land, was so slight that it is not strange that contemporaries did not notice it sufficiently to make it a matter of record.

The constitutional history of the reign of William I falls thus naturally into two divisions: the changes which the Conquest brought about, and the institutions which remained practically unchanged. A general characterization of the two divisions is possible, if it is not pushed too far. It was the general or central government which was changed; local institutions were only slightly affected. It is impossible, however, in the treatment of the subject to draw a hard and fast line between these two divisions. In the central government much remained unchanged; in the field of local government important changes were introduced which are best considered under that subject. As a general characterization the division holds true and is of value in the organization of our material. The central, or national government became Norman; the local remained for a long time Saxon.

In the field of the general government of the state, two changes outweigh all others in importance: the substitution of a stronger royal power for the Saxon, and the introduction of political feudalism. Neither of these changes was simple in character, that is, they were not confined to what would be implied by a strict interpretation of the terms, but they were generic, that is they carried with themselves a number of subordinate or closely related changes. It is also true that these two sets of changes cannot be wholly dissociated from each other but are more or less interlocked with one another in the actual situation. It is as a matter of convenience that we consider them separately.

As we take up for examination, here and later, institutions which are generic in character we must be on our guard against one misconception. It is sometimes difficult to ex-

plain in language just what an institution or an institutional change really was in principle and effects without using terms which seem to imply that we are stating the ideas which its own contemporaries had about it. Such an impression would often be an error. From what we know of the whole history of the Norman monarchy, for instance, we can form a conception of what it was in theory and in practice quite impossible to those who lived under it. The theoretical statement is ours, not theirs. Men who were carrying on practical affairs in England did not theorize to any extent about the character of their government before the middle of the thirteenth century. But the account which we can now give of an institution or a historical transformation, in language which makes its character clear to us, may be quite accurate as an historical characterization, though it might not have been possible, or even intelligible, to the actors who were making the history of the time.

Potentially the Anglo-Saxon kingship was powerful, and it had been so actually, as operated by Canute, but practically for a long generation before the Conquest it had been in weak hands and had been overshadowed by the great earldoms of the later Saxon period. Still more important both practically and institutionally were the facts that there was in England no tradition of well established and long continued strong central government such as attached to the rule of the Norman dukes, and that there was no definite institutional organization through which a strong government could be carried out. In both these respects the Norman government of 1060 was no doubt inferior to that of John in 1210, but it was nevertheless a great advance upon that of Edward the Confessor at the former date. With time and with kings of foresight and skill, a powerful monarchy could no doubt have been built on the Saxon foundation. What actually happened was that the Norman monarchy with its traditions and its practices was substituted bodily and at a stroke for the Saxon. The Saxon disap-

peared completely; the Norman took its place, in possession of the field as exclusively in England as in Normandy.

The Norman monarchy did not owe its power nor the place which it occupied in government, to any ideal which the men of that time cherished of what the kingship ought to be, nor to any theoretical conception of the state and its constitution. In another century ideals of what the kingship ought to be do play a part in English institutional history, but we cannot detect their influence in the change in the character of the central government wrought by the Conquest. The duke of Normandy simply transferred his government to England with such of its practices and institutions as he thought necessary. He became all powerful in England because he had been and was all powerful in Normandy. As a matter of fact neither he nor any one else thought anything about it. It was the only natural thing to do, and a change was made without remark or consciousness which was really revolutionary in its consequences.

On what material and constitutional advantages the royal absolutism was based will be pointed out hereafter, but it must be emphasised at once that it was an absolutism. In the construction and machinery of the Norman state no normal and constitutional way was provided by which a will opposed to the king's could act or even express itself. Feudal law did provide a way which will be considered later, but hardly one which we should call constitutional. It implied rebellion and civil war as its means of operation and the first step towards modern constitutional government in Magna Carta a hundred and fifty years after the Conquest was to invent a method of giving effect to a will opposed to the king's without civil war. Meantime the state was the king quite as truly as in the France of Louis XIV. The officers of the state, justiciar, and treasurer, and sheriff, were his personal servants. The machinery of the state, above the merely local, was his machinery. The force which operated it was his will. If the king was strong and ruled firmly,

the state was in good order. If he was weak and vacillating, it fell to pieces. More specifically the area of the state was his lordship and domain, like the manor of a baron; its revenues were his private income. Justice was his and he assumed for himself the right to enforce it upon all; an offence against the law was an offence against him personally; justices and courts were his instruments. Even the great council, the national assembly, existed to do his business, not the nation's; it had no right of initiative except by petition; its decisions were his decisions, and invalid if he did not make them his, a fact which becomes the sovereign's absolute veto in the modern state. In a word the king assumed that the state and all its belongings and all its actions were his, and this was really true in England as hardly anywhere else in the history of western Europe.

It was the fact of course that the king did not maintain himself in this position of supreme power by assertion merely. There were certain solid advantages which he enjoyed which were the material basis of his strength. In the first place, and most important, the king had a decided military superiority over any combination likely to be formed against him. This superiority rested upon two things—first, the king's greater feudal resources, and second, the general levy or *fyrd*. The king's feudal resources were of two kinds. In the first place he retained in his own hands as domain lands about twice as many manors as he gave to any single baron and, if his two half-brothers be excepted, he retained a much larger proportion of the resources of the whole kingdom. These were, however, domain manors and contributed only indirectly to military strength. They formed an economic domain only, not a political royal domain, which had no need to exist in England because the king possessed his whole kingdom as the French king possessed the royal domain only. These manors were the source of the king's wealth which was much greater than that of any baron, but they were at the same time the main source of what we should

call the revenue of the state. The king's private wealth had to bear the chief burden of carrying on the government, but to some extent it did contribute to his military strength for the practice of retaining knights at pay for their military service was in use, and by barons as well as by the king. More important probably, was the second of the king's feudal resources, the knights fees held directly of the crown, i.e., *in capite*, upon condition of military service. Many of these were quite small holdings, one knight's fee or less, at least in days not long after William I, but held, by a military not an economic tenure. Then there were the holders of from one to five fees, still reckoned usually as minor barons, and these it would be exceedingly difficult to bring together into a combination against the king. Above these were the holdings of the major barons up to the 796 manors of William's brother Robert of Mortain or the 439 of his other brother Odo bishop of Bayeux. These barons also it would be difficult to combine together in any one movement against the king, and it never was done even in the great rebellion of 1173. It was easy for the king to unite his military strength; it was far less easy for the barons to bring theirs together. The *fyrd*, as the Saxons called the general levy of the common freemen, still remained an added resource of the king's, and practically more effective at this date than the general levy in the other feudal states of Europe. In the rather serious baronial insurrections at the beginning of the reign of Henry I and in 1173, it rendered important service to the king.

The king's greater wealth and greater military strength were undoubtedly the chief material bases of his power, but other things contributed to it. Especially important was the fact that feudalism as it had been interpreted in Normandy, and as it was transferred to England, made it difficult for the baron, whatever the size of his barony, to make it into anything like an independent state. Where such a baronial state arose on the continent, circumstances

made it easy for the baron to assume and keep in his hands the administrative functions of the government throughout a district and to break off all judicial dependence of the local courts upon the national. To be independent of the king administratively and judicially was to be really independent, whatever theoretical dependence there might be. No such independence was possible in England. The king always kept a firm hand on the local administrative officer, the sheriff, and though extensive grants were made of rights of jurisdiction to monasteries and private lords, even including the execution of criminals in certain cases, these "liberties" were practically an interference with local rather than with national justice—they were indeed hardly felt during the Norman period to be an interference with justice at all. The royal supervision, as exercised by the curia regis, over the local administration of justice was more close and effective than ever before, and at this time the chief advantage to the lord from possessing a "liberty," and the chief loss to the state in granting it, was financial —the transfer to a private individual of the profits from the courts. No baron however powerful, was released from his own responsibility to the justice of the king, and his tenant always had an appeal from the worst abuses even of the baronial court proper to the royal protection. The English baron also never had a right to maintain his castle against the king. The castle was the king's, the baron was its governor for the king. In rebellion, but in rebellion only, the baron defended his castle against the sovereign.

There were also certain moral advantages, less material but no less real, which the king possessed. The anointing in the ceremony of coronation made him a consecrated king. In the feeling of the time it gave him a special divine right and made rebellion seem to have to some extent at least the character of sacrilege. Again it was the Norman practice, coming down from the earlier Frankish state, that each rear vassal in swearing allegiance to his lord reserved his

allegiance to the king, and the king occasionally took from all holders of land a direct oath of fidelity to himself.[1] In times of actual rebellion this oath did not hold rear vassals as a class to their allegiance to the king, but it must have made organized insurrection a little more difficult and have acted as a deterrent in individual cases. Altogether the Norman king of England was the most powerful element in the state, and the most powerful sovereign in the Europe of that day. His preponderance of power was so great that even the palatine earldoms, where the king's writs did not run, which had an administrative and judicial independence, and which were large and fairly compact principalities, never asserted a political independence for themselves.

In Saxon times, as we have seen, two officers represented the central administrative and governmental system in the shires and connected the national and the local governments, the ealdorman or earl and the sheriff. In their government at home the Normans had been prepared to understand and go on with both these offices. The vassal counts of the Norman duke differed very decidedly from the original Saxon ealdorman. They were more feudal, less official. As the result of changes which followed the Danish conquest, the later Saxon earl approached the Norman type more nearly but still was not the same. The Norman Conquest made still more extensive changes. The Saxon name "earl" survived but practically nothing else of the older institution. The earl after 1066 was not in any sense an officer. He still took his title from a shire, which began now to be called a county, and he still received at least in some cases the "third penny" of its judicial revenues but, except in the case of the palatine earldoms, he had nothing to do with its government. The name is a title merely, indicating rank in the baronage and, if it carried anything else with it in a particular case, that had to be indicated by a special grant.

[1] Stubbs, *S. C.*, 96.

By such grants extensive royal rights of jurisdiction and administration were conveyed to the palatine earldoms, especially of Chester on the Welsh border, and of Durham, held by the bishop, on the Scottish. These departures from the ordinary practice in England were apparently fully justified for military reasons by the constantly disturbed condition of the borders. In general, however, the earldom as an official institution disappeared with the Conquest.

The Normans were also prepared to understand the office of the Saxon sheriff, even more clearly than the position of the earl. They had inherited from the West Frankish empire the office of *vicecomes*, or representative of the count, the count's deputy either in the whole or in a local division of his territory. The territory of the count of Normandy was so large that he naturally employed a number of *vicecomites* in different districts in which they looked after his interests and performed financial duties very much like those of the Saxon sheriff. The English office was probably better worked out and more definite in character than the Norman at the time of the Conquest and apparently it became the leader in the development which followed in both states, a development which was a logical continuation of the Saxon history of the office.

The sheriff shared as a matter of course in the increased power of the king because he was the king's representative in the shire, enforcing his rights and protecting his interests. On the other hand the local power of the sheriff sustained and rendered effective the central government, for he was in Norman as in Saxon times the chief instrument of centralization. A great baron of the shire was usually appointed its sheriff, sometimes of several nearby shires also, more rarely with some hereditary right to the office, but the danger which had been so serious from the counts in the later Carolingian state, that the office would be turned into a family possession and made the center of an independent principality, was avoided in England. The Norman mon-

archy was too strong. It was able to keep the sheriff in the position of an officer of the government and hold him to a strict accountability, and even to prevent in the main the financial oppression of the smaller people of the county which the sheriff's opportunities made a constant temptation. Not very long at any rate after the reign of William I, if not in his time, the sheriff paid into the king's treasury a definite sum for the county, which had been fixed upon as representing fairly the annual return to the government. This sum, called the sheriff's ferm or farm, the rent which he paid, was made up from two sources, the income from the king's domain manors in the county, and the proceeds of justice in the local courts. After paying his ferm whatever surplus remained was the sheriff's own, his compensation, but the counties were never put up to the highest bidder.

Besides his relation to the local justice of shire and hundred, which continued the same as in Saxon times, the sheriff was intimately concerned with the new royal local justice which was introduced by the Normans. In the local king's court, which begins to be somewhat frequently employed by William I to carry the curia regis into the counties, and which was held by authority of a royal writ naming justices to preside,[2] the sheriff was often commissioned as the justice or one of them. The fines imposed in these courts, he collected as something additional to his ferm, and his office shared the increased importance of the king's peace and of the pleas of the crown, which will be later considered. In the end this new system of royal justice was to be one of the chief causes in undermining the sheriff's power, but at first it added to it. The great age of the sheriff, as the indispensable agent of the central government was from the Conquest to past the beginning of the thirteenth century. During most of this period he was the chief instrument through which the government acted in the local units of the kingdom and secured the necessary

[2] A. and S., 2.

centralization. He was at once responsible to the national government for its interests in local financial matters, in maintaining order, in the administration of justice, and in getting out the military service due the state. It was when the state in the thirteenth century began to get better ways of looking after these interests that the power and importance of the sheriff rapidly declined, and he became finally but little more than the executive officer of the courts.

In no department of the public life of England did the coming in of a stronger monarchy lead to more immediate change than in the church, and in two contrary directions. The church became at once less independent and more independent. Before the Conquest William had held the Norman church under a far stronger control than the central government had been able to exercise at any time in Saxon history. This power he transferred in full to England and began a supremacy of the state which, though later weakened and at times greatly weakened, was never entirely lost. The historian Eadmer, writing about twenty years after the death of William, said that it was the king's purpose to exercise the same rights over the church in England which he and his fathers had possessed in Normandy, and he states three rules governing the relation between church and state under William which were certainly long observed and fundamental in this field of public law.[3] They were that no pope should be recognized in England without the king's consent, nor papal letters received which had not first been shown to him; that no enactments of English councils should be valid without his approval; and that barons and officials of the king should not be put on trial in the church courts, nor excommunicated, nor constrained by severe ecclesiastical penalties without his consent. The church was brought under a stricter control by the general government than it had been before subject to, but at the same time its national organization was improved, the standard of clerical morals

[3] Stubbs, *S. C.*, 96; Cheyney, *Readings*, 110.

and learning was advanced, and the way was opened for the influence of the Cluniac reformation which till then had been little felt. The English church was also brought into closer relation with the monarchical papacy which was just then becoming more highly centralized and more imperial. Later these changes were to lead to severe conflicts between church and state in England, but at first their influence was wholly good.

Another measure of institutional importance gave greater independence to the church. By a notification sent out probably early in his reign, William made known an act of a legislative character by king and great council declaring the separation of ecclesiastical and secular courts.[4] For the future no bishop was to hold ecclesiastical pleas in the hundred court but only at such places as he should appoint and solely according to canon law. Secular persons were no longer to have a share in the making of spiritual judgments, though the officers of the state were to assist in enforcing them if necessary. By this measure not merely was an independent jurisdiction given to the English church courts but the country was opened to the full influence of the canon law, just then forming into a great and scientific body of law. At the same time greater freedom from secular interference was given to the national church council, securing it more independence in legislation though it was still subject to the royal veto.

The change in the general aspect and interpretation of the constitution which was made by the introduction of feudalism has been briefly indicated in the first chapter. It is so difficult, however, for the modern mind to understand feudalism and its operation, and the effect of its introduction was so great, that some repetition is desirable. A clear perception of the distinction between political and economic feudalism, for instance, is essential to any understanding of the system in operation, but it is not easy to gain. It

[4] Stubbs, *S. C.*, 99; A and S., 1.

was political feudalism which was new to England, and in constitutional history Norman feudalism must be conceived of not chiefly as a social organization, nor as a method of giving endowment and rank to a national nobility, but as a means of carrying on government. Economic feudalism already existed in England considerably developed, but as a result of the Conquest it was probably extended geographically throughout the kingdom and it was perfected and made more definite.

Let us begin with this proposition: During the feudal age two different men held the same piece of land, by two different kinds of tenure, under two different systems of law. On each of these two sides of feudalism the unit is the same piece of land. On the economic side it is known as the manor, on the political as the knight's fee. As a manor it is a unit in the agricultural organization of the kingdom, and its purpose is economic, that is, it is regarded as a source of income. Its cultivated area is divided into two portions, the lord's domain and the "tenures," or holdings of the free and servile dwellers in the manor. The tenants in the manor hold their lands of the lord by a variety of services and payments in kind to which they are held.[5] In the eleventh century actual money payments were relatively unimportant. Payments in kind were of real value to the lord, and the labor services which were due him were used to cultivate his own domain lands, from which his chief income was derived.

The services of the free tenants differed at this time from those of the servile tenants chiefly in the fact that they were fixed in amount and could not be varied at the will of the lord. Free and servile alike must attend and constitute the court of the manor, or domanial court, from which the lord obtained considerable income. This court, however, had no governmental function, except the simplest police justice, corresponding to that of the township only,

[5] Cheyney, *Readings*, 212–217; Penn., III, 5, 3–32.

and in all the organization of the manor, and all the services rendered to the lord, the purpose was plainly economic. It was to furnish the lord with the income which enabled him to perform the feudal obligations which he had assumed towards his lord and to maintain his place in the society of his time. A manor so held "in hand" by the lord, and used for income, was called a "domain manor," the word "domain" being used in a slightly different sense from its use with reference to the domain land within the manor; but its use was economic, contrasting the manors used for income with those which the lords granted to their vassals on a tenure of feudal services. All ranks in the feudal hierarchy must have their domain manors from the simple knight whose only manor must be held in domain, through the various grades of barons who must keep "in hand" manors enough to maintain their rank, to the king at the top whose domain manors greatly exceeded in number those of the richest baron, partly because he must meet some of the expenses of the state from their income.

This body of domain manors, with the economic services by which the lands were held within the manors, and the customary law by which the holdings were regulated in the domanial courts, is the economic feudal system. The political feudal system was a coördinate, coincident scheme, in which the same manors were held, but by a quite different set of services, regulated by their own law. The king was at the head of this hierarchy also. As such he was the owner of all the land of the kingdom, or sometimes to be entirely logical the feudal lawyers said that he held the kingdom of God. All other holders of land at any rate were tenants, tenants in chief of the king or of some mesne lord who stood between them and the king. Of the land of the kingdom, which came by degrees all of it to be considered as contained in manors, the king retained "in hand" a certain number of manors as domain manors. The others he divided out among his tenants in chief according to their rank,

great barons and minor barons. The services which he obtained in return from these tenants were political in character and by them the state got the larger part of its business done.[6] The most common service was military, and the feudal system was the chief dependence of the state for its army.[7] In the same way, as the payment of another feudal service, it got its central great council or curia regis which was at once national council, legislature and highest court. Even when the central court began to cast off by differentiation judicial institutions which were of a more fixed character, practically permanent and becoming professional, the idea still lingered that the justices were barons and the peers of all other barons. Even the central administrative machinery was manned and operated chiefly by vassals of the king who were paid not salaries but manors to be held by these services. The practice of the time distinguished between manors held by services of this kind and those held by military services. The former were called serjeanties, grand serjeanties if the services were clearly honorable in character, petty serjeanties if the services were insignificant or more nearly of a menial nature, but serjeanties were feudal, though not military, tenures. They endowed the civil service of the feudal age.

The tenant in chief on receiving his fief did the same thing with it that the king had done. Let us say for example's sake that the king grants to the earl of Surrey 80 manors for the service of 40 knights. The earl retains 30 manors as his domain manors and enfeoffs vassals in the remaining fifty for the service of 45 knights, for it was the general rule that the great baron enfeoffed more knights than his service to the king called for, so as to increase his own social and political consideration. This process of enfeoffing rear-vassals was called sub-infeudation.[8] The

[6] Cheyney, *Readings*, 131–136; Penn., IV., 3, 15–32.
[7] Stubbs, *S. C.*, 96–97; Penn. IV. 3, 28–32.
[8] Penn., IV. 3, 21–23, 29.

earl's vassals did the same with their fiefs and so on down to the unit, which we have assumed at the bottom, the simple knight holding a single manor. Each of these vassals from top to bottom assumed not merely the obligation of military service but also of all the customary feudal services,[9] including that of court service, and each lord maintained his own baronial court, if he had feudal tenants enough to justify it, in which the cases of his vassals concerning their holdings and their relations to one another and to himself were judged according to the feudal law.

The customary feudal services due from the vassal to his lord included certain payments of money which must be carefully distinguished from payments of an economic character.[10] When the vassal as heir succeeded to the fief he paid a "relief," a *relevium*, a taking up again of the fief, which meant that in theory the ownership of the lord entered between the occupation of his vassal and that of the heir. In practice in the case of tenants in chief the ownership of the king did enter and actual possession, called "primer seisin," or first possession, was taken of the fief by the officers of the king. It was only on payment of the relief that the heir obtained recognition and the right to perform homage, swear fealty, and receive the formal investiture which gave him legal possession of his fief. That is, the relief was a payment intended to keep alive in every generation the fact that the holder of the land was a tenant merely and not the owner.

Besides the relief, payments which were called "aids," *auxilia*, were recognized feudal obligations. These were payments by which the vassal came to the aid of his lord on certain fixed occasions when he had to meet extraordinary expenses. In England these were when his eldest son was made a knight, when one daughter, usually the eldest, was married the first time, and when he had to ransom himself

[9] Penn., IV., 3, 32–34.
[10] Stubbs, *S. C.*, 193–194.

as a prisoner of war. Sometimes also on other special occasions, as when the lord had to redeem his lands from heavy mortgages held by Jews, an extra aid might be asked for, to which it was expected that the vassal would consent, but these special aids were always voluntary, *gratis* they were called. They could not be collected without the previous consent of those who had to pay them. These payments are all to be interpreted according to the feudal understanding of the relation between lord and vassal. They cannot be regarded as either economic returns, or as taxation.

On similar principles rested other rights of the lord which were even more valuable financially when they accrued. The right of wardship gave him possession of the fief, so long as the heir was a minor, on the theory that a minor heir could not perform the services due. The law required him to support in their proper station and educate his vassal's children, and his rights did not interfere with the dower rights of the widow, but apart from these obligations the income of the fief was his without accountability so long as the minority lasted. If the fief fell to an heiress the feudal law gave the lord the right of marriage, that is the right to select her husband on the theory that the lord must be sure that he would be able and willing to perform the services due. The right was in reality a financial one, the selection being sold to an interested bidder or to the heiress herself or her family. If the vassal's line became extinct, the fief reverted to the ownership of the lord by "escheat," and also if he forfeited his holdings by felony, the king also having in this case prior right to possession for a year and a day, if the felon was a rear vassal.

The change produced by the introduction of these political tenures was probably the most immediately extensive and the one most felt by the people of England of any of those which followed the Conquest, because it was connected with the transfer of lands from Saxons to Normans. The change was not made by legislation nor announced in any public

proclamation, nor was it suddenly made. It was made step by step as William bestowed the confiscated estates on his followers or, as was done in some few cases, returned them to their owners.[11] Probably also it was not a change made deliberately or of conscious purpose. The tenure by which lands were held of the king was made feudal and the basis of the political organization because that was the only natural thing to do; it was the only arrangement which the Normans understood.

For this reason also it was made practically universal. It was applied to the lands of the church, for instance: the churches and monasteries very generally retained the lands which had been given them in Saxon times, but now they were feudalized. Bishops and abbots became vassals of the king and definite portions of their endowment lands were formed into "baronies" which they held by the same kind of services as were due from lay barons. In no case, however, did the barony include all the lands of the church. A portion was set aside to support the church and the monks. These latter lands were usually held by a tenure called *frank almoign*, or free alms, that is, without service returns or by religious services only, such as prayers for the soul of the donor. Every church held also what were called "lay fees," that is land held of some donor by the ordinary services as a layman would hold them.

It has been often said that William in introducing the feudal system into Engand made important modifications in its character to secure the power of the crown. But proof of such an intention is lacking and a conscious intention of the kind is hardly reasonable to expect. The holdings of most of the great barons were scattered through several or many counties but that was a natural result of the gradual occupation of the kingdom, and of the fact that the estates of their Saxon predecessors, which were often given as a whole to some Norman, were also scattered in the same way.

11 Cheyney, *Readings*, 103–104.

The same thing was true of feudal holdings on the Continent except where the great baron represented the successor of a Frankish count or duke who had been governor of a district. In certain cases, Cheshire, Cornwall, Shropshire, and Kent at least, William showed that he was not afraid of the accumulation of something very near a local principality in the hands of one man. William did require an oath of fealty of all land holders whether they were his immediate tenants or not, but this custom was no innovation in Norman feudalism and had been inherited from the Frankish monarchy, nor was it in practice of value to the king.

It will readily be seen that feudalism as a system of political organization for the state involved three principles which were of great influence upon the constitutional development of the future. The first of these is that the obligations of public service which the citizen ordinarily owes to the state ceased to be due to the state as such and were considered private obligations which one man owed to another as a return for land which he held of him. The simplest illustration of this is the feudal military service, but we are soon to notice its application to the national assembly. The second principle follows from this. It is that the relations between the king and his subjects, in many exceedingly important features of government, were regulated by a definite contract which neither party could vary without the consent of the other. The definite understanding which the feudal custom had about the services on both sides, of the king to the baron and of the baron to the king, could not be changed at will. These two principles were of decisive influence on the development of the constitution. The third is that the actual occupier of the land was tenant merely and not owner. This principle had an equally decisive influence on the development of our land and property law whose effects remain to the present day as will be indicated later.

The Anglo-Norman central council or curia regis was an

institution of quite a different type from the sheriffdom, and yet it shows even more clearly perhaps the undifferentiated character of the government. In form and appearance, and in the main in the functions it performed, it seemed, as clearly as in the case of the sheriff, identical with the Saxon national assembly which had preceded it. It was like that an assembly of the great men of church and state, of the household officers of the king, and in exceptional cases of any whom he might wish to summon. But in reality the Norman Conquest had introduced into the assembly a new controlling principle of composition which makes a decided institutional change and compels us to find its true ancestor in the Frankish, not in the Saxon state. That new principle of composition was feudal. The great council was feudalized, not in function but in structure. The great men of church and state in attending it performed a duty which they owed no longer to the state, nor to the king as sovereign, but to the king personally as the lord of vassals, just as their own vassals attended their exactly similar councils. The rare exceptions which we find in individual cases to this feudal principle in the membership of a given assembly were survivals not of an earlier characteristic of the assembly, but of an earlier function of the king, and a sign of his prerogative power in the government of the state. The same institution in both the essential and the exceptional characteristics, with of course occasional local peculiarities, is to be found in all the contemporary feudal states which formed within the Frankish empire, and to deny the feudal character of the Anglo-Norman great council because of its similarity in superficial appearance and function to the Saxon assembly would be to deny the feudal character of every institution of the kind in Europe and the Latin Orient.

Before trying to get an idea of the part which this institution played in government, it is necessary to understand as clearly as possible the difficult fact that, to the men who were acting in it, its two forms, the great and the

small councils, were identical in everything except size. The small council was the active body in the intervals between the meetings of the great council, but it was not a committee which the larger body had clothed with certain of its functions to be performed under responsibility to itself. It is very natural for us to think of it as a committee, but no one at the time had such an idea of it. It was the larger body shrunk to the smaller dimensions determined by those who were immediately connected with the government or attendant, perhaps accidentally even, on the king. But size had nothing to do with function, and in the business of the state the small council could do all that the great council could do. In fact the steady and permanent institution by which day by day the business of the Anglo-Norman state was operated and supervised was the small council. The unity of this institution in its two forms is somewhat difficult for our more analytical minds to grasp clearly, and yet the fact is exceptionally important because this undifferentiated institution, in which most functions of that primitive government were centered, became in time through each of its forms the mother of a numerous progeny of institutions existing in the modern state. The fact that all functions and powers of the central body belonged alike to each of the forms in which it acted reveals itself also in the later history in a tangle of crisscross institutions and operations which is most puzzling and misleading unless the original identity is clearly held in mind.

As the chief machinery of actual government and a part of the constitution, the essential fact regarding the council is that it exercised or supervised the exercise of all the functions of the state without making any institutional distinction between them. It was the supreme legislature on those infrequent occasions when the slight business of the community demanded new legislation or the modification of existing law. It was the highest court of law in which the most important cases, or the cases of the most important

persons, were tried and decided, it might be in the same session and by the same assembly which perhaps immediately before had changed the law of the land. It was in supreme control of the executive and administrative activities of the state. To it all executive and administrative officers, high or low, were responsible and, when we attempt to collect instances of the legislative action of the Council in this early period, we find that a large proportion of them were in reality in the form of administrative orders or changes made in administrative practices.

In local institutions and local law the changes which were made by the Conquest were comparatively slight. Shire and hundred remained territorially what they had been. In function, competence, and procedure, shire court and hundred court seem not to have been affected by any change, except such change in competence as may have been involved in the withdrawal of ecclesiastical cases.[12] Procedure in the local courts of Normandy, in such details as we know, was almost exactly identical with that of Saxon England and the Normans felt no need of change. They had in use, however, particularly in cases affecting land or in accusations of felony, a method of proof not used by the Saxons, proof by battle or the judicial duel. This they retained, but Englishmen were not obliged to use it among themselves nor in all cases with Normans.[13] In the trial of a case the duel was treated like an ordeal but it was not technically an ordeal. An important practical innovation, the use of the county court to hold a local session of the curia regis, will be discussed in the next chapter.

Early in the Norman period, probably in the reign of William I, the Anglo-Saxon tithing, influenced apparently by the system of personal sureties, was developed into the frankpledge system, which held a great place in English local government for more than three hundred years. Over nearly

[12] Stubbs, *S. C.*, 122.

[13] Cheyney, *Readings*, 105.

the whole, but not quite all, of England, all men, unless they had property of their own, especially land, which would serve as security for them, or were vouched for by some responsible individual with whom they were specially connected, as in his household for instance, must be in a frankpledge and a tithing, ten or twelve persons formally grouped together under a tithing man. It was the duty of the township to see that all its male inhabitants above the age of twelve were in a tithing. If the accused before the court was found not to be in a tithing, the township was amerced. If he was in a tithing but not arrested and produced by the tithing, the latter was amerced. That is the system was one of collective responsibility for the arrest of persons suspected of crime, arrest being a very difficult thing to secure in those times. The earliest court rolls show the constant fining of tithing and township for failure in these respects, in all probability from sheer inability. The tithing system firmly enforced was probably as good a method of meeting the difficulty as could be then devised.

At some uncertain date the responsibility was placed upon the sheriff of seeing that the men in the county were properly enrolled and the tithings in working order. This he did in the practice called the sheriff's turn by going in circuit to each hundred and holding a "view of the frankpledge" in an especially full meeting of the hundred court twice each year. In the transfer of so much that concerned government into private possession which characterized the feudal age, even this function, so essential for the maintenance of local police and good order, was given over in a great number of cases to the lord who had possession of the hundred court from which the sheriff was in many cases shut out.

That system of private jurisdiction, partly economic, partly local police, which had developed somewhat generally before the Conquest, received no check from the Normans, except as the governmental supervision of local police became rather more strict through the growth of the frank-

pledge system and more slowly of a new criminal justice. The Normans were familiar at home with private courts of a similar character and would see no reason to interfere with them in England. Indeed the kings confirmed liberally the Saxon grants of hundred courts to private lords, and made new ones of their own, and it was not long before they included freely, among the rights granted, the view of the frankpledge itself. It should be noticed, however, that the centralization of the Norman state was so great that the chief significance of these grants, both to grantors and grantees, was not political independence but financial income from fees and fines. No appreciable political independence went with them, and it is more than two hundred years after the landing of the Normans before the central government took seriously in hand the recovery of the local courts.

With the introduction of political feudalism, the Normans also introduced a new kind of private court, the feudal court proper,[14] or the baronial court as it is better called for distinction's sake: the court of the lord for his vassals and freehold tenants, with jurisdiction over their holdings, and their relations to one another, and over questions arising from the service due their lord. In organization and procedure it was like the other courts of the time, an assembly court using the same methods of trial and proof as the hundred court, and presided over by the lord or his representative not as judge but as moderator. The law which it enforced, however, was not the law of the hundred as in the franchisal court of the "liberty," nor the customary law of the domanial court, but the feudal law proper, regulating the relations of lords and vassals with one another.

There were thus in Norman England three kinds of private courts which we may in theory distinguish sharply from one another as we know that they did in practice: The baronial, whose field was the relations of lords and their free tenants in political feudalism; the hundred court in private hands,

[14] Penn., IV. 3, 32–34, Nos. 1 and 4.

which we may best call a franchisal court, because it was established by the grant of a "franchise" or freedom from the local organization and its officers, also called commonly in England a "liberty"; and the domanial, or manor court proper, whose field was the manor and its tenants and their relations with one another and their lord in the sphere of economic feudalism. In practice for convenience and economy these courts, especially the two last, were often used to do the business one of another, but not in such a way as to confuse their jurisdiction proper or to destroy the distinction between them or between the kinds of law which they interpreted. The baronial court, sometimes called an "honor" court, as the barony was sometimes called an "honor," was very rarely used for any business not its own, though it seems to have been occasionally used as a court of appeals for questions from the domanial courts of the same lord.

The population of England remained divided into the same classes and ranks as in Saxon England. The new nobility was more powerful, more sharply defined, and to enter into it was apparently more difficult for men of non-noble origin. The feudal tenure proper, political feudal, was always considered a noble tenure, and with the single exception of the earl, there were no technical distinctions of rank among the feudal tenants. As in Saxon times the common freeman holding his land by a non-feudal, oftentimes also by a non-labor, tenure, called commonly "socage" tenure, stood between the noble and the serf, and the unfree in various grades constituted the lowest stratum. It was impossible of course that the community should go through such a revolution as the Norman Conquest without great depression of individuals, and it is probable that the loss to Saxons generally was greater than the evidence reveals to us. Few Saxon nobles passed into the Norman nobility; the common freeman lost distinctly in relative influence and weight in local and public affairs and it was long before he

recovered his former place, and many individuals of the class undoubtedly were depressed into the class below them. If the serf lost relatively less than the other Saxon classes, he gained nothing from the change, unless possibly those of the very lowest class. The improvement of his position awaited general economic improvement, and the common freeman began to recover his place earlier, with the development of judicial reforms in the twelfth century.

Monarchy and baronage stood over against one another after the Conquest as the two most powerful forces of the time, as indeed the only forces as yet affecting public life and government, if we include the clergy in the baronage as we must from the point of view of the government. The middle and lower classes had not yet acquired a standing in the community which gave them an influence on public affairs nor was there any institutional machinery through which they could make themselves heard. The king was the more powerful of the two great forces, but the baronage possessed the principle, in the feudal contract and the resulting limitation of the king's rights, which was destined to be the foundation of the limited monarchy. It was indeed the great preponderance of the royal power which led to its own destruction.

As yet neither king nor baronage had any wide outlook on the future nor any clear conception of constitutional progress or specific rights. The king had more regard for the present exercise of power than for laying the foundations of its future permanence. The individual baron was not prone to regard his share in public affairs as privilege or opportunity for the exercise of influence on the conduct of government, but rather as a burden. In such a community ideals of public service were not high, and the individual would naturally escape gladly with as little share in public affairs as possible. Nearly everything was left to the determination of the king, though with no conscious intention and no institutional result.

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CHAPTER III

THE NORMAN PERIOD

The changes introduced by the Norman Conquest are really less important when looked at from the side of institutions strictly speaking than when considered as changes in emphasis and interpretation. As to institutions the only great change was what necessarily followed the introduction of feudalism, the change in the structure of the great council and the prevalence of a new land law, the law of feudal tenures proper. But changes in emphasis and interpretation were far reaching and in one matter at least, in their influence on the position of the king in the constitution, of immense significance. Until we reach the rise of Parliament in the middle of the thirteenth century, the one great topic of constitutional interest is the power of the king and its probable future. The judicial reforms of the last half of the twelfth century were of great and lasting importance, but their final importance was to be institutional, that is concerned with the details of governmental operation, rather than constitutional, that is affecting the character of the whole governmental system. At first, however, their effect was quite as much constitutional as institutional, and this significance they obtained through their direct bearing on the royal power. This is the one fact, the royal power and its future, which is fundamental in the history of the first two hundred years after the Conquest. The problem of the time was, if we may phrase it as a problem: will the king be able to translate his power, which as yet is practical rather than institutional, a power derived from emphasis and interpretation rather than from law, into a constitutional power, founded strongly in law and institutions; or

will it be found possible to make the immature and rudimentary checks upon arbitrary power which exist in feudal law the ruling principles of the constitution.

One element of the royal power, the royal prerogative, which has been of great importance in all constitutional history down to the present time, was already semi-institutional in character at least, that is, it was recognized by the courts as clothing the king with extraordinary power, even in some cases against themselves. The king's prerogative right was so much discussed when men began to theorize about their government, and emphasis upon various phases of detail was so greatly varied from time to time, that the task of deciding what it was in the medieval period is not an easy one; and it is perhaps an impossible one, for the idea developed greatly in the course of time. It is, however, exceedingly important that, if possible, an understanding of its fundamental character should be gained at the beginning of a study of constitutional history; but we must be reminded again that, in using phrases which make the past fact clear to us, we are not asserting that the men of the time could have used the same phrases, or have explained the fact in the same way. We may say that prerogative was the power of the king to do things which no one else could do, and his power to do them in a way in which no one else could do them. He could direct a jury of neighbors to determine a fact, but no one else could do this. The jury was prerogative procedure and it was the king's own. Roughly prerogative was his power to do all things which were not expressly forbidden him by the law, or by custom equivalent to law, or by agreements which he had himself made. Practically it was not always easy to hold the king to his own agreements, or to make him conform in every case to the law. Indeed in many respects he was distinctly recognized as being above the law. He could not be sued. He could protect rights of others which the common law would not protect, and in doing this he gave rise to the whole system

of equity law and courts. No valid law could be made if he did not consent to it. He could set aside a judicial sentence by granting a pardon. In times somewhat later he could set aside a statute, or a part of a statute, or a special application of a statute, to which he had consented. He was responsible for his acts to God alone. He was the representative of God in the government of the world and as such clothed with extraordinary powers, as well as held to the duty of securing right and justice. On the other hand there was some law, especially public law and express engagements of his own, which he was not above, and the conflict and reconciliation of these two contradictory ideas, the king is above the law, the law is above the king, the conflict of law and prerogative, constitutes a large part of English constitutional history.

There can be no question about the first tendencies of constitutional growth. William I had ruled with moderation and had never shown a disposition to take advantage of his position to push his right to extremes. The evidence is not so clear as we could wish but it is sufficient to warrant us in saying that his son William II did do so. The few specific instances that we have, and the abuses which are indicated by the promises of his brother Henry's coronation charter, while implying that his acts were illegal, show somewhat more clearly that he had pushed the rights logically involved in the position of the feudal suzerain to unusual extremes and in some cases had made them justify demands that were new. Both ecclesiastical and lay barons suffered, but the exactions from the church fiefs were especially regarded as new.[1] Apparently William I, while acting upon his right to control a fief during a vacancy, had gone no farther than to take the lands in hand, to make an inventory of the goods and to see that they were not wasted, leaving the income to the church. His son, however, exercised his right with strict logic, and retained the income to his own use as he would in

[1] Stubbs, *S. C.*, 109; A. and S., 3.

case of a lay wardship, or even considered the fief escheated and granted out its lands without reference to the interests of the church. In the case of lay barons he was not satisfied with a moderate relief, but he was accused at least of demanding something near the capital value of the fief. The right of marriage also he used in the same way to justify unusual exactions and applied it to the widow as well as to the heiress of a deceased baron.

However slight the evidence may be as to specific acts, there can be no doubt but that in general, William II, exercised a power in England which was so arbitrary and unlimited as to be near at any rate to tyranny. Twice during his reign the barons tried the feudal remedy of rebellion, in the first instance with force enough to make the attempt for a time dangerous to the king, but without success. William was too strong. It is interesting that danger brought the king to some repentance. He appealed to the English people and made written promises of better government, which would give us valuable information, if we had them, but when the danger was past he returned to his earlier methods of rule. In Ranulf Flambard, whom he raised from obscurity to the bishopric of Durham, the richest and most powerful in the kingdom, he had an able and vigorous minister who, we are led to suppose, was not merely ready and able to do the king's will, but also to show him new steps to take in the same direction. So far as we are able to judge, the demands of William were all logically involved in the acknowledged rights of the suzerain and, except perhaps for the size of the sums exacted, his innovations became recognized rights of the king of England for a century and a half at least, and were even carried farther in the same direction.

The sudden death of William II, together with the absence of his elder brother, Robert, gave the barons their opportunity. The younger brother, Henry, persuaded the barons to support him as king, but in order to do so he was obliged to promise that he would abandon the arbitrary acts of his

brother and return to the practices of their father. These promises were formulated in specific form in a charter, or what would be for a private man a legally binding deed or grant, which we call the coronation charter of Henry I.[2] The provisions of this charter were based clearly on the principle that the things which William II had been doing he had no right to do and that therefore they were unjust and illegal. In the first paragraph Henry gives as the reason for his promises that "the kingdom had been oppressed by unjust exactions" and he promises that he will remove "all evil customs by which the kingdom of England was unjustly oppressed." That is the king definitely acknowledges that there are certain things, some of which he goes on to name, which the king cannot legally do. Nearly all the specific points mentioned in the charter concern the feudal relation between the king and his barons. The charter is, in the points which it takes up, an exemplification of the fundamental contract relationship of feudalism, that is services definitely defined by custom in return for a definite piece of land received, and it is a special contract — the barons engage to support the king if he will make these promises — within the field of the more general feudal contract.

It is in this sense that it has its significance in constitutional history. The specific promises of the charter Henry himself did not keep, nor did later kings, but the idea upon which the charter rested was never lost sight of. We may state this idea, though the barons of 1100 could not have done so, as this: that there are certain things which the king cannot legally do, certain limitations on his power which he is bound to observe and, if he will not, the barons may rightfully insist that he shall. Through most of the period of the strong Norman and Angevin monarchy this principle lay dormant, but when the time came that another tyrannical king, acting illegally, was also at a disadvantage, the barons turned to it again, now even more clearly held, and

[2] Stubbs, *S. C.*, 117–119; A. and S., 4–6.

it was upon the model of the coronation charter of Henry I, that Magna Carta was drawn up, and through it this principle became the corner stone of the limited monarchy.

Not long after the date of the charter, Henry had to defend his throne against a most dangerous combination of English and Norman barons, who feared that his power would become too great, and it was not until after several years that the struggle was finally settled in Normandy in favor of the king. Henry reigned for nearly thirty years after his victory and during the whole of that long period his authority in England was unquestioned. It was a period indeed of steady and sound growth of the royal power, not so much upon the practical side, where it had little need to grow, as in law and institutions. Our evidence of the changes made in the reign of Henry is only scanty and fragmentary, but it is enough to convince us that the foundations were then laid for those advances in the reign of his grandson, Henry II, which went so far towards establishing the English royal absolutism solidly in the constitution.

The special characteristic of this constitutional development of royal power in both these periods of its growth is that it was a development of law and of judicial institutions. Indeed it is true that some of our institutions which we especially associate with the protection of liberty against the executive power, like the jury, were in their origin parts of machinery for the more intense centralization of government in the hands of the king. Of what was actually done in the reign of Henry I, we have only incomplete information, but the slight glimpses that we get are very significant, and the evidence of peculiar interest in law is clear. In fact there is hardly to be found in the whole of legal history a period of equal length which has left us as convincing evidence of legal interest and study as the last twenty-five years of this reign. There remain to us from that time seven, perhaps we ought to say eight, compilations more or less complete of English law then current, or at least of what

the writers wished to have pass as not obsolete. Possibly an impulse was given to the writing of these books by the promise in the coronation charter of the king that he would restore the *laga Edwardi regis* with such changes as had been made in his father's time. Probably the demand was not so much for the laws of Edward or for any particular set of laws as for the Anglo-Saxon system in general, now far enough in the past to be idealized, and the promise was probably less impulse to a beginning of interest than itself evidence that the interest had already begun. At any rate it is clear that the writers were trying among themselves to do one or more of three things, to show what the Anglo-Saxon laws were, to give the results of the legislation of William I, or to depict the mixture of Saxon and Norman law which was actually in use in the contemporary courts.

The most interesting and valuable of these books is one which bears the title *Leges Henrici*, which purports to give the law which the courts of the time applied, and apparently it does do so. It was written in 1116 or soon after, as a private, not an official work, though its author was probably one of the royal justices.[3] Accepting the accuracy of its picture of contemporary usage, the specially significant fact is that it shows two distinct systems of law, the Saxon and the Norman feudal, operating side by side in the courts with no sign as yet of any melting of the two together into one organic whole. That union was to take place shortly and to give rise to our common law as that is depicted towards the end of the century in Glanvill, the first great text book of the common law, but as yet the two systems of law stand side by side as independent, though both enforced in the same courts, as they could easily be. We cannot be sure that some of the Saxon law written in the *Leges* was not already obsolete but much of it we know was not, and it is certain that the reference to the *Laga Edwardi* in the charter of Henry I, though it may then have had no very

[3] Stubbs, *S. C.*, 122–126.

solid foundation in actual law, served to keep alive an ideal of government according to law which was at a later time to reinforce the more positive forces which led to the beginning of the limited monarchy.

In one large field of law, criminal law, we can see a little more clearly that the old Saxon was already beginning to fall into the background and disappear before the Norman and the change seems to have been closely connected with that increase of the king's power which resulted from the Conquest. In the *Leges Henrici* the old Saxon system of *bots* and *wites* still appears in full force. It probably was in force as of old in the local courts, for the Normans at home had practically the same system and there would be no reason for a change. The new system grows up beside the old and in the course of the century crowds it out. The first stage in the new growth seems to have been the development, or simply the extension of two older ideas, the idea of the king's pleas, or cases reserved especially to the king and his courts and not included in the sheriff's normal jurisdiction, and the idea of the king's peace as described in Chapter I. In the *Leges Henrici*, it is the first of these ideas which shows especial extension. The short Saxon list of pleas reserved to the king, given above, had now become a much longer and more miscellaneous list, showing the growth of the idea that a crime committed is an offence against the king.[4] Disloyalty, murder, robbery, arson, contempt of royal writs, false coining, and crimes of violence are named. Breach of the king's peace stands in this list as one of these offences and the early development of this idea does not show itself so much in the specification of the crime which is made in the accusation as it does in the character of the punishment. That is, it is somewhat later in the century apparently that the practice becomes common of transforming any crime into a plea of the crown by alleging that it was a breach of the king's peace. But under

[4] Stubbs, *S. C.*, 125.

Henry I, the idea is clearly held that the offender who is guilty of a grave crime is at the king's mercy, *in misericordia regis*, that is life and property are forfeit; the king may take more or less as he sees fit: life or a limb, all the property or a heavy fine. In the *Leges Henrici* the list of pleas which put a man at the king's mercy is practically the same as the list of pleas of the crown. The change is an extension of the idea of royal, or national, justice at the expense of local, both of the local courts and of their system of *bots* and *wites*.

In another feature of the criminal law of the time the same effect is shown, the increased strength of the Norman central government as compared with the local. It illustrates also the difficulty of arresting criminals in those times and the plan of collective responsibility. If a man was found killed, the hundred in which he was found was held either to produce the slayer or to prove by a not easy process called "presentment of Englishry" that the slain man was an Englishman. If it could not do one of these two things, it must pay a heavy fine, called *murdrum*.

The royal power was in the end, however, to find far less extension and support in the development of criminal than of civil justice. Of such a development in the reign of Henry I we get only slight glimpses. They are enough to enable us to say that all the great advances in the principles, institutions and organization of civil justice, which characterize the reign of Henry II, had their beginning in the time of his grandfather. We must reserve, however, the treatment of the full reforms for the later period, and limit ourselves here, as our lack of knowledge limits us, to the first indications of growth in the institutions that were brought into England by the Normans.

Three institutions constitute the beginning points of this development which were either new to England, or existed in such rudimentary form that it is clearly the Norman and not the Saxon from which the growth begins. They are the

writ, the jury, and the royal itinerant or circuit justice. The writ was used by the Saxons and its later use has been regarded by some as a Saxon survival, but the writs which play the chief part in the judicial development are surprisingly like certain Frankish writs and have no Saxon prototypes. It probably is to be said that we have in the writ another case where Saxon and Norman easily ran together into one, but that the impulse to growth was Norman. The writ primarily was a mandate of the king's directed to the sheriff or to some other officer of the government, or to a private individual, directing that some specified act be performed.[5] As such it was the authorizing and moving force which the royal government employed to initiate and carry through the judicial changes of the age. In the process its own development consisted in fitting the form of the writ more and more exactly to the action it was to initiate and therefore in the multiplication and classification of forms of writs.

The jury may be called the pivotal, or perhaps the causal, institution in the process of growth, for it was in a very large proportion of the cases the desire to use the jury which led to the extension of the writ and to the employment of the itinerant justice. The jury was not Saxon. The Normans had inherited it from the Frankish Empire in which it goes back into very early, perhaps even into Roman times. During all the Frankish and Norman use of it, however, it had shown no tendency to grow. Its development into its modern applications is after the Conquest. As brought into England in 1066, the jury may be most simply described as machinery for ascertaining a disputed or desired fact by the testimony of those most likely to know about it. Selected persons were summoned before an officer commissioned for the occasion, put on oath (*juré*), the specific question was put before them, and they were required to say whether the

[5] Stubbs, *S. C.*, 97; A. and S., 7.

fact was this or that.[6] If they did not know, they might say so, but they were selected because it was supposed that they would know. Twelve as the number of the jurors, the requirement of unanimity, the submission of evidence to the jury, and the excusing of a juryman because he had formed an opinion about the fact in question, are all later modifications of the original institution. At the beginning the jury was a royal institution only, a prerogative institution. It could be used only by the king and only in a king's court before a royal justice. The great advantage which it offered was that a fact in dispute, or a fact which it was desired to ascertain, could be established by the sworn testimony of those most likely to know, and in the neighborhood where the evidence was most likely to be found.

The desire to use the jury was the chief reason which led to the more common employment of royal justices and to the final organization of a permanent and regular system of circuit justices and courts. This desire was not merely felt by individuals who wished to get a better method of proving facts in their suits at law than by the older, less satisfactory procedure, but also by the king who made great administrative use of the jury in holding local officers to proper conduct, in taxation, and indeed in any question of interest to the government. From the beginning by special permission in each case, which of course had to be paid for, the king allowed his jury to be used by private persons in the trial of their causes in his local courts before his justices. In such cases and in all cases the writ was the justices' commission to act for the king and at the same time it was permission, or a mandate, for a jury for the specific purpose described, though the description in early cases is sometimes vague.

The justice commissioned was very often the sheriff of the county in which the case arose; sometimes others were

[6] A. and S., 2; Penn. I. 6. 22.

named to act with him; sometimes a justice, or justices, were named without the sheriff. Usually, if not always, the justices were to go into the locality where the parties resided and try the case where the evidence could easily be obtained, that is, they were the king's *missi*.[7] The court which was summoned to meet them and to try the case, was a local court, a hundred or a county court, or a court of combined hundreds or counties. The result was that the king's *missi* held a king's court, a curia regis, using the machinery of the old local court. In this court no change was made at first in the old procedure except in the use of a jury for the establishment of disputed fact. The first great advance in the growth of this new system of justice consisted in grouping the counties together into circuits to each of which a body of justices was commissioned to go for the trial of cases that might have obtained the necessary permission, that is, a step towards making the system regular and permanent. Of this advance, as a part of the judicial system, there is no sign in the reign of William I, only slight indications in that of William II, while the signs that such a regular plan was in use in the time of Henry I are much more numerous but not detailed enough to enable us to localize the system definitely.

For one purpose William I made use of this machinery in a form almost as fully developed as it was when constantly employed by his great grandson, Henry II. It was used to gather the facts from which was made that unique record which was called before very long, as we still call it, Domesday Book, the record from which no appeal could be taken.[8] The Domesday survey, or inquest, was an inquiry made throughout the kingdom in 1086 to ascertain the ownership of each estate of land and its value for taxation, for the Danegeld. To get the facts royal commissioners, called barons, justices, or *legati*, that is *missi*, were sent to each

[7] A. and S., 4.

[8] Stubbs, *S. C.*, 100ff; A. and S., 2-3; Cheyney, *Readings*, 111-115.

county, probably to a number of counties grouped in a circuit. The county court was summoned to meet them just as it was summoned later to meet the justice on his circuit. The whole "county" sometimes decided questions of special importance, but the business of the survey was done as a rule by the sworn jury of each hundred which was present as in the later justice courts, and in the same way also the questions to be answered were submitted to these hundred juries. They were required to tell the name of each manor and the name of its holder at the time of King Edward and at the time of the inquiry; the number of hides it contained; the number of ploughs employed on the lord's domain lands, and the number on the lands of the tenants — a rough way of determining the amount of land in cultivation. Then they gave the population of the manor in classes: freemen, villeins, cotters and serfs; the amount of forest and meadow; the number of pastures, mills and fishponds; and what the value of the manor was in the time of King Edward, when granted by King William, and at the date of the inquest. The facts thus gathered were put into permanent form in the Domesday Book, a storehouse of information on the economic condition of England at the end of the eleventh century, but from our point of view remarkable for the completeness with which it foreshadows the new judicial system established a century later.

The beginning of king's local courts, presided over by king's *missi*, using the old county courts, and foreshadowing a regularized system of royal circuit courts, in which jury and writs were developed as parts of a new procedure and a common law was carried to all parts of the kingdom, opened the first stage in the unifying of the kingdom institutionally, in the uniting of Saxon and Norman institutions into a single whole. That in this final common whole more of the Saxon seems to have disappeared from view than of the Norman does not prove that Saxon institutions made no contribution to the result. They furnished almost everywhere a solid

foundation on which the new construction rested, as in the case of the surviving county and hundred courts already referred to. This process of unification went on in two stages. One is that just mentioned, which we shall shortly consider more fully. It is really a process of carrying certain Norman institutions belonging to the central government down into the counties and uniting them there with old Saxon local institutions to produce new results. For these results really were new — new uses of writs, justices and juries. This stage of the process gave rise to the modern Anglo-Saxon judicial system. The second stage begins later, in the middle of the thirteenth century, and is a reverse process. Certain results which characterize local government and procedure as a consequence of the first process, were brought up from the counties and united with institutions of the central government to produce further new results. This second stage gave rise to the Anglo-Saxon forms of representative government, and to parliament.

It was not merely the judicial organization of the country which was rapidly improving during the period covered by this chapter, but also the administrative system, or to state more specifically the chief interest with which administration was at that time concerned — the financial. The Anglo-Norman state made no great improvement on the Saxon in the matter of public revenue; the regular sources of income remained the same, made somewhat more productive but not increased materially in number. The irregular feudal revenue, though occasionally large in amount, had not yet been developed, as it finally was to be, into a more constant and dependable income. The strength of the government, in which the sheriff shared, not merely improved the collection of the revenue but, through the greater security which it gave to business and property, increased the amount to be collected. The sheriff was still the officer who was responsible for the financial interests of the state in his county, and most of the new payments which the Normans intro-

duced, like the relief, it fell to him to collect. Before the end of the reign of Henry I, the accounting of the sheriff at the treasury was put into the improved and rather elaborate form which it retained for many generations — the accounting at the exchequer.

Just when the peculiar system of accounting which is associated with the exchequer began, and when the special session of the small council, set apart for the purpose, began to be called technically the exchequer, as if it might be something different from ordinary sessions, cannot be said with certainty. We can say that the more the subject is investigated the more an early origin seems likely and that at present the earliest evidence of use is English rather than Norman. The system of accounting gave rise to the name exchequer. The official members of the small council, with one or two others, and their clerks to keep the records, sat about a table with a chequered cloth, or cloth divided into columns of squares for pence, shillings, pounds and multiples of pounds. On these squares counters were placed and moved about as the accounting went on — an adaptation of the abacus method of reckoning. Before this tribunal each sheriff appeared twice a year, at Easter to make a preliminary, and at Michaelmas a final accounting. The scrutiny was minute and as it went on nearly every item was checked by written records. The sheriff was allowed credit for expenses which he had incurred by written order and for the income of those royal manors once making part of his ferm which the king had given away. He was charged with the amount of this ferm, with the amercements in king's pleas which were not included in his ferm but noted in the records of the justices, with the income of escheats and of lands falling to the king not included in the ferm, and with debts which he had been directed to collect, including sums paid to the king by individuals for favors or exemptions. He also accounted for reliefs which had fallen due within the year, and for lands in wardship. From the accounts thus

rendered the general record for the year was put into permanent form, making the series which we call the Pipe Rolls. The earliest of these which has come down to us is for the year 1130, but the system had been in operation for some years at that date. We have no Pipe Rolls for Stephen's reign and the continuous series begins with the second year of King Henry II.

The development of distinct institutions of government out of the simple and generic constitution of the feudal state was to be very largely a process of differentiation, by which the primitive institutions of the eleventh century were to be split up into new ones along the lines of the various functions they originally performed. This process of differentiation affected especially the small council because it was the permanent supervising organ of the central government having control of almost all the business of the state. We shall have to note this specialization of function and consequent differentiation at several points in the history. Here we have to note the first in the series, as we know it, and one that is typical of many others. The first step was taken when the financial supervision of the council was set off to be carried on in a special session for which the official members of the council seem to have had a peculiar responsibility. At first it was merely a session of the council having special reference to its financial duties, but capable of performing any other function of the council in the same session. This capacity remained to the exchequer for a hundred years or more, to result finally in a differentiation within itself, forming the financial exchequer and the exchequer of pleas, or the exchequer as one of the common law courts.

During the period of almost fifty years from the death of William I, to that of his son Henry I, the royal power was steadily advanced by the vigor of the kings, by the failure of baronial insurrections, by the establishment of customs at first hardly legal but soon accepted, and by the improvement of governmental machinery, judicial and ad-

ministrative. But at the end of that period the constitutional absolutism which was forming was brought to a test which it survived with difficulty. Henry I, was succeeded by his nephew Stephen whose position was weak because his right to the throne was disputed by Henry's daughter, Matilda, wife of the count of Anjou, and because he was himself irresolute and unable to compel men to obey him. The result was, where so much still depended on the personality of the king, where the constitution was not yet so firmly fixed as to be habitual, that the state fell into disorder. The new financial and judicial machinery became a good deal disorganized, and England had a little taste of what feudal society might be when the bonds of central control were loosened. Nothing was permanently lost, however. Some progress in the direction of law was actually made and even more in Normandy, and when Matilda's son, Henry II, succeeded Stephen in 1154, he re-established, in a couple of years and with a little difficulty, the financial and judicial machinery and the strong monarchy of his grandfather, Henry I.

In one direction Stephen's weakness had constitutional results far more permanent than any change upon the merely political side. Over one important element of state and constitution the monarchy never recovered the power which Henry I had received from his brother, power over the church. At the moment when William I made his conquest of England and brought the Saxon church under a more strict state control than ever before, a great reformation in the Latin church of the west was just reaching its culmination. The reform movement which had started in the monastery of Cluny in the tenth century, had for its ultimate object a constitutional advance by which the government of the Roman church should be made an absolute and highly centralized monarchy under the pope. The success of the movement was complete. At the end of the eleventh century a powerful imperial government, with all the machinery of

a state, based upon the union of all state churches and subjecting them all to itself, took its place beside the state governments of Europe. Conflict was in the nature of the situation inevitable. The church organization of England was in important ways a part of the state government. Extensive fields of law, marriage, divorce, inheritance, belonged wholly to its courts. Service from its fiefs was essential to army, legislature, and courts. The bishop as a baron, better educated and of broader outlook than the lay baron, was indispensable to the efficient working of feudal government. On the other hand, if there was to be a universal monarchical church, the case for it was just as clear. The church of every state was an essential portion of such a monarchy, without which it could not be, and must be obedient to it and serve it primarily. Conflict was inevitable and, where there was so much of justice in both claims, compromise was the only way of reconciliation.

The double position of the bishop, as an essential working officer of feudal government, as an essential working officer of the ecclesiastical monarchy, brought on the first and most severe phase of the conflict. This question, which should appoint the bishop, church or state, from which should be derived his authority and to which should he be primarily responsible, was fought out in the early years of Henry I, between the king and Anselm,[9] the archbishop of Canterbury, and the compromise by which it was terminated was the same as that made later between the emperor and the pope. The church should select the bishop. The king should then receive his fealty and confer upon him the fiefs belonging to his see, and then he should be consecrated bishop. The king thus obtained virtually a veto for, if he withheld the fiefs, the endowment lands of the bishopric, the church would hardly insist upon consecrating the particular man. The compromise was as fair a one as could be made, but the church really gained and the king lost. If all the results of the

[9] Cheyney, *Readings*, 125–127; G. and H., 63.

change appeared only gradually, they were all involved in the settlement. The church was no longer, as it had been traditionally, the obedient servant of the state. It had come up along side the government of the king as an independent and rival power. It received its law and its judicial decisions from an outside sovereign, and it garrisoned the land with the devoted bands of the new religious orders.

The full consequences of this change, Henry I never experienced. His rule was so strong that the concessions he had made had little practical effect. But Stephen was in a different position. At the beginning he had been obliged to secure the support of various interests by liberal promises, which were clearly of the nature of bargains, and emphasized though in slightly different way the contract relation between king and baronage as did the charter of Henry I. Stephen's first charter is general in its terms and amounts to no more than a confirmation of Henry's, but his second is more specific and is really a charter to the church.[10] What it granted that was new, or could be made something new, was jurisdiction to the church courts over ecclesiastical persons and their effects. The terms of the charter might be interpreted in more than one way but there is no doubt but that what it was made then to mean, was that all cases, civil and criminal, in which ecclestiastics were involved were removed from the state courts into church courts — an advance of its practical government within the state which the church had long striven for but scarcely anywhere obtained.

This was the situation which Henry II found when he came to the throne. In his first work of restoring the judicial system as the means of re-establishing order and security he came at once face to face with the fact that a large and important part of the people were beyond the control of the state courts. The cleric in orders who committed a crime could be tried in the church courts only, whose pun-

[10] Stubbs, *S. C.*, 142–144; A. and S., 7–9.

ishments seemed wholly inadequate. Henry's instant determination to bring this condition to an end brought on the famous conflict with Thomas Becket, the Archbishop of Canterbury of his own appointment.[11] It is the constitutional aspect of this conflict only with which we are concerned. Henry succeeded in getting from the archbishop a promise to observe the ancient customs of the realm, and this would have settled the matter in the king's favor if it had been faithfully observed by Thomas, for there is no doubt but that the king's position with reference to the jurisdiction of the state courts was historically correct. But Henry did not stop with this concession, and the archbishop had some justification in refusing to be bound as the matter was finally put. In order to make a permanent record of the relation between the two sorts of courts, the king demanded of the great council a recognition of the ancient customs of the kingdom. A "recognition" was the formal answer of the jury appointed to make an inquiry, or "inquest," and the document which we have, the Constitutions of Clarendon, of 1164, the first of the great constitutional documents of Henry's reign, may well have been drawn up by a jury, but we do not know how the jury was made up and the document itself had more nearly the form of an act of the great council.[12]

The Constitutions did not demand that the state court should try the question of the guilt of the accused man, if in orders, but that he should be arrested by the state officer, to be brought before a state court for accusation, then turned over to a church tribunal for trial and, if found guilty, for degradation from his orders. Then he was to be returned to the state for sentence and punishment. But the Constitutions went beyond this particular question. They reasserted practically the three rules of William I, though the pope was not specially referred to; they pro-

11 Cheyney, *Readings*, 143–160.

12 Stubbs, *S. C.*, 161–167; A. and S., 11–14.

vided that suits as to the right of presentation to churches should be tried in secular courts, and also suits as to the ownership of land, unless it could be proved that the church held by the *frank-almoign* tenure; and they defined clearly and emphatically the feudal position of the bishop as a vassal of the king's. Becket refused to be bound by the Constitutions though the other bishops submitted, and the struggle between archbishop and king ran rapidly to extremes, and finally to the murder of Thomas.

The reaction which followed against the king was natural, and he was obliged to abandon in form his most extreme claims in order to obtain reconciliation with the church. In practice, however, he did not keep his promises any more faithfully than his grandfather had done. In the end the state secured all that the Constitutions asserted with the one exception of the punishment of clerics accused of felonies less than treason. The punishment of treason and of misdemeanors remained to the state. The exception in the case of felonies is what was long known in English law as "benefit of clergy"— one accused of a felony "pled his clergy" — pled that he was in orders and so could not be tried or punished by the state. If the fact was proved according to the established rules, he was turned over to the ecclesiastical court and so escaped the punishment inflicted by the state.

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CHAPTER IV

CENTRALIZATION AND LAW

Henry II, could not have foreseen the ultimate results of the reforms introduced in his reign, though they were to be of such enormous consequence in the legal and constitutional history of the future. No man of his time could have foreseen all, and Henry was not distinguished by any special foresight even in the simpler political problems that confronted him. It was indeed probably as a political problem that the king looked at the question of reform. The central government had been weakened; its strength must be restored. There had been much crime and disorder in the country; it must be repressed. Life must be made secure. Property must be protected. The contemporary conception of the first duty of a king, which Henry no doubt shared, was that he should make justice prevail. The good king was a "lion of justice," as men called his grandfather, and Henry avowed that his ambition was to follow in his grandfather's steps. There was, however, a little more direct advantage for the king's government in the policy which he followed than the satisfaction of duty performed, and this further advantage was undoubtedly a motive of action. The machinery of administration and of justice was identical in that day. To improve the machinery of justice was to improve the collection of the revenues and increase the royal income. To improve the courts in itself was to increase the revenue because it increased the number of fees and amercements falling to the crown, by no means a small source of income. Some one who was influential in carrying through those changes, either the king or some of

his ministers, had other motives also in what was done. The age is one in which the processes of justice, the organization of the courts and the procedure necessary to secure justice in them, was greatly improved. There is no reason why we should not suppose that these improvements were foreseen and desired, and that the government believed it worth doing to make justice easier to secure and the ways of getting it simpler and more certain. It was a time of great lawyers and administrators who had a large share in actual government.

It was upon this side, judicial organization, law and procedure, that the institutional results of this age were to have the longest life in a form but little changed from that then given them. The constitutional results of the period have been equally permanent, and of even more vital importance in the history of the race, but they show themselves today in forms that never would be recognized by the ministers of Henry II, though Richard de Luci and Ranulf Glanvill, Henry's great judges, would quickly feel themselves at home in a court of law in any part of the Anglo-Saxon world. There would be much that would seem strange to them, and much that they would not understand at first, especially in substantive law, but in machinery and procedure they would recognize at a glance their own work and quickly they would see how all had come out of the beginning they made, for the common law and equity of all Anglo-Saxon states, as well as their judicial organization, was founded by them. This side of our institutional life, as the immediate result of the time, must occupy us chiefly in this chapter, but we must also keep the constitutional result constantly in mind.

The constitutional result in a single word was centralization. The new organization given to the judicial system and the new processes of securing justice were an organization of centralization. Through these new methods the Norman central government reached down into every locality

and put its hand on every man. The Norman central government had always been an absolutism, but it had been a practical absolutism, not one vested in constitutional forms. What was happening now was that this Norman absolutism was making itself constitutional, was finding its expression in law and institutions. If it should succeed, if it could transform itself from a thing of habit merely, into the spirit and necessary interpretation of all the organization and machinery by which the state did its business, it would obtain a security and permanence of threatening import for the future. So far as the result of his own reign is concerned, Henry II did all in this direction that could be done, more indeed than might have been expected. The machinery which was devised created a surprisingly efficient centralization for the twelfth century. It was left to the future to determine its permanence.

The first great age of change in the constitutional history of England, after the Norman Conquest, shares one of its prominent characteristics with all ages of similar change in history. It is less marked by the invention of new institutions than by the enlarged use of old ones or their use in new applications. The effective instruments of the changes made are the institutions which the Normans brought with them into England, king's justices, circuit courts, writs and juries. We can find traces of most of these specific changes in earlier times, either in those of Henry's father in Normandy or of his grandfather in England. But their combination into a coördinate, organic system, their permanent incorporation into the habitual machinery of the central government, and the opening, under fixed regulations, of this royal machinery to the use of any one who wished to use it, were the work of Henry II. It is only in a few cases that we can tell exactly what innovations were made, or the order in which the steps were taken, or their date. The best that we can do is to treat the subject logically, beginning with the things that are

fundamental and seeing how others are involved in them, noticing however where we can any modifications that need to be made because of specific facts which we know.

In the whole series of reforms, the thing which was fundamental both logically and practically was the king's local court. The great motive on the king's part, underlying all the changes and bringing them all together into a systematic whole, was to get a session of the curia regis in the locality in which had originated the cases to be considered, and the king's court furnishes the conditions which govern all the rest. There is no evidence to show that any of the other instruments used, justices, writs or juries, were ever employed, for the use of the king or the central government or by royal permission, in anything except a curia regis. If the writ directed that a local trial be held, it was always before king's justices and in a king's court. If a private person got permission to use a jury, it was always before king's justices and in a king's court. There was no weakening in this period of the idea that all this machinery was the king's personal machinery to be used by other persons only by purchase and permission.

It must not be understood that the king's local courts imply any interference with the older systems of local courts, county and hundred. By the end of another century the new courts were to supplant the old county courts for all except very small cases, but at first, though creating to some extent a competing jurisdiction, they interfered little with the popular courts. These were still going on in the second half of the twelfth century as they had in the eleventh, with the same composition, procedure and functions, and, in the case of the hundred court, further absorption of public courts into the possession of private lords was also going on. One of the reforms of Henry I of which we have documentary evidence concerned the local courts. He restored the older rules as to their times and places of meeting, protected them against irregular use by local officers for their

personal advantage, and laid down some rules for their procedure when used for his own purposes.[1] It seems likely that the use made of them by the king gave them at first a new lease of life rather than otherwise.

The justices on going to the circuits to which they were assigned, were preceded by a writ sent to the sheriff of each county of the circuit directing him to summon a meeting of the justices.[2] This meeting was not an ordinary assembly of the county court such as the sheriff called together at intervals to do the usual county business. It was a special meeting called for the special purpose of furnishing the necessary local machinery for holding a session of the curia regis in the county. As such we may imagine that it restored the county court to its ideal composition before exemptions and franchises granted by the king to favored individuals and corporations, like monasteries and boroughs, had relieved, we may almost say, whole classes from attendance. All immunities and privileges were suspended. The magnates, lay and clerical, and all freeholders were summoned to attend in person, and from each vill the reeve and four legal men, and from each borough twelve legal burgesses. The great men acquired at once the right to be represented by attorney, but some one was there to answer for them, and the whole county was present to do business presented to them by the justices.

Proceedings in the court were opened by reading the king's writ which not merely directed the holding of the court but gave the justices their authority to act and to make use of the machinery belonging to the king. Apparently some one of the justices then addressed the assembly explaining the purposes of the "iter" and pointing out the advantages of the system. The juries were then formed. First four knights were chosen for the whole county and put on oath. They then chose two knights from each

1 Stubbs, *S. C.*, 122.

2 Writ of 1231, Stubbs, *S. C.*, 354–355; A. and S., 54.

hundred who were also sworn, and these two selected ten others, or if there were not so many knights, then free and legal men, who with themselves made up the jury from the hundred. To these juries were submitted the list of inquiries upon which the justices had been instructed in their commission to take sworn local testimony.

We have the list submitted to the juries in the iter of 1194, and it is undoubtedly typical of the business attended to by the justices.[3] First the juries are to report all pleas of the crown which should be tried, whether new or old, that is, left unfinished by earlier courts. Then they are to report all private pleas for which permission to use the court has been obtained by writ or which had been sent down to be tried in the county by the central court, the later *nisi prius* cases, that is, cases transferred from the common law courts at Westminster to the assize circuit courts. Then follows a long list of administrative business in which the king had a direct interest but which fell ordinarily under the sheriff's care, showing clearly how the itinerant justices exercised a strict control over the sheriff's conduct, and how the court served as an effective instrument of administration and centralization. Escheats were to be reported, vacant churches of the king's gift, wardships and marriages, aids not yet paid, forfeited lands and chattels, and all kinds of crimes and offences of which they knew. They were to lay a tallage, to see to the stocking and care of the royal manors, to enroll the property of Jews and debts due them, and carry out a new regulation with regard to securities held by Jews, and to report on all recent seizures of property by royal officers with the reasons for them. When in one of our state circuit courts the judge directs the grand jŭry to visit the county jail and report on the way it has been administered by the sheriff since the last visitation, he is performing an administrative function inherited by direct descent from the original itinerant justice of the twelfth

[3] Stubbs, *S. C.*, 251–257; A. and S., 29–33.

century. Though the district on which he reported was a small one, the office of a juryman in those days was no sinecure and he was heavily fined for any mistakes which he might make.

Undoubtedly it was the administrative and criminal business of the iter in which the king of the twelfth century was chiefly interested, because those things well attended to meant larger income, better order, and a stronger government. But there is reason to suppose that he was interested also in the civil lawsuits which came into his courts. At any rate these cases were destined to a rapidly increasing importance relatively in the business of the court. By gradual degrees in the course of a century and a half, the government got other ways of caring for the administrative business which the justices had supervised, but during the same period the civil business of the circuit courts, and with them of all the royal courts, increased enormously. Indeed the current of such business out of the older into the newer courts began to run strongly from the very beginning. The process was not due merely, though it was in part, to the increased prosperity which came with better government. It was due in large part to the fact that the new royal courts furnished litigants with much better ways of getting their cases tried, notably the jury.

The older courts whose procedure in trying cases has been described, though they had a rough way of getting at the opinion of the community on the merits of a case in the practice of compurgation and the making of the medial and final judgments, still had very imperfect means of getting at the truth about the facts in dispute between the two parties. The great advantage which the royal courts had to offer was a decidedly better and more trustworthy method of finding out what the real facts were. Instead of trusting to what might seem almost like accident in the old procedure, the litigant might have a jury, selected from the men of the neighborhood who would be most likely to know what the

facts were, and who were required by the justices to answer the specific question submitted to them from their knowledge and on their oath.[4] Their answer could not be impeached. The man who was confident that he had a good case, if he could only get the facts before the court, was anxious to have a jury trial. The process of getting at a fact by the use of a jury, either in an administrative case or a suit at law, was called an inquisition or inquest, the formal answer of the jury a recognition or a verdict (*veredictum*).

But the jury formed no part of the regular machinery of the government. It was a personal process belonging to the king, which had come down to him from the Frankish kings, used only in exceptional cases, mostly of an administrative kind, in regard to taxation or the conduct of royal officers, or to recover royal property, for the purpose of establishing the facts on which a decision depended. If a private man wished to get the facts in his case before the court by the verdict of a jury, he must get the king's permission to have one. He could not have one otherwise. This permission was given in a writ, describing the case and giving the justice authority to try it. Hence arose the principle of the common law that every case must open with a writ, the original writ. Hence arose also the principle that the writ must describe accurately the action to be tried, for permission to use a jury, or a king's justice, in one case did not carry with it permission to use them in another. Almost at the beginning the justices began to say to the man who had got a wrong writ that he could get the right one if he applied for it. Hence arose also one of the chief characteristics of the first age in the formation of the common law, the classification of actions and the multiplication of writs.

The practice of granting writs to allow private men to use the king's machinery, jury and justices, began almost immediately after the Conquest. During the first generation

[4] A. and S., 36–39, Nos. 1 and 2.

the practice increased only slowly, so far as we can now tell, but in the reign of Henry I, it seems to have been used with greater frequency and somewhat more attention was given to the form of the writ. The first great step in advance was taken, however, so far as England is concerned. by Henry II near the beginning of his reign. The step appears to have been taken by a legislative act, an "assize" as it was called, or more than one of them, though no text has come down to us and we are not even sure of the dates. These acts gave assurance that in certain specified cases, which experience had shown to be especially frequent, any man could have a trial of his case in a king's court with the use of a jury, if he would apply for the necessary writ and pay the required fees. This really meant that in these cases the new procedure became a part of the regular judicial procedure and was thrown open to the nation. Combined with the regularization of the system of circuit courts, the assizes made a long step in transforming the king's special machinery of government and centralization into the fixed constitutional machinery of the state.

The special cases which were called assizes were five in number:[5] the three so called possessory assizes, named in Norman French, *Novel disseisin*, *Mort d'ancestor*, and *Darrein presentment*, the assize *Utrum*, and the Grand Assize.[6] The three possessory assizes did not submit to the jury the question of rightful ownership but merely whether the plaintiff had not been wrongfully dispossessed, in the first two cases of land, in the third of the right of presentation to a church living, leaving the question of title to be settled later. The assize *Utrum* submitted the question whether a piece of land in the hands of the church was held as *frank almoign* or by an ordinary feudal tenure, and the grand assize was for the use of the defendant whose right and title had been called in question and who preferred to have

[5] Stubbs, *S. C.*, 194–195; A. and S., 37–38; Penn. I. 6. 31–32.

[6] Stubbs, *S. C.*, 190–192.

the matter settled by a jury rather than by the judicial duel.

Nearly all the cases arising in the twelfth century, in which litigants wished to get the advantage of the new royal prerogative procedure, were feudal cases which would be begun in the first instance in baronial courts. Cases affecting common freehold tenures could also have the benefit of the same procedure, but there do not seem to have been many of these at first. Servile tenures were excluded. The general effect of an application for the use of the king's machinery was to remove the case from the baron's court and to bring it into a king's court. Such a removal would deprive the baron of his right to try the cases of his own men and, what was perhaps more important, of the property right to the fees and amercements to which the trial gave rise. This result might naturally seem to the baron to be practical confiscation, and he would be disposed to question, if possible, the king's right to take such action. The new procedure might also affect cases beginning originally in the popular courts of shire and hundred, but with reference to them the process would be simpler and more natural.

Besides the assize writs, the new prerogative procedure brought into common use two other writs, which accomplished even more openly the same result of transferring the baron's cases out of his court. One of these was the writ of right, the other the writ called *praecipe*. The writ of right was a writ directing that the question of right, of title, of ownership, should be tried. It was addressed directly to the lord of the court commanding him to do justice to the plaintiff, who had obtained the writ, and implying that for some reason not stated, he was unwilling to do so. It concluded by saying that if he did not do it, some other person named, usually the sheriff, would, that is, it appointed a royal commissioner to try the case and gave him authority to proceed in it, if the lord did not. The writ was based clearly on the recognized duty of the king to see that justice was done to everybody, but it recognized fully the first right

of the baron's court to try the case. Legally it rested on the appeal of defect or default of justice, common throughout the feudal world, which gave the vassal the right to carry his case into the court of the higher lord, if his own lord refused to try it. The king made the use of this appeal easier and gave it to be clearly understood that it was the business of his courts to see that justice was done in the baronial courts.[7] So far, however, the barons could not complain. The king was clearly within his rights.

The writ *praecipe* went considerably farther. It ignored the baron's court altogether. The writ, obtained by the plaintiff, was addressed to the sheriff and directed him to command (*praecipe*) the defendant to return at once to the plaintiff the land in dispute or else to appear in the king's court and explain why he had not done so, that is why he had not obeyed the king's command.[8] His explanation would be the statement of his side of the case and a part of the trial in the king's court. The writ assumed the plaintiff's case to be just and was based on the duty of the king to secure justice for all. It passed over the feudal law and the rights of the feudal lord entirely and fell back on a higher conception of the royal office, not as lord paramount of the realm, but as representative of the divine government of the world, which the medieval theory assumed the king to be. In this way it was a direct attack upon the feudal government of the state and a long step towards recovering the rights of jurisdiction which had been allowed to fall into private possession. It affected indeed only one class of cases, but it was an important part of a whole system of changes which, taken together, constituted the machinery of a powerful central government such as existed nowhere else in Europe at that date.

The effect of the improved judicial process and the resulting increase of business in creating new judicial machinery

[7] Stubbs, *S. C.*, 194.

[8] Stubbs, *S. C.*, 190; A. and S., 28.

was not exhausted in making the system of the itinerant justices a permanent feature of the government. In fact the itinerant justice courts themselves led directly to a new creation — a permanent central court, with specially appointed justices, trying the same kind of cases as the circuit court and using the same prerogative procedure, practically an itinerant justice court always in session, the court known later as the court of common pleas.[9] This court was probably not, like the other two common law courts of a later time, king's bench and exchequer, an offshoot from the judicial function of the small council, but a special creation by legislation, or what served at the time as legislation, to render the benefits of the new procedure accessible at all times. For a long time it was the only central common law court. The council as a court of law never adopted, in either of its forms, great council or small, the new procedure for its own judicial work, and the two offshoots of the council, king's bench and exchequer, became common law courts using this procedure only by usurpation and after a century or more. The legislative action which established the court of common pleas gave an impulse, however, to the later development. It provided that especially difficult questions arising in the business of the new court should be referred to the council for decision. Such references increased and helped to specialize the business before the council known as *coram rege* business which led in a later differentiation to the court of king's bench.

A further outgrowth of the new system was not intended in the minds of those who established it, but has been of the greatest value and consequence in Anglo-Saxon history — the common law. The customary law which had grown up in the local courts during Saxon times was full of variations and differences from one county to another and this fact was not changed even when the feudal law had been superimposed upon it, a law in its main features common

[9] Stubbs, *S. C.*, 155.

everywhere and regulating such an important local concern as land holding. This fact was noted by the twelfth century law writers though they could have no conception of the future which lay before the common law. They could, however, perceive the fact that the itinerant justices, going from a single central court and carrying that court and its law into every county in turn, were making a common law for the whole kingdom. Before very long they began to call it, as we do, the common law, meaning the law which is alike everywhere, as we may still mean through the whole English speaking world. Before very long also, this national law had absorbed into itself what was best in the local law, which slowly disappeared. This result, a uniform law for the kingdom, was in a negative way at least of great constitutional importance. When towards the end of the middle ages increasing commerce began to demand a law which should be alike everywhere, England could satisfy the demand with a national law and had no need to import the law of imperial Rome with its absolutist tendencies. Later still in the constitutional struggle of the seventeenth century, the firm hold of the common law upon the nation was a strong bulwark against the king.

In considering the sources of the common law we must distinguish procedural from substantive law. The new elements which gave rise to the common law were procedural, though not all procedure was new. The impulse came when the king gave to the community a new set of courts, a new way of getting the defendant into court, and a new method of proof, all changes in procedure. Here again what is fundamental in the process of change is itinerant justice court, writ and jury. What actively led to the creation of the common law was the new judicial system, but the substantive law out of which the common law was made was, for the time being at least, mostly old Saxon local law, Norman local law, which was almost identical with the Saxon, and feudal law. If the law books of the reign of Henry I show

us Saxon law and feudal law standing beside one another, hardly mingling, the great law book of Henry II's time, Glanvill, shows us these two systems of law being moulded into one in the new courts. It is only with an effort that we can distinguish old from new in that book, and it must be done by historical analysis; the distincton does not lie on the surface. The book itself shows no sign of anything but a common law. This united whole is the foundation upon which the common law of today was built. The immediately following first age of its growth was a development of the new, not of the old, a multiplication of writs and consequent classification of actions. Also it is interesting to note that the influence of the judicial decision began almost immediately to be felt in the growth of the law. Bracton, the second great writer on the common law, two generations after Glanvill, cites some five hundred decided cases, as evidence of what the law is.

But the common law is not the only important distinction of the law of the Anglo-Saxon world. The legal system which we call "equity" is as great a creation, and it also had its beginning along with the common law — not as a separate system but in the simultaneous introduction and emphasis of the principles on which it rests. In fact if we regard the principles only which were given expression in the reforms of Henry II, it would be more accurate to say that at the end of the middle ages it is equity which rests upon them, or expresses them, rather than the common law. In the course of the historical development, it is the common law which departs from the fundamental principles of the twelfth century, and equity which continues to abide by them. For the essential thing about the innovations of Henry's reign is what later characterizes equity, namely that they concerned prerogative institutions, belonging peculiarly to the king, and not to the state or to the community, opened to general use by the grace and favor of the king to provide better and surer means of justice. But they were not yet

made the common right of everybody. They must be asked for in each case and evidence furnished to the justices that their use had been permitted, though the petition for them was always to be granted.

But the principles of the royal prerogative which underlay these changes were really wider than we have yet noted, and the additional point, which the later equity system emphasized, was also of great importance in the history of the constitution. The special duty of the king to secure justice for all men, as representing the divine government of the world, we have already seen influencing the development of the writ. In an age when might was very apt to call itself right with few to oppose, it is not strange that men were ready to carry this prerogative of the king's to an extreme and to see in it a protection, not a danger, to the freedom of the community. And so they said: if the law itself, through human lack of foresight in anticipating every possibility, sometimes does injustice, if it fails to provide remedies for wrong which it ought to provide, or to protect every right which it ought to protect, it is the duty of the king to step in and provide the remedy or protect the right, the law to the contrary notwithstanding. The king is above the law. He may overrule and override the law to secure justice. It is a survival of this prerogative in its original form which we still have in the right of the executive to pardon a condemned criminal. The twelfth century saw only good in this principle and did not foresee what use the later kings could make of it in their struggle against the limiting constitution.

Therefore, when by the end of the thirteenth century the common law had begun to insist upon hard and fixed forms for its procedure, and to declare that rights were strictly defined and limited by the exact terms of the written contract, men had no recourse but to say that the king could interfere, by virtue of his duty and his prerogative power to secure justice, and set right the wrongs which a strict

adherence to the common law would sanction. This has seemed to us something like a new beginning in the reign of Edward I because written records had become by that time so much more frequent, and the records themselves so much better preserved, that it looks as if many things were happening for the first time which really had been going on for a long time. What really is new in that age is the hardening of the common law into fixed forms which it is itself powerless to change. What is old is the continued power of the king and his council — the organ through which he acts — to interpose in the common law to secure justice not allowed by its forms. When the king acted thus at the end of the thirteenth century, he was doing the same thing in principle that he did at the end of the twelfth, when he established by prerogative action new courts and procedure, not provided for by the traditional law of the land, because they would secure justice to the community in a simpler and more certain way.

The development of equity into a great system of law came at a later time, but in its earliest stages its historical development was foreshadowed and some of its present day forms were established. As a suit at the common law must open with a writ, so must the suit in equity with a petition — a petition to the king to interfere because justice cannot otherwise be secured. The petition was addressed almost always to the king and his council, because the council was the organ of the king's prerogative action, and the development of the equity system, and of equity or chancery courts, is a phase of differentiation from the council independent of that seen in the common law courts. It must be remembered, however, that in the history of law the difference of equity from the common law in procedure and courts is not so important as the difference in the rights protected and the remedies afforded.

These beginnings of change in the judicial system are closely associated also with the beginnings of change in

two of the great offices of the state. The justiciar had been in the first Norman century a special king's justice; the *summus* or *capitalis* justiciar, the chief justiciar, had been the special representative of the king, sometimes a kind of prime minister, or something like the later regent during the king's absences from the country. Now as there began to be king's courts constantly in session and a permanent bench of king's justices, and as the ministerial duties of the office began to be provided for in other ways, it lost its importance and, from a time soon after the middle of the thirteenth century, it disappeared. The history of the chancellor's office is quite different. Originally the head of the king's chapel or chaplains, he had practically nothing to do with judicial matters. But the king's chaplains were at the same time his private secretaries who put his letters into form and took charge of petitions addressed to him. With the great development of the writ, which was a royal letter, and the increasing emphasis placed upon its forms, the chancellor's office, the chancery, where the writs were made, was brought into immediate contact with the new judicial system and its importance greatly increased. It was increased still further, somewhat later, as the more frequent use of petitions opened up the great possibilities of the field of equity jurisprudence. Upon these foundations were built in course of time the high rank and great practical power of the office of lord chancellor.

The changes which we have so far been considering concern the growth of civil law, but during the same time changes affecting criminal law and criminal trials were taking place of equal importance and permanence. In the repression of crime, the peculiar difficulty of that age was finding out who committed the crime and getting him arrested and before the court for trial. The aim of the new procedure was to overcome this difficulty and at the same time to furnish a more trustworthy method of trying the accused. Both these purposes were accomplished by a single change,

by the introduction of what we know as the grand jury. The new institution was not exactly the grand jury of our day. It was not "grand," for there was then no petty jury; the accusing jury was drawn not from the county, but a separate one from each subdivision of the county; it acted usually upon its own knowledge, not from evidence put before it by public officers; its action was also not a mere accusation to be followed by the real trial, but it was an essential part of the trial itself.

In practical operation the new criminal procedure was closely connected with the new itinerant justice system. Undoubtedly one of the chief reforms which Henry II desired in making the circuit court a regular feature of the constitution was to bring the local knowledge of the community in which the crime had been committed to bear upon the punishment of the criminal.[10] As we have already seen one of the first duties of the justices on coming into the county was to get the local juries appointed, and these were obliged on their oath to inform the justices of all pleas of the crown, that is, criminal cases, which should be tried. In the document which gives us our first definite information about the new method of trial, it is said that the king and the great council have enacted that inquiry should be made by means of the jury "upon their oath that they will tell the truth whether there is in their hundred or in their vill any man who has been accused or publicly suspected of himself being a robber, or murderer, or thief, or of being a receiver of robbers, or murderers, or thieves, since the lord king has been king." [11] If it was found out that the jury had failed to accuse some one who was suspected of crime, the members of it were heavily fined. In times when crimes of violence were frequent and likely to go unpunished through fear or favor, it was an admirable system for enforcing order and strengthening the hands of the central government.

[10] Penn. I., 6, 30–31.

[11] Stubbs, *S. C.*, 170; A. and S., 14.

Indeed to this day we have found nothing better, though increase in population and in the complexity of life has modified some details of operation.

In the new criminal trial all that part of the old procedure which went before the ordeal was swept away. Appeal, fore-oath, compurgation, had no place in it. The sworn jury was a far better method of getting at the public opinion of the community as to who was guilty of a crime than the crude method of the older trial, and the verdict of the jury, as expressing that opinion, was taken as putting the accused in the position where all had gone against him, leaving no chance of escape but through the ordeal. This last chance of proving his innocence was allowed to the accused, until the church forbad the use of the ordeal in 1216. Then after long experimenting to find the best method of allowing the accused a last chance, the practice became established of asking a second jury, the petty jury, to pass upon the verdict of the first. The new method, the petty jury with the grand jury, as an accusing jury from the whole county, became established in use soon after the middle of the fourteenth century.

Some of the changes which we have been considering were the result of natural growth, like the formation of the common law, while others we know to have been brought about by deliberate acts of legislation. The word "assize" in those days bore the meaning of a legislative act as one of its meanings, and we may judge the five assizes to have been established in that way, though we can assign no specific date to them, except with some confidence the date 1179 to the grand assize. Some of them very likely go back of Henry's reign into his father's time or Stephen's. References to the assize *Utrum* in 1164 and to the assize of *Novel disseisin* in 1166, seem to imply that both were well known at these dates.

Apart from these assizes, a remarkable series of documents has come down to us from the reign, some of them we

believe to be legislative enactments in almost the form in which they were originally made.[12] The Constitutions of Clarendon of 1164 have already been mentioned, containing statements of what purports to be early law on many points. The Assize of Clarendon of 1166 is an act of legislation concerning especially the new criminal procedure which has been described and the itinerant justice courts. The Inquest of Sheriffs of 1170 has rather the form of a commission to itinerant justices directing an inquiry into the abuse of their power by sheriffs and local magnates, and it shows in a striking way how the new courts held the royal officers under a strict control and served as a most efficient instrument of centralization. The Assize of Northampton of 1176 is a revision of the Assize of Clarendon and further develops both the criminal procedure and the itinerant justice system. A chronicler of the time, especially familiar with institutional matters, records that further regulations concerning the itinerant justices and courts were made in 1178 and 1179, but documentary records of what was done at these dates have not been preserved. The Assize of Arms of 1181 is a provision regarding the military force of the kingdom and the arms which were to be kept by knights and free men for service in war. It assumed that every free man might be called to serve the state in war and it was used as a model for many later acts on the same subject.

Besides these documents, two very interesting books have been preserved to us, both probably written in the last decade of Henry's life, and both concerning the institutions of the time. Their authors were men thoroughly familiar, evidently from personal observation, with the institutions they describe. *The Dialogue of the Exchequer*, was written by Richard, son of Nigel, treasurer of England and of a family long officially connected with the exchequer. It is in the form of a dialogue between a master and his pupil, and gives a detailed description of the financial system of the

[12] Stubbs, *S. C.*, 161–184; A. and S., 11–25.

time and of the exchequer method of getting in the revenue and keeping an account of it.[13] The book which bears the name of Glanvill, one of the leading justices of the new courts, has already been referred to and cannot be better described in a word than as opening worthily the great series of works on English law, Bracton, Littleton, Fortescue, Coke, and Blackstone. It is entitled *Tractatus de Legibus et Consuetudinibus regni Anglie*,[14] and it deals in full with the new system of law which the new courts were bringing into an organic whole, the future common law, and it gives us much information of other things by the way, as does also the *Dialogus*.

How far these changes, which produced permanent results of such great consequences in law and judicial institutions, and which bad fair at first to lead to consequences much more momentous in constitutional history, were due to the initiative and foresight of the king we cannot say. In the management of political affairs, in reference to the pressing problems of working his wide dominions together into a single state, he shows himself thoroughly a man of his own time, with no clear foresight of the future and in this respect distinctly inferior to his rival Philip Augustus of France. But in his government of England he seems instinctively to have grasped from the beginning both the great problem to be solved of order and strong government, and the best means to attain the desired end. Whoever may have pointed out or suggested the new steps that were taken, they could hardly have been taken at all or maintained without the support of the king, and that support was steadily forthcoming from the first day of his reign without a break to the end. From a state whose government, to some extent at least, had fallen into disorder, which certainly as a machine could not have run by itself in orderly security

[13] Extracts in Stubbs, *S. C.*, 199–241; translation in full in Henderson, *Historical Documents of the Middle Ages*, 20–134.

[14] Extracts in Stubbs, *S. C.*, 190–195.

without the strong hand of the king, England came to be at the end of his life a realm of unusual safety of life and property, with government machinery so firmly established that it could run alone, and a body of officials so well trained that they could act without the king.

Such a result could not be attained in that day without methods that were to some extent revolutionary and in this fact lay the possibility of a greater revolution. Henry II had established a strong government. He had set up machinery of centralization unparalleled in his day. He had gone far towards transforming an absolute government which existed in habit and custom only into one firmly fixed in the constitution of the state. He might well believe that his work would be permanent, that his new constitution would in its turn become habitual and customary, and that even more surely than in the past there would be no opportunity in the state for any will to express itself in opposition to the king's. But in doing his work he had overridden unsparingly rights, well defined in the law, which belonged to the feudal baronage. It was not merely that such a steadfast centralization would seem a constant threat to a baronage not inclined to be controlled, nor that the overwhelming power of the crown would be a constant temptation to a king less scrupulous than Henry to further arbitrary acts in conflict with his barons or in fear of what they might do. It was an even more decisive element in the future that Henry had not been able to create his machinery without the actual infringement of property rights belonging to the barons. If his machinery was to be permanent, the private jurisdiction of the baron over his vassals, with all its advantages in income and consideration, was at an end, as indeed it was after but little more than a century. That the baronage in Henry's own time had any understanding of these ultimate results, or was opposed to his innovations, as we should expect them to be, we do not know. The great feudal insurrection of 1173–4, certainly had some

general underlying cause, but we do not know what it was. It was only in another generation, so far as we can tell, that the tendencies of Henry's constitution were clearly seen and limits set to the use of the royal power.

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CHAPTER V

THE GREAT CHARTER

The staying power of Henry's constitution, its ability to sustain itself without the supporting presence of the king, was soon brought to the test. Richard I, who came to the throne on his father's death in 1189, was not interested in the problems of government and was not interested in England. While his elder brother lived he had been destined to be duke of Aquitaine and he had spent all his youth in that stormy province. His experiences there and the training he received strengthened the bent which was perhaps natural to him towards the military life of the time and the daily fighting of the feudal age then at its height. After he became king he visited England only twice for a short time on each occasion, but spent all his time either on the crusade or in his constant struggle with the king of France for supremacy on the continent. The institutions of England were left to run themselves, or rather left to the care of officers who had been trained in the school of Henry II, who carried them on in the spirit of that reign. The new judicial system was so well founded that it needed no special care and it may be left with the statement that it continued along lines of natural growth to the date of the granting of the Great Charter.

The advance which was new to this period was on the financial side in the first steps towards national taxation. In general the sources of income for the state remained in the last decade of the twelfth century what they had been a hundred years earlier. Coined money had been slowly coming into more frequent use, and payments in kind had

been in many cases transformed into money payments. The money income of the state had also been increased during the century by another commutation which goes back at least to the time of Henry I, a payment, called scutage, made by the feudal tenant in lieu of the military service which he owed. It is probable that the difficulties and expense of campaigns in France, so often necessary, led to an early development in England of the use of hired troops and to money payments by knights in lieu of their personal service. At any rate from about the middle of the twelfth century so long as the feudal system remained the chief dependence of the state for an army, scutage continued to be an important payment to the state. None of these sources of income, however, was of the nature of a national tax.

From the Saxons, as we have seen, the Normans inherited the Danegeld which was something like a general tax on land. This was occasionally levied by William I and William II, and in the last part of the reign of Henry I regularly, almost like an annual tax. It fell out of use again under Stephen and was revived by Henry II at least for occasional use. If we trust to the positive evidence which we have, this is all that we can say, but the character of our evidence is such that we suspect the tax was through the whole period in more regular use than directly appears. Certainly we may say that this form of land tax, somewhat transformed, was one of the sources out of which national taxation arose in the thirteenth century.

Another source of income was new in the generation immediately preceding Richard, the general tax in support of a crusade. It was suggested in part, it is likely, by the universal tithe payable to the church, for the crusade was an undertaking especially of the church, and in part by the vassal's "aid" for the crusade of the lord, which was not uncommon in France, and it was first imposed in that country in 1146. In 1166 Henry II followed the French example in a similar tax throughout his dominions, and again in 1184

or 1185. The famous instance, however, which may be said to have fixed the practice as the beginning of the direct taxes of the modern state upon personal property and income, as distinguished from a land tax, was the "Saladin tithe" of 1188.[1] These taxes were the first instances of general taxes laid by the great council to be paid by all classes. The Saladin tithe was to be collected in each parish by a mixed ecclesiastical and lay commission, and in case of a disagreement as to the amount of tax to be paid by any person a local jury was to decide — a use very like that of the primitive jury and widely imitated in the following hundred years in taxation by the state.

It was not long before the government had to put into use for its own needs all the new means of raising revenue for in 1193–4 money had to be collected to pay £100,000 to the Emperor for the ransom of Richard, an enormous sum for the resources of those days.[2] Nearly thirty years ago Maitland wrote: "Historians have not as yet succeeded in determining very precisely the nature and extent of all the various imposts which had been exacted for the purpose of raising" this ransom, and we must say the same today. A few things only seem certain. Taxes were laid on the kingdom at three different dates, the first proving insufficient. There were also at least three different kinds of taxes. There was a tax on military fees called a scutage, or sometimes an aid, but evidently the former since exemptions were allowed for services abroad with the king. There was a different tax on land called a hidage or a carucage, supposed by some to have been on land not held by military tenure; and there was a personal property and income tax like the Saladin tithe. There is mentioned in this connection also for the first time what was to be for some generations a principal source of revenue, for we are told that one year's crop of the wool of the Cistercian order was taken. In

[1] Stubbs, *S. C.*, 188–189; A. and S., 27–28.
[2] Stubbs, *S. C.*, 245–246.

the development of taxation, however, the chief matter is the transfer to the uses of the state of the personal property and income tax begun for the crusades. There is loud complaint in the chroniclers of the heavy burden of this taxation, but it is evident that England was a rich country with strong reserves of wealth. The stern government of the Anglo-Norman monarchy repressed disorder and civil war and rendered possible the accumulation of property and forms of industry, like sheep raising, which could not be maintained without internal security. England continued, however, for a long time to be a country whose wealth and taxing resources depended upon the production not of manufactured goods, but of raw materials.

In 1198 another forward step was taken; the method of assessing a tax by sworn representatives of the locality was transferred from the personal property to the land tax.[3] A tax of five shillings was laid on the carucate, or ploughland, and the commissioners appointed to levy the tax fixed a uniform measure of one hundred acres for the carucate. As in the Domesday survey it was a county court which was called to meet them but the tax was assessed in each vill by its reeve and four men, assisted by two elected knights for the hundred. With this tax the machinery for the assessment and collection of taxes which was employed for the next century with minor variations had been put into form. In this machinery the use of local representatives in a national service should not be overlooked and in a function closely related to that of the jury. The possible bearing of this practice upon the addition of local representatives to the great council, that is upon the origin of parliament, we shall have to consider later.

Notwithstanding his taxation, excessive for that time, Richard was constantly in want of money. He raised large sums by the extensive sale of offices, exemptions and privileges. At the end of 1197 an incident occurred which has

[3] Stubbs, *S. C.*, 249–251; *cf.* 277–279, and A. and S., 35–36.

sometimes been given an exaggerated importance. In place of the usual feudal levy, Richard called upon the barons to furnish three hundred knights for a year's service in France.[4] In the great council which considered the request, the bishops of Lincoln and Salisbury refused, asserting incorrectly that their fiefs were not liable to service outside of England, and the plan failed. The details of the incident are difficult to understand but at most we can see in it no more than a growing disposition to watch the king's conduct and to insist that it shall be strictly legal. It may be regarded as the sign of the coming revolution which secured Magna Carta, but not as a step in the development of consent to taxation.

The Anglo-Norman absolutism, strengthened greatly by the centralizing measures of Henry II, reached its culmination in the reign of John. The Christian states of western Europe for six hundred years after Charlemagne's death afford no example of a power so unlimited and so unshakable as his in England. For years he resisted the determined attack of the most powerful of medieval popes, Innocent III, with a highly organized church behind him, with no apparent weakening of his authority. The growing opposition of the English barons added to that of the church was not able to force him to yield in the least until a great French army was on the point of invading England with the sanction of the pope.[5] Then John suddenly yielded but with such skill in the form of his yielding as to bring the pope over to his side and to compel him to serve as his protector both against France and against the English barons. He became the vassal of the pope and made England a papal fief with his feudal services limited to a rent charge of one thousand marks per year.[6]

For a time it seemed as if the king had survived the crisis

[4] Stubbs, *S. C.*, 249–250.
[5] Stubbs, *S. C.*, 270–273.
[6] Stubbs, *S. C.*, 277–279; A. S., 38–39.

without loss of power, but signs of approaching open opposition began to multiply rapidly. His plan to carry the army which he had collected to defend England over to attack the king of France on the continent failed because the barons refused to go, and some of them declared that their feudal obligations did not compel them to serve out of England. In intense anger the king set out to punish them for their disobedience but was checked by Stephen Langton, archbishop of Canterbury, who reminded him of his recent oath to keep good laws and that he could not punish any baron without a sentence of his court. In that oath, sworn at the time of his absolution from the papal excommunication, he had promised to restore the good laws of his ancestors especially the *laga Edwardi*, the law of Edward the Confessor. Probably no one knew what the law of Edward was, and the phrase was very possibly borrowed directly from the coronation charter of Henry I, but it would mean to all who heard it a going back from the innovations of his father, where they had led to unjust applications, to an earlier system of law considered to be less tyrannical.

What the leaders of the opposition seem really to have been doing was to try to find some basis in the past on which the arbitrary action of the king could be legally limited. Apparently some of them thought of using the great council in some way, or the coronation oath, or a reënactment of the charter of Henry I. It was the latter probably which suggested the principle upon which they did act — the fundamental feudal contract. Underlying all the practices, law and institutions of feudalism was the fact of contract, binding lord and vassal alike, not to quite the same things but equally. Of the feudal services, for instance, by which the public business was carried on, the king could not demand of the vassal without his consent further money payments than those specified by law or custom, nor more military service, nor in different conditions of time or place, nor infringe his rights of private jurisdiction, nor subject him to

a different mode of trial from the usual feudal, much less punish him without trial no matter what he had done. If we cannot prove that John had actually been guilty of each of these breaches of contract, it is at least true that the barons declared and evidently believed that he had been. His worst oppressions of which we are sure were the arbitrary punishment of individuals and the extortion of large sums of money from them when opportunity offered. His scutages also, which had been collected almost like an annual land tax, had gone in some cases beyond his feudal rights and had been increasingly heavy in amount. In a more general sense the reforms of Henry II, although they were of great advantage to the state and the foundations of future progress, as we can see plainly enough, seemed to the barons dangerous attacks upon their property and rights, and for this feeling they had some ground in feudal law.

The opportunity came to the barons through the defeat of the king and of the combination of allies which he had formed against Philip of France in the great battle of Bouvines, 27 July, 1214. John was forced to make peace with France in September, but in October he returned to England evidently determined to maintain all his authority there, and he at once demanded a scutage for the campaign which had just closed. The barons on their side determined to resist; they seem to have formed a confederation, probably bound by an oath, decided to make the charter of Henry I the basis of their claims, and agreed to meet after Christmas to present their demands to the king with the alternative of civil war if he refused them.[7] Their meeting was in January in London. John asked for delay until the end of April which was granted, but, alarmed by his preparations against them, the barons took the field before the time had expired. Two months were occupied with negotiations and with aggressive action by the barons: the formal

[7] Stubbs, *S. C.*, 273–274.

diffidatio which the feudal law required the vassal to send his lord if he was going to make war upon him in defense of his rights, and the occupation of London on May 17. Finally the terms of a formal recognition of the barons' rights were agreed upon, and the document in which they were formulated, Magna Carta, the Great Charter, was agreed to by the king on June 15, at Runnymede, near Staines, between London and Windsor.[8]

It has been said that the importance of Magna Carta can hardly be exaggerated. The truth of the statement depends upon how the Charter is regarded. If it be regarded as a document of contemporary law, interpreted as it would be by those who drew it up and going no farther than their political and constitutional ideas could go, its importance can easily be exaggerated and has been often. Nearly every right claimed in it was recognized in the contemporary law of France and of most continental states, but constitutional results followed in England only. If it be considered as the beginning of a tendency, as the first stage in a process of growth which has gone on without a break from that day to this, then it is hardly possible to exaggerate its importance, even if we say that it is the most important constitutional document of all human history. To arrive at a clear understanding of the document and of just what it accomplished, we must keep these two ways of looking at it as distinct from one another as possible.

It was not the intention of the barons in drawing up the Charter to make new law. Their whole opposition to the king was based on the assertion that he had been violating the law in his conduct towards them and that he must be made to promise to do so no longer. As they had learned that they could not trust him, the special points they had in mind were put into writing and the king was pledged to observe them in the most binding form which they could use, the form of a legal grant or conveyance. They did

[8] Stubbs, *S. C.*, 291–303; A. and S., 42–52.

add a few points which were new, in some of which they were wrong, but in nearly all their demands, looked at as a mere matter of law, they were clearly within their rights. They were stating old law, not making new. Looked at from this narrow point of view, Magna Carta is a document of the past, not of the future, and it belongs to a past then rapidly disappearing. None of the famous institutional features of English liberty, which were so soon to begin the transformation of its constitution, can be found in it. Consent to taxation, parliament with the representative system, *habeas corpus*, the jury trial, in their historical significance, were all unknown in 1215. On the other hand, the feudal law which it records, the feudal relation between lord and vassal on which it was based, was already beginning to lose its importance for the community, and within fifty years the barons themselves show their indifference to some of the rights on which they most strongly insisted against John. If we were to regard the Charter in itself alone, without regard to the consequences which followed from it, its value would be chiefly as a record, a record of certain points of contemporary law, and of the barons' opinion of the character of John and of their own rights as against him.

The historical importance of the Great Charter is to be found, not in the specific provisions which it embodied, but in the principle upon which it was based. In 1215 this meant no more than an application of the fundamental contract relationship between lord and vassal to the special problem of the time: how to make sure that the king would be faithful in the future to his side of the contract. Fortunately this fundamental principle was not stated in explicit form in the Charter. It was taken for granted and left to be inferred, though plainly implied. It was consequently left in shape to be easily expanded into a general principle applicable to all the changing phases of national development: There is a body of law in the state, of rights belonging to the subject or to the community, which the king is bound to

regard. With this there went another principle, drawn directly from the feudal law, and put into specific form in chapter 61 of the Charter, though with reference only to the special case of 1215, that if the king will not regard these rights he may be compelled by force, by insurrection against him, to do so. It is upon these two principles, henceforth inseparable, though standing necessarily in quite different relations to the formal, avowed constitution, that the building of the constitution rested. It was through them that Magna Carta accomplished its great work for free government in the world. It is proposed to comment here only upon those parts of the Charter which have, or which seem to have, the most importance for the future, or which indicate its character most clearly.

The Charter opens with a clause descriptive in character, giving the antecedents of the grant and a list of those who had advised the king to make it, in which the leaders of the baronial party were not included. This is followed immediately, according to medieval ideas of precedence, by a clause granting to the church its rights and liberties in general terms but with a reference to a charter earlier granted by the king and more specific in character.[9] The chief point which the church had in mind at this time was freedom from interference with the election of bishops and abbots. In the later issues of the Charter this clause was reduced to still more general terms, and in practice Henry III, John's successor, did not consider himself bound even by what promise was left in it.

Chapter 1 closes with the specific granting clause of the Charter. This is taken from the most complete and unreserved form of land conveyance, of warranty deeds, known to that time. In selecting this form the barons no doubt intended to make the grant so binding legally that neither the king nor his successors could repudiate it but, while a grant of land in this form of words from one private man

[9] Stubbs, *S. C.*, 282–284; A. and S., 40–41.

to another would undoubtedly at that time have conveyed a perfect title to the donee and his heirs after him as against the donor and his heirs, the law was not yet clear that the sovereign could bind his successors on the throne without their specific confirmation of the grant. In practice for two hundred years it was considered wise to get such a confirmation from successive kings and from some many times over for special reasons.

Chapters 2–6 relate to points of feudal practice in which naturally the interests of the king and the barons were opposed: reliefs, wardship and marriage. They show at the beginning of the Charter the predominant feudal interest of the barons and also the general fairness of their demands. In all these matters the legal rights of the king were clearly recognized and protection was sought only against abuses. It is doubtful if before this date the amount of the relief to be paid by the feudal tenants of the king, at least of barons, had been fixed by law, but it was reasonable that it should be, and there is evidence enough that John had taken advantage of his power to exact unjust payments of reliefs and of fines for succession. In the case of wardship the difficulty was with the conduct of those to whose custody the lands of the heir had been committed and who often wished to get all they could out of their opportunity. The plan of putting the land into the hands of two men of the fief was new and does not seem to have been employed afterwards, but the records of the courts show that care was taken to enforce the law against waste.

Chapters 12 and 14 are among those which have been considered of special constitutional importance as relating to the right of consent to taxation by parliament. It is hardly to be doubted I think that they did have decided influence in the establishment of this parliamentary right, although they were left out of the reissue of 1225 which became the Magna Carta of English law; certainly before the close of a century they were restored in wider form to the

tradition of the Charter. But it is another question and one quite as important for the historian: What did they mean to the barons and the king in 1215? In trying to answer this question, we notice at once that taxation in the modern sense is not referred to at all. The provision concerns feudal aids and the feudal payment of scutage only. The aids had been customary payments in the feudal world for several centuries and scutage for one. Therefore, the aids because fixed in custom, and scutage because a customary commutation of a legal service, did not strictly speaking require action by the great council, but such action was very likely usual in case of the aids, and had occurred in at least one scutage. To demand, however, as was done, that every scutage in order to be legal should have the consent of the great council, and that those who were not present should be bound by the action, was of doubtful legality, interfered with the right of the individual feudal tenant to serve if he wished in place of paying, and was probably not what the barons wished to secure by the provision. The specially important provision of the chapter is that any extraordinary aid, not provided for in the regular feudal custom, and so not covered by the contract between the king and his barons, must be obtained by the counsel, and necessarily the consent, of those who were to pay. In this demand the barons were only asking what the law already gave them. Their purpose was not to establish a new right but to bind the king to an old one. The emphasis here placed upon this right, however, undoubtedly aided materially in carrying it over from the feudal scheme, as that passed away, into the wider conditions of the modern state. The last clause may possibly mean that the barons intended to obtain for London the position of the French commune, that is to put the city as a corporation in the same relation to the king as one of themselves.

In the interpretation of chapter 14, we are confronted at once with the question as to the meaning of *consilium*. The

words *consilium* and *concilium* are regarded by many scholars as identical in meaning and practically interchangeable in the documents of the twelfth and thirteenth centuries. There is no doubt but that *consilium* is used technically as the name of the small council. On the other hand it is almost equally certain that it is not used of the great council, but that *concilium* is, except in rare instances, the word applied to it. *Consilium* is, however, often used of the action of the great council. It is with its counsel that legislation is enacted and decisions made. It must be considered, I think, practically certain that no mention is made here of the "common council of the kingdom," but that the method of getting the common counsel of the kingdom is described. That is undoubtedly by a meeting of the great council. The specification in chapter 14 of the persons who were to be summoned leaves no doubt on that point. The assembly is composed solely of tenants in chief of the crown. The greater barons were to be summoned individually, the minor by a general summons for each county through the sheriff, a method of summons which was also used in calling for the related military service of the barons. We may consequently paraphrase the principle asserted in saying that the extraordinary aid must be consented to by those who are to pay it.

Two things further should be noticed concerning chapter 14. The feudal great council is here shown in charge of one of the primary functions of government, one of the primary duties of the modern legislature, of providing the state with an income. No better illustration can be found of the fact that the assembly of barons was the central machine of the feudal state. The second thing is that no trace of the representative idea can be found here. The assembly provided for is the assembly of all the tenants in chief great and small. The principle implied in the last clause, that those absent should be bound by the action of those present, is not the same as the principle of representa-

tion and was a necessity of taxation. It had undoubtedly been applied in the case of the Saladin tithe and in the taxation of Richard's reign. We should perhaps except the case of scutages which, theoretically at least, implied a personal right of choice in the case of each baron as to whether he preferred to serve or to pay the commutation. To declare, as some modern critics have done, that the barons should have gone beyond the simple and specific provisions of these clauses, and have laid down general constitutional principles to guard against dangers which the future was to disclose, is to demand something impossible to them.

Chapters 17–22 concern directly the new judicial system which had been begun by Henry II. They show conclusively that while the barons may have objected to some features of that system, they had no intention of making a general attack upon it. In the particulars which these chapters cover, the convenience and simplicity of the new procedure had undoubtedly won its way into permanence against all opposition. Chapter 17 concerns the court of common pleas established by Henry II in connection with the itinerant justice courts and enacts as law what had been for some time the usual practice that this central court should remain at Westminster no matter where the king might be. Another class of cases already beginning to be distinguished as *coram rege* cases, in two or three generations to be known as king's bench cases and to give rise to the court of king's bench, still continued to follow the king wherever he went. The distinction between these two classes of cases was not as yet very clearly drawn, but the chapter is noteworthy as legalizing one stage in the differentiation of the common law courts.

Chapters 18 and 19 deal with the three possessory assizes, essential parts of the new judicial system, and give them the formal sanction of the baronial party as recognized parts of the law. Details enacted in chapter 18 regarding the operation of the assizes did not prove satisfac-

tory and were soon repealed. These references to the judicial system lead naturally to chapters 20–22 which were intended to protect all classes, as all were equally involved, from what we call in modern law "excessive fines." They were wider in their range than the two preceding chapters, for they cover amercements in criminal as well as civil cases. Their purpose plainly was to prevent the use of the courts for the extortion of money and they indicate, as other chapters have, the character of John's government. The exemption of the freehold and the wainage, while no doubt intended on general principles, like the exemption of the merchant's stock of goods, to benefit the person directly affected, was almost as much to the advantage of the lord of the manor as to that of the holder of the land. The last clause of chapter 20 comes the nearest to a recognition of the jury of anything in the Charter, though that is indirectly provided for in chapter 18. Chapter 21 reads like an after thought to protect the baron from amercement by the jury of common freemen just provided for. Chapter 24 should logically immediately follow chapter 22, for it also deals with the judicial system. It is a step in the transfer of all criminal business into the king's hands and does put the trial of all such cases into the royal courts, leaving only minor police offences for trial in the local courts.

A series of provisions, of which chapters 28, 30 and 31 are examples, are interesting because they state in specific form the principle which has passed into modern constitutional law in the statement that "private property shall not be taken for public use without just compensation." Chapter 34, which forbids the issuing of the writ *praecipe* in such a way as to remove a case from a private court into the king's, is especially important because it reveals clearly the attitude of the barons towards one aspect of the new royal justice. The baronial jurisdiction over land, however, was fighting a losing battle against the king's courts and, although this provision was in form obeyed, the cur-

rent of cases out of the private courts was not checked and by the end of another half century the barons themselves were comparatively indifferent to the result. Chapters 35 and 41 for the benefit of trade should not be overlooked as showing how general in scope the Charter is and as indicating that already the barons were becoming aware of their interest in the activities of foreign merchants which in the next century became of constitutional influence.

A group of chapters seeking to protect the liberty of the individual as against the government may in part at least be expressed in general terms in modern constitutional language. Chapter 36 has been sometimes thought to secure the writ of *habeas corpus*, but the writ referred to is not the direct ancestor of the modern writ but one that accomplished partially the same result in a narrower range of uses. Chapter 38 has been enlarged in its range by experience since 1215 but it lies in principle at the basis of our provisions that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury," and that "no warrants shall issue but upon probable cause supported by oath or affirmation." Closely related also, as a fundamental principle to the "bill of rights" of our constitutions, is the promise of chapter 40 that justice shall be free and fair to all. Chapter 39 has been the subject of much controversy but the questions in dispute do not touch the constitutional principle here enacted that "no person shall be deprived of life, liberty or property without due process of law." The question what classes were intended to be covered by the word "free man," for example, while important with regard to the intentions of the barons in 1215, is otherwise chiefly of academic interest because the word was so soon after the granting of the Charter interpreted to mean, not merely the baronial class, but all men who were in law free. "The judgment of his peers" came in later

times to be applied to the jury trial, but it had no such meaning in 1215. Its real meaning survives today in the right of the members of the house of lords to be tried by that body only.

Chapter 61 is one of the most important in the Charter as indicating both the foundation of law and right upon which the barons supposed themselves to be acting and what objects they had in view. If we regard it as part of a state constitution, it is of a most extraordinary sort for it does two things which seem antagonistic to settled government: it takes away from the government one of its primary functions, the judicial, in a certain range of cases and vests it in a self-appointed committee, and second it legalizes insurrection and war upon the sovereign. The idea of a state constitution, however, or of constitutional law in our sense, was impossible to the barons in 1215 and, if we regard the Charter as intended to be chiefly a statement of feudal law, its bearing on the purpose of the barons and on their right to what they demand are clear. The feudal law of Western Europe recognized the right of the vassal to renounce his allegiance and to make war on his lord to protect himself from injustice. In no such case could he be charged with treason. The barons were at the moment acting upon this right and had shortly before served upon the king the required formal notice withdrawing their fealty. They must have understood from the character of John that, whatever he might promise, the question was very likely soon to arise whether they must not do so again. But they wished to avoid the necessity if possible, and to limit the resort to force both in its occurrence and in its extent. They accordingly devised a method of bringing pressure to bear upon the king if he began to break his promises. This method was to be tried before there should be any resort to force. If it failed, then their general right of insurrection, which they had only postponed to try their expedient, would be avail-

able, but in their written statement of it they did not include the right to depose the king, though that was logically involved.

This was a crude and clumsy expedient, but it is to be remembered that it was the first attempt ever made in history to put into constitutional form the principle that the government must obey the fundamental laws of the state, for that is what the barons really did though they could not have been as conscious of the meaning of their act as we are. There was no earlier experiment from which the men of 1215 could learn. There was no theoretical discussion of the institutional forms of a limited monarchy in the literature open to them. Nor should its clumsiness conceal from us the fact that in this first attempt is clearly struck the keynote of English constitutional history and foreshadowed, faintly perhaps but truly, what is its final triumph and greatest glory, for this was in truth an attempt to find a way of enforcing the fundamental law upon the king without the necessity of civil war and revolution, with civil war and revolution as the last resort only. That is in very briefest form of statement what the Anglo-Saxon constitution is; it is a perfected method of holding the government responsible to the will of the nation without the constant danger of civil war.

For what the Great Charter did was to lay down two fundamental principles which lie at the present day, as clearly as in 1215, at the foundation of the English constitution and of all constitutions derived from it. First that there exist in the state certain laws so necessarily at the basis of the political organization of the time that the king, or as we should say today the government, must obey them; and second that, if the government refuses to obey these laws, the nation has the right to force it to do so, even to the point of overthrowing the government and putting another in its place. That this second principle has never been distinctly affirmed in legal form since the thirteenth century is not

evidence against its continued existence. Even the thirteenth century expressed it only as a right of insurrection to force conformity to the law, not of the deposition of the king, but in the great crises of the past when the constitution was seriously endangered, the nation never hesitated to act upon the extreme right logically involved in the supremacy of the law. We have only to remember the Declaration of Independence with its reiterated statements, that what the king of England had been doing was an infringement of the legal rights of the colonists as Englishmen, until the point had been reached when he was "no longer fitted to be the ruler of a free people." The principle upon which the Declaration of Independence rests is exactly the same as that upon which Magna Carta rests, stated in modern terms by colonists, i. e., by a portion of the nation which could not undertake to revolutionize the whole. In every age of English history in which the question has risen, in every crisis in the development of English liberty, this double principle is that upon which our ancestors stood and upon which, as a foundation, they built up little by little the fabric of free government under which we live. The specific and individual legal provisions which Magna Carta stated may soon have disappeared in the changing social conditions of the following generations, but the sound judgment of the nation insisted that successive kings, one after the other, should pledge themselves to be faithful to the Charter, some of the kings many times over, and should confirm to them the liberties which it granted. In these demands they did not intend to pledge their king to laws which had become obsolete, but to that fundamental conception which underlay all special provisions, a conception of the relation of the government to the governed which has become almost proverbial in the Anglo-Saxon world — a conception not expressed in the definite terms of today, which would have been impossible to the thirteenth century, but clearly enough implied. These renewed pledges and confirmations continued almost to

the end of the middle ages, until the supremacy of parliament had come to be rather clearly recognized and the chief lines of the modern constitution quite distinctly laid down. Then in the fifteenth century, when we may say the idea of a constitutional monarchy had become for the time at least a habit of the English mind, they ceased.

Although in the weeks immediately following the acceptance of the Charter King John acted as though he intended to be bound by its provisions, it is probable that he had never really meant to keep his promises.[10] By the end of summer he had collected a strong force and a papal bull had released him from his obligation to the Charter. It became evident to the barons that if they were to maintain their case against the king they must proceed to extreme measures. They accordingly denounced their allegiance, deposed John and recognized in his place Louis, husband of his niece and heir to the French throne. Civil war began again but John was stronger than he had been before, and the barons notwithstanding the help of Louis made no progress. What the result would have been, it is not possible to say, but the situation was changed by the sudden death of John in October, 1216. His successor, Henry III, was a child nine years old against whom there could be no grievances and the chief man of the new government, William Marshal, Earl of Pembroke, was in sympathy with the barons' demands. More and more rapidly the barons began to abandon Louis and make their peace with the government, and the process was hastened by a reissue of the Great Charter in November, 1216.[11] In November 1217, after the revolted barons and the French had been defeated, and Louis had withdrawn, the Charter was again reissued,[12] and this version, with no important changes, was issued once more by Henry III in Feb-

[10] Stubbs, *S. C.*, 303-304.
[11] Stubbs, *S. C.*, 335-339.
[12] Stubbs, *S. C.*, 340-344.

ruary, 1225, and became the final Magna Carta of English law.[18]

In the first two reissues a number of chapters of the original Charter of 1215 were omitted and in others important changes were made. Too much emphasis has often been placed upon the omissions as indicating the spirit of the reissues. Of these chapters 12 and 61 have been considered the most significant. But chapter 61 could hardly have been retained. The Charter was now issued, not upon the demand of a successful revolution, but by the government itself which recognized it as binding law and pledged itself to abide by it. If it could be trusted, as it intended to assert that it could be, the special provision for enforcing the law upon the king was unnecessary. The general principle of feudal law, of which it was a modification and limitation, remained always unchanged to be appealed to whether it was stated in the Charter or not. The same thing is true of chapter 12. In the reissue of 1216 several provisions of the original charter are referred to as of doubtful character (*dubitabilia*) and among them that regarding scutages — evidently the chief point in the barons' minds in chapter 12. In requiring the action of the great council upon a scutage the barons had probably gone farther than they intended or desired. In chapter 44 of the Charter of 1217 it was provided that scutages should be taken as they had been in the time of Henry II, which probably shows us all that they intended in 1215, and is in strict law all that they had a right to demand.

A change like this is typical of most of the changes made in John's Charter. They are in the direction of more exact and accurate statements of the law. Some of them look as if they were changes which experience had shown to be necessary from attempts to regard the Charter as statute law to be enforced in the courts. Some of them are the modifica-

[18] Stubbs, *S. C.*, 349-351.

tion of demands which were unjust to the king and many of the additions were in the interest of the more exact statement of the law. In the changes which were new to the reissue of 1217, however, most of them additions, there is evidently some further influence at work. This version contains more new legislation than the earlier Charters; it deals more extensively with matters which are those of government and administration; and it shows some care to protect the interests of the greater barons against their tenants. It should be remembered, however, that through all the series of Charters no modification is made of the fundamental principle that there is a body of recognized law which the king must observe in his dealings with the community.

From the reissue of 1225 on to the end of the middle ages references to Magna Carta are frequent, though less frequent in the fifteenth century than they had been before. Of these references two kinds are of most common occurrence: references in chroniclers and those in official documents, records and rolls. Chronicle references are usually complaints of some violation by the government or its officers, very commonly of the rights of the church. Official references are of many different kinds: legislative and other interpretation of clauses, or more specific application of them, directions as to their enforcement, and quite frequently appeals to the Charter in cases before the law courts as to a binding statute. There is evidence that the omitted chapters are not forgotten but are still sometimes thought of as a part of the Charter and there is evidence of an occasional disposition to treat the Charter as fundamental law binding even parliament. A formal confirmation of the Charter was demanded and obtained several times over of all kings from Henry III to Henry IV, but only once each of Henry V and Henry VI. From the beginning of the reign of Edward III to the end of that of Henry IV the statute roll of each session of parliament as a rule opened with a confirmation of the Charter. These confirmations, as

has been said, cannot be regarded as intended to continue all the specific provisions of the Charter as binding law; many of them had become obsolete. Their purpose was rather to pledge the king to the fundamental principle that in certain directions his conduct was bound by the law.

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CHAPTER VI

GROWTH OF THE CONSTITUTION AND OF THE COMMON LAW

Magna Carta closes one epoch of English Constitutional History and begins another. The absolute, irresponsible monarchy of the earlier period comes to an end; the limited monarchy begins to form. Of course for a long time the change was very slight, the progress very slow, but the principle upon which in course of time the constitutional monarchy was to be based had been laid down, and it was never to be forgotten nor to lose its fundamental importance in the future.

Magna Carta in itself accomplished nothing. Considered as a code of feudal law, it would have no more power of growth than any other code of law. It depended entirely upon the character of the immediate future whether the principles to which it gave expression should be developed into controlling principles of the constitution or should be forgotten and disregarded. If John had been succeeded by a king as strong as himself, or as his grandson Edward I, or by any king who could have had a suspicion of the results to which the Charter might lead, it would not have been difficult to have pushed it into the background and have prevented any practical reference to it. It was one of the happy accidents of monarchical succession that almost immediately after the Charter came the long reign of a weak king. Henry III succeeded in 1216 and reigned until 1272. During this long period the character of the king was what determined the fate of the germ of constitutional liberty unconsciously given existence in 1215. Henry was not a bad king in the sense in which his father was. He was not

a tyrant. He intended to be a good king and believed that he was, for he was vain and had great confidence in his own abilities and wisdom. But he was weak both in intellect and will, always under the influence of some one stronger than himself without knowing it, and never able to judge correctly currents of popular feeling which he ought to have understood and heeded.

The line of connection between the character of the king and the growth of the constitution was first made by the exploitation of England by successive swarms of royal favorites from abroad, at first survivors from his father's foreign supporters, like the bishop of Winchester, Peter des Roches, later relatives of his wife from Savoy, and later still his own relatives from Poitou through his mother's second marriage. These men not merely absorbed rich gifts which the king had to bestow, wealthy marriages and wardships, to the intense exasperation of the English barons who believed that as Englishmen they had a natural claim on these opportunities.[1] Many of them obtained important offices and an influence in the government, which made them seem responsible for general abuses of practice and policy and forced the English to distinguish still more clearly between the king's "natural subjects" and foreign favorites.

The same result was reached in consequence of difficulties of the reign which were more inevitable. The rising scale of prices, which had so complicated the problems of his father's time, continued through most of Henry III's. The expense of carrying on the government had greatly increased but there had been no corresponding increase in the royal revenues. It was impossible for barons in the thirteenth century to understand the embarrassments which this situation forced upon the government, and it was natural that they should attribute the king's constant demands for money to his reckless extravagance and to the throwing away of money on his favorites. The king gave excuse enough for such a

[1] Stubbs, *S. C.*, 324–325.

judgment for he never learned economy, nor the value of money, nor how to distinguish between his own caprices and the needs of the state. The old idea of the state still prevailed though these experiences were to change it. The king regarded the kingdom as his lordship, his manor, all whose income was his private possession to do with as he chose. The barons' constant demand on their side was that the king "should live of his own" that he should meet all his expenses, including those of the state, with his natural income, as the lord of a manor did with his.

The situation was further complicated in the same manner by the financial demands which the pope was making of England. The papacy was finding the increased cost of government as serious a difficulty as any secular state and was attempting to enlarge its revenues by vigorous measures throughout all Europe. England suffered especially perhaps because of its feudal dependence on the pope, but its wealth made it a natural taxing ground. Ecclesiastical grants of tenths, or tithes, occur at intervals, but the bitterest complaints were excited by the development of the practice of "provisors." A provisor was the grant of the next succession to an ecclesiastical benefice, or living, not yet vacant — a grant of the right of succession when vacant.[2] The popes had gradually developed the right to make such appointments and now in their financial need it proved a rich resource. An officer of the papal court appointed to a benefice in England performed its duties by a vicar and drew most of its income as salary for his services in Rome. Naturally the English clergy resented such appointments bitterly as a flagrant abuse and they were ready to join unanimously with the barons in the cry "England for the English."

Two changes taking place in the reign of Henry III were greatly assisted, perhaps chiefly caused by these conditions. One was the rise of a national consciousness, the beginning

[2] Cheyney, *Readings*, 249–255.

of the modern idea of the nation, the growth of the conception of the community in its corporate capacity as a thing distinct from the state or government, but that for which the state exists. In trying to make clear just what happened in the rise of a national consciousness, it is easy to overemphasize and overstate what occurred. The modern democratic nation, with city and country on an even plane, and all classes with equal political rights and theoretically with power to determine everything, could have no existence in the middle ages. The medieval national community was still too much a matter of separate classes. Each group had still its own special interests which hardly allowed a really organic unity to form, or every man to be interested in at least some phase of common public affairs and to take part to that extent, if not further, in determining their trend as in the modern state. All that we can discover in the reign of Henry III is the beginning, still very faint, of that ultimate result. And yet what does take place means then no small change. It means the rise even at the moment of a new political influence and a new conception of the state, and this is the second change which characterizes the reign.

The feudal system, as a form of organization given to the state, was in every feature of its political operation falling to pieces in the thirteenth century. Its great service in holding the state together in an age of political disintegration was no longer needed. Its legislative, judicial, military, and financial services to the state were finished and better methods of getting all these services performed were coming in. Along with these things there disappeared also, in the change which marked the rise of a national consciousness, the general conception of the state which feudalism had formed. The king ceased to be looked upon as primarily the lord of vassals; the kingdom was no longer to be his barony, his lordship, which he might exploit as he pleased. The idea was growing up instead that his was an office; that his chief function was to seek and serve the interests of the

community even if, as it now begins to be seen may be possible, these interests are in conflict with personal interests of his own. The community, as contemporaries said, and we hardly dare yet to say the nation, beginning slowly to be looked upon as a kind of personal whole, a corporate unity, might have its own important interest which might be injured or sacrificed by the things the king would like to do. In that case his interests must yield and the community might insist by force that its views should prevail. The narrower conception of Magna Carta, that the barons had the right to protect from infringement by the king those rights of theirs which were the natural outgrowth of the fundamental principles by which the feudal organization of the state was constituted, was broadening out into the more modern conception of the national state and of the relation of the government to the community of the ruled.

But in trying to explain the ultimate meaning of what was taking place, the impression must not be given that this was a theoretical or speculative change, or one brought about by reasoning about an ideal situation. It was intensely practical. It grew directly out of specific abuses and expressed itself in specific complaints. The English barons bitterly complained that the gifts which the king heaped upon his foreign favorites should of right belong to them. The eagerness with which the king pursued abroad his own interests, in which the community was not concerned, but for which it had to pay heavily, forced upon Englishmen, the king's natural subjects as they said, the consciousness of their corporate unity and corporate interests as against the foreigner.[3] The many who were concerned were made to draw a sharp line between Englishmen and non-Englishmen and between their interests and the separate interests of the king. This new conception of the relation of the king to the community of the governed grew more clear and controlling as the reign went on, but then as always the practical sense of the race

[3] Cheyney, *Readings*, 217–221.

led it to express in legal form the ruling interests of the particular moment rather than to make a theoretically complete statement. To bind the king to regard the interests of the community, they made a new application of the principle of Magna Carta.

At first it seems to have been felt that an explicit renewal of his engagements to keep the Great Charter would limit the king's disposition to commit the abuses of which they complained. The first "confirmation of the charter" in this sense occurred in 1237, the first of many similar pledges during the next two centuries. The king granted the renewal in a special charter which was called the "little charter," and the archbishop of Canterbury in a solemn service renewed the earlier excommunication of all who should offend against it. But it was soon found that such a promise from the king was not sufficient. The question of especial difficulty then arose which was the same in Henry's case as in his father's — how to deal with a king who would not keep his promises. It was also now true that the abuses complained of were not the same as in the earlier reign. It was not so much specific violations of feudal law of which Henry III was guilty as abuses in the conduct of government, waste of the income of the state and the sacrificing of the interests of the community to his own selfish interests and those of his favorites.

In these circumstances it was soon felt that if the abuses were to be really ended some form of institutional control of the king must be found like that which the earlier barons had embodied in chapter 61 of the Charter. That chapter had been dropped from the reissues but it and its method had not been forgotten. Its plan had been to subject the king in case he persisted in the violation of his promises to the control of a committee of barons not responsible to himself. At this time the difficulty concerned the general conduct of government and in 1244 the great council devised and put into formal shape a more extensive modification of the con-

stitution.[4] The great officers of the state, appointed by the great council and responsible to it, were to be always present with the king and were really to conduct the government in his name. The great council, in other words, took the conduct of government out of the hands of the king, and made sure by a positive constitutional device that it should be conducted in harmony with its own wishes. The striking similarity of the result intended with that achieved by the present English constitution is at once apparent, that is the conduct of government in the name of the king by what is really a committee of parliament, but it must be noticed that the process was decidedly different. In the modern constitution no positive institution limits the king and no officer of the state is in form responsible to parliament. The result foreshadowed in 1244 was to be the goal of the English constitution, and these early institutional experiments lead directly to it, but a better method of securing the result was to be in time discovered.

We are not sure that the plan drawn up in 1244 was actually put into operation. If it was, it was very soon got rid of by the king and the old abuses continued with increasing weight. Unsuccessful attempts at similar reforms were made at intervals but it was not until 1258 that a thorough-going effort was made to set up machinery to control the king. At that time what may be called a complete constitution was devised which continued more or less fully in force for many months. The great council, "parliament" it was then beginning to be called, met at London in April 1258, and was besought by the king to aid him in his financial difficulties. These were then especially great not merely because of his extravagance and his gifts to foreign favorites, then very influential at court. He had gratuitously increased them by his acceptance of the kingdom of Sicily from the pope for his second son Edmund, a kingdom which it was necessary to conquer from the Hohen-

[4] Stubbs, *S. C.*, 326–327.

staufen. The barons refused to grant the king money and demanded definite reforms. Henry was obliged to yield and a commission of twenty-four, twelve named by the king and twelve by the barons, was appointed to put the necessary changes into form. This commission reported to an adjourned meeting of the great council at Oxford in June, and the constitution which was then adopted is known as the Provisions of Oxford.[5]

The new constitution virtually put the kingship, as has been often said, into commission. The king was practically suspended and his place in the government was taken by a series of committees and commissions all responsible to the great council, though they acted in the name of the king. As a standing committee, constantly to supervise all departments of government and to be an immediate check upon the king, a council of fifteen was appointed, nine of whom were from the barons' party. Another body of twelve was commissioned to meet with the fifteen three times a year to exercise the functions and authority of parliament. The original twenty-four was continued to consider questions affecting the church and a second twenty-four appointed to decide what should be done about the aid asked for by the king. The great executive officers, justiciar, chancellor, and treasurer, and the local executive officers, the sheriffs, were to be appointed by and made responsible to the new government.

It will be evident that this new constitution elaborated still further what had been crudely begun in 1215 and somewhat elaborated in 1244. It removed from power a king who could not be trusted and set up a government directly responsible to parliament which, though not at that time technically a representative body in the later sense, was still fairly representative of that portion of the community which had been until then the only one to have a direct share in carrying on the state. As described the experiment of 1258

[5] Stubbs, *S. C.*, 369–387; A. and S., 56–62.

is the highest success reached by the thirteenth century in attempting to embody in practical, workable institutions the underlying idea of Magna Carta. In this sense it became a controlling precedent in future experimenting in the medieval method, that is, in trying to find an institutional embodiment of the limited monarchy in forms of direct responsibility to parliament, instead of according to the modern method of indirect responsibility.

As a constitution in actual operation the Provisions of Oxford were short-lived. The king was able before long to reconstruct a party against the barons, and in 1261 he refused to be longer bound by the Provisions and civil war began. Towards the end of 1263 it was agreed to submit the issues between the king and the barons to the arbitration of Louis IX of France, but the barons refused to accept his decision against the Provisions, though he confirmed the king's obligation to the Great Charter, and the war continued. In the spring of 1264, the baronial army under the command of Simon de Montfort, Earl of Leicester, gained a decisive victory over the king's forces at the battle of Lewes, capturing Henry himself and his eldest son, Edward. For a little more than a year, Simon de Montfort held the king a prisoner and himself conducted the government in his name, a task beset with difficulties and resulting in no constitutional advance except in the history of parliamentary origins soon to be considered.

After the battle of Evesham in August, 1265, in which Simon de Montfort was killed and his army dispersed, Edward, to whose military skill the victory was due, became the leading influence in the conduct of government. There are facts which seem to imply that all along he had sympathized with the demands of the insurgent party on many points of real abuse and in 1267 a considerable number of reforms were embodied in the statute of Marlborough, the first of the series of great statutes of the second half of the thirteenth century. None of the institutional changes of the

Provisions, however, which attempted to fix limitations upon the king were accepted, and the constitutional effects of the crisis were confined to a vivid renewal of the idea of a limited monarchy and the creation of a precedent of its actual, if temporary, operation. To these more definite results should be added the beginning of a less tangible but not less effective influence — the tradition of baronial opposition to the crown. By this is meant not the opposition of feudal barons who were seeking independence of royal control in little principalities of their own, but the opposition of a great class, having a distinct feeling of corporate unity and professing to speak for the whole community of the governed, while it demanded for itself a definite share in determining government policies and in carrying out national administration. The baronial party in the struggle with Henry III and in the following generations seems more often than not to be selfishly pursuing its own interests and to have in mind no larger result than the advantage of the moment, but it is in the line of this opposition that precedents of controlling the king accumulate, and great constitutional principles are embodied in statute and formal document. The baronial opposition, with no real foresight of the final result and very little consciousness of the meaning of their policies, did furnish the protection and the motive force of the constitution which was forming until such time as parliament, more consistent and continuous in policy though foreseeing the end no more clearly, was ready to assume the defence and the development of the constitution.

While the conflict between king and barons determined the larger constitutional results of the reign, numerous less conspicuous changes were taking place, of decided institutional significance. It was an age of the rapid decline of political feudalism. In every direction the state was becoming independent of the baron's services which had once been indispensable to the carrying on of its business. No longer was the feudal military service even the chief dependence of

the state. The mercenary soldier was of greater value, and more and more use was being made of the baron and his men who, while not exactly mercenary soldiers, would remain in the field at pay after the feudal term of their service had expired. So extensive was the decline in the value of this service that the baron was less and less frequently called upon to send his entire service due into the field, and precedents were rapidly being established that his full obligation could be satisfied with only a fraction of his old quota of knights.

In the matter of feudal court service the change was no less rapid. The great council, indeed, in its judicial capacity had not been affected by any change of membership or procedure, and the same thing is apparently true of the small council when acting as a court. These were still the old assembly courts of the feudal ages. But when we consider the new judicial institutions and the offshoots of the council, it is clear that progress was rapid along the same lines of development that had been begun in the twelfth century. The professional justice was steadily becoming more and more the chief element in these newer courts, and the theory of a baronial assembly a more and more discarded fiction. There was no longer any pretence that these courts could serve as a court of peers for the baron; that could be found only in one of the forms of the small council or in the great council. The body of the common law had greatly increased by multiplication of writs and clearer distinction between actions, and by an enormous mass of decided cases recorded in the rolls of the court, and it demanded as it had never done before a special knowledge.

The second great treatise on the common law, Bracton, written about the middle of the century, while following the general lines of the first, Glanvill, is many times its size, reveals a much more developed law, and cites hundreds of precedents from decided cases.[6] But the forms of the common law were beginning to lose their elasticity and power of

[6] Extracts, Stubbs, *S. C.*, 411–416.

adaptation to all sorts of cases which they had once had as direct expressions of the king's prerogative, and were gradually assuming a rigidity which demanded that every new case should be brought within their formulae, if it was to be tried in a common law court. To compensate for the loss of these courts, as freely acting organs of the king's prerogative power to do justice to every man, the small council was opening itself more and more freely to the work of general justice through petitions to the king for redress in special cases which were referred to it — the line of the growth of the chancery system and equity jurisprudence. In criminal procedure a great change had been begun by the dropping of the ordeal as a means of testing the verdict of the accusing jury, in obedience to a decision of the church against it, but the courts as yet were only experimenting with substitutes and it was another century before our present system of a double jury, the grand or accusing jury and the petty jury, was settled upon. There was during the reign a great increase in the use of the assizes and of specially commissioned assize justices, while the general eyre with a wider commission visited the counties at intervals, exercising for a long time even the prerogative of equity justice, because it was considered peculiarly to represent the king. All this development of courts and law was free of feudal influence, or was affected by it only slightly.

On the side of the private jurisdiction of the lord, a similar decline of feudal influence and feudal interest is apparent. The documents of the revolution which led to the Provisions of Oxford in 1258 have a great deal to say about private jurisdiction but it is plain that the interest is very different from that expressed in the Charter of 1215.[7] The purpose of the baron is now not to maintain an independence of the king nor to protect a position which may be called political, but his interest is almost wholly financial. The great point at issue is court service, suit of court, and the issue is not

[7] Stubbs, *S. C.*, 389–394.

between the baron and the king but between the baron and the suitors of his court. The suitors are trying to rid themselves of the service; the baron is having great difficulty in maintaining his rights. The disputes between them seem to concern most frequently the public court in private hands and the probability is that the process was already well under way which by the end of the century had practically extinguished the other private jurisdiction, the baronial, that is, the feudal jurisdiction proper, reducing it to a mere shadowy survival of itself in the so called court baron. This result was brought about in reality by the development of the royal common law jurisdiction, against which chapter 34 of Magna Carta had appealed in vain to the old feudal law. The sanction of the possessory assizes in chapter 18 of the Charter was a fatal concession, and the baronial justice could not maintain itself against the more secure and definite justice of the king's courts. Already also the *Quo warranto* proceedings had been begun by the king against the public court in baronial possession, by which the lord was required to prove by legal evidence his right to hold the court, and by which in the next reign many of the "liberties" were absorbed into the local jurisdiction of the state.

On the side of administrative institutions, the same transformation was taking place from the feudal to the modern administrative system. It is not possible to be quite so definite here as on some other subjects because the administrative history of the thirteenth century has not as yet been thoroughly studied. We can, however, find in the reign of Henry the beginnings of changes with whose later stages we are more familiar. As the manor held by military service was the feudal endowment of the state's army, so the "serjeanty" was the feudal endowment of administration. That the state was now getting other and better service for its administrative needs than the feudal, as it was for its military needs, is clear from the transformation into a money payment, now beginning to be frequent, of the service by which

the serjeanty was held — "arrentation" as it was called. The transformation also, which was proceeding slowly, of some of the great offices of the household into honorary titles of empty rank, while the duties were performed by subordinates actually members of the household, is an indication of the same change. Some of the offices — chancellor, treasurer — underwent a different transformation by which they became still more than ever working offices, but it was a change of the same significance.

One differentiation which was slowly going on in this period and which has not yet been sufficiently studied, the differentiation of the small council into three later bodies, the court of king's bench, the chancery court and the administrative or advisory council, is a change both judicial and administrative. The later council continues the earlier so far as its general functions and place in the government are concerned. We may say indeed that it remains undifferentiated, that, having thrown off the special exercise of certain functions to new bodies, it still retains the power to exercise these same functions at will because it is the peculiar organ of the royal prerogative. The change which particularly affects the council, as council, in the reign of Henry III is the much greater emphasis which begins to be placed upon its conciliar function, upon its function of advising the king and of taking an active part in directing the policy of the government. Councillor in this sense comes to be a distinct office to which appointments are consciously made and for which a special oath of office is prescribed, though no distinct advisory council was formed.

In 1272 Henry was succeeded by his son Edward I who had served a long apprenticeship in the business of government. His reign of thirty-five years is one of the greatest in the constructive work accomplished both in the political and the constitutional history of England. Upon the constitutional side the reign affords us two topics which outweigh all others in importance, the development of the

common law and of judicial institutions, and the origin and growth of parliament. In this chapter we have to discuss the former topic.

Edward has been called the English Justinian and in a sense justly, but the title is not broad enough. The legal work for which Justinian is particularly famous was codification, not creative advance, but we must recognize in Edward both these grounds of fame. In a series of great statutes in the first half of his reign the past progress of the common law was recorded in a way that may be rightly called codification, if the meaning of that word is not too narrowly pressed. It was not the whole body of the existing law as it had been built up by the courts which was taken up into these statutes. It was rather a series of matters representing the active advance of that generation, but matters of such wide reaching influence both upon law and upon judicial institutions that in a way they both sum up the past, and cause the statutes to become a new starting point for future growth. Much substantive law, however, which is given us in Bracton as clearly and definitely established and which goes on into the future body of the common law, finds no place in the statutes and much in them is either new to Bracton or records a further stage in his law.

The word statute was being used in Edward's time for any kind of a regulation, issued by the authority of the government and intended to be permanent without reference to the way in which it came into existence and therefore without the exact and technical meaning which it later assumes. The name has been accepted for these acts by later times and not improperly so because of their influence on the development of the law. It must not be supposed, however, in every case to indicate legislative action by even the rudimentary parliament of that time. Reckoned in this way the list of the chief statutes of the first twenty years is a long one: Westminster I, named from the place of its enactment, in 1275, a comprehensive statute covering many points, supplemented

the next year by the statute of Rageman; Gloucester in 1278, dealing with the assizes and with the *Quo warranto* proceedings; Mortmain, or *De viris religiosis*, 1279; Acton Burnell, or *De mercatoribus*, enacting a custom which had been long observed in many places for registering debts due to merchants for collection without the delay of a suit at law, in 1283; Wales, introducing the common law into the country, and Rhuddlan, prohibiting the trial of common law cases in the exchequer court, unless the king had a direct interest in them, in 1284; Westminster II, a comprehensive statute dealing with land and many other subjects, Winchester, dealing with arms and police, and *Circumspecte agatis* with the relation of the ecclesiastical to the secular courts, in 1285; and Westminster III, or *Quia emptores* in 1290.

One of the first acts of Edward after he began to reign was to take up with vigor an inquiry which had been begun by his father but not pushed to any conclusion. He sent commissioners throughout the kingdom to inquire in each locality by the now familiar process of the inquest what "liberties" or franchises in the hands of private lords interfered with the course of public justice. The returns from these inquiries were recorded in the "Hundred Rolls," a collection of local reports of almost as great value to us for the thirteenth century, as the Domesday returns for the eleventh. Upon these returns were based the *Quo warranto* proceedings. These were given their first form by the statute of Gloucester [8] which authorized other commissioners to go over the country and call upon the lords to show by what right they claimed to exercise these functions of public justice. Already it had become firmly established in English law — it is clearly stated by Bracton [9] — that prescription by possession through any length of time could not establish a right against the king. The lawyers who represented the Crown before the commissioners insisted that definite

[8] Stubbs, *S. C.*, 449.

[9] *Cf.* Stubbs, *S. C.*, 413.

proof by charter, or other legal evidence, of a grant of the franchise must be presented by the baron or the rights would be resumed by the king.

There were few cases in which the required evidence could be produced and the inquiry excited very bitter opposition from the barons. Edward, however, did not care, or think it wise, to push his advantage to the extreme. In 1290 he agreed that evidence of continuous use from the coronation of Richard I, that is for a full century, should be a sufficient proof of title. But if local jurisdiction was not in many cases recovered from private hands, the dependence of the right upon a royal grant, and the superior claim of the state to exercise it, were sharply emphasized, and the extension of franchises by usurpation or the creation of new ones, which had been frequent in the past, was checked. The very fact that this inquiry could be made, upon such principles and with so much success, reveals the great progress which had been made in the development of the judicial system, of national jurisprudence, and of the conception of the sphere and function of the state, in the century since Henry II began his reforms. It must be noticed that these proceedings concerned only public jurisdiction, the hundred court in private hands, which included however usually such things as the view of frankpledge, the return of royal writs and the trial of pleas of the crown, and the punishment of the condemned, in many cases even capital punishment, or the collection and retention of amercements in such pleas. Manorial jurisdiction proper, that is dominial jurisdiction, with its interest in economic matters, went on undisturbed and existed in the colonies even after the settlement of America. So also there continued without interference the baronial or feudal jurisdiction proper, now reduced to considering the cases of the small freeholders of practically no more than manorial grade, and exercised in close connection with the manorial court. The sole relics of its former greatness were the name "court baron" and the rule requiring two free-

holders at least to constitute the court since unfree tenants could not do the business of feudal tenants, though the feudal tenant proper no longer attended.

No part of Edward's legislation had a more profound influence on the future, and no part of it remains to the present day in force so nearly in the form which he gave to it, as his statutes affecting land. These laws were adopted to settle a series of problems which had been created by the decline of feudalism, and the consequent disappearance of what had once been the chief interest in land, the political, leaving the merely economic interest to survive. A policy of strengthening the crown at the expense of the baronage has been attributed to Edward in this legislation, and so keen was his political and legal insight that we may well believe that he saw more clearly than most rulers could have done that the final result would be to his advantage, but with the decline of feudalism the same problems arose in most of the states of Europe and were solved in the same way. Indeed English legislators had been conscious of them and tried to solve them before Edward was born.

The transformation from feudal to modern relations was working decidedly to the advantage of the tenant, the possessor of the *dominium utile*, and to the disadvantage of the lord. The feudal law regarded the tenant strictly as tenant and, baldly interpreted, allowed him none of the rights of an owner. The more modern tendency, and by the opening of the thirteenth century the tendency was beginning to be strongly felt, was to look upon the tenant as really owner and to grant him all the rights of an owner. This tendency was in the end to triumph, but the legislation of Edward I represents a reaction against it, a reaction which perpetuated a feudal influence upon our land law greater than has survived to the present time in most countries. Parliament was in the hands of the greater barons and, with the sympathy of the king as the greatest of landlords, they were able to shape legislation to protect their own interests. But we

must remember, if we would understand not merely the beginning but the history of our land law and of the other phases of law which have derived from it down to the nineteenth century, that the sympathy of the lawyers and of the courts was on the side of the tenant and of his right to do with his land freely as he would. Indeed it is no great exaggeration to say that the development of our land law has been a duel between the legislature and the courts.

The dates of the legislation having been given, we may proceed here without regard to date from the simpler to the more complex of the problems to be solved. As the economic interest, the interest in income, grew in relative importance, the value in the eyes of the landlord of the feudal incidents, relief, wardship, marriage, escheat, rapidly increased. In original feudalism these incidents had not been considered as an economic return but as a proof that the lord was owner, and the vassal only tenant. Now it was no longer of advantage to have vassals, but of greater advantage than ever to have a good income. Escheat on the extinction of the vassal's line, or as a punishment for felony, was of especial importance because it brought the fief with its whole capital value back into the lord's possession; wardship was the next most lucrative because it gave to the lord the whole income of the fief during the minority of the heir, subject only to his duty to bring up his vassal's children in their proper station; marriage went with wardship or with the succession of female heirs and could often by a fortunate sale be made to equal a large fraction of the capital value; the relief was of the least importance but it might be made to bring in once in a generation a year's income of the fief.

The simplest of the problems was created when the tenant wished, as so many medieval tenants did, to give a part or all of his land to a church or monastery. The church or monastery never died; it never married. None of the feudal incidents, escheat, wardship, marriage, or relief, could ever occur to the advantage of the lord. The land had passed

into a dead hand; it had been granted "in mortmain." For this there was a simple remedy, and it was generally adopted throughout Europe. The statute of Mortmain forbad wholly such alienations of land without the express consent of the overlord, on pain of forfeiture to him.[10] It was a simple remedy, if it could be enforced, but in practice licences were frequently granted, and also the statute had its full share in developing the measure by which, through the ingenuity of the lawyers and the connivance of the courts, this whole legislation was defeated.

The problem which the statute *Quia emptores* was intended to solve was closely similar. Original feudalism had not been inclined to check the process of subinfeudation, the liberty of the tenant to create subordinate fiefs within his own fief to be held of him as lord by the same kind of services as those by which he himself held. Indeed the logic of the feudal system required that this process should go on, as far as it could, if the business of the state was to be adequately cared for. It was the change in feudal values which created the problem. If B, who holds of A, enfeoffs C in a part of his holding, then if B's land escheats or wardships occurs in his line, A loses the value of all that part which is held by C. He can claim only the services by which C has agreed to hold of B, much less of course than the capital or revenue value. The statute of *Quia emptores* was an attempt of the overlords to save themselves from a portion at least of this loss.[11] It provides that in the example given, and all such cases, B may freely alienate his land but when he does C shall not be his tenant but the tenant of A owing to him the same proportion of B's service that his land is of B's land. That is, the statute really means that of the new fief created by subinfeudation all the future feudal incidents shall accrue not to B but to his lord A. Theoretically the lord had always been able to protect himself from this loss, if he desired to do so,

[10] Stubbs, *S. C.* 450–452; A. and S. 71–72.

[11] Stubbs, *S. C.*, 473–474; A. and S., 81–82.

because the tenant was obliged to get his consent to alienate, but except in case of tenants in chief of the king the principle had not been practically enforced. Now the statute granted to all who held in fee simple, free right to alienate subject to the new condition. Nothing was said about the king's tenants, who still required permission to alienate, but in practice the rest of the statute was applied to them also so that all subinfeudation in the feudal sense was brought to an end. The natural tendency of such a practice was to bring by degrees all holders of land by feudal tenure into direct relationship with the king and, while multiplying the number of tenants in chief, to strike a deadly blow at feudal independence and the extension of feudal privilege.

The statute *De donis conditionalibus*, a part of the statute of Westminster II, concerned a more complex matter but one even more important for the future.[12] It had been a common feudal practice, the feudal law taking up in this case, as it did in many others, principles of earlier Teutonic law, for the grantor to convey to the purchaser, not the full fee simple, but a limited right of ownership. The fundamental principles of feudalism made it logical for the seller to attach any kind of conditions he pleased to the grant since, even where the full fee simple was conveyed, various conditions of service and fealty were attached which must be fulfilled or the land escheated. As the economic side of feudalism began to outbalance the political, it came to be more and more clearly to the advantage of the grantor to increase the chances of the land's coming back into his ownership by escheat. At the same time the purchaser, desiring to found securely, or build up, a territorial family, saw an advantage in making it impossible for his descendants to lose or alienate the land.

To take a single though a common example of which there might be many variations, A, the seller, grants land to B and the heirs male of his body lawfully begotten. Evidently,

12 Stubbs, *S. C.*, 462–463; A. and S., 75–76.

if this grant is legal, no other heirs than those specified can inherit and the chance of escheat is increased. For an escheat of this kind, under a conditional grant, the term reversion came to be used; the land was said to revert, to return, to the grantor. But evidently also, the donee had no power to alienate away from his heirs, nor had any subsequent holder in the line, since not general heirs or assigns were named, but certain specified heirs were parties with the donee in the grant. Each holder in succession had only a life interest in the land. Such a grant did not convey the whole fee but a fee off which something had been cut (*taillé*). The purchaser therefore did not possess a fee simple, but a fee tail, and he is said to hold *en tail* — the land is entailed. The increased chance of reversion which has been created by the conditional grant is a property right remaining to the grantor and this he may sell to a third party if he wishes. That is he may sell his right of reversion. Or he may divide it and convey away a part of it in the original grant or in a subsequent one, if he wishes. He may grant the land to A and the heirs male of his body lawfully begotten, with a remainder to C his brother, or his daughter, with the same limitation as to heirs; that is, in this case the land does not revert, or return, on the extinction of the first line specified, B's, but stays out or remains to the second line, C's. A right of remainder has been created and a line of remainder men.

All this was a simple extension of feudal principles and required no legislation to make it legal. But this was a decided check on free alienation and the interests of the later heir, who might wish to sell, would not always be the same as those of the original donee. As in other cases lawyers and courts were on the side of the free disposition of property and by conventional interpretation a way was found to break the entail. The grant was interpreted as if it were to B and his heirs if he have an heir male of his body, and, on the birth of an heir male, B was declared competent

to convey the fee simple to another though he still did not possess it himself. It was this ruling of the courts against which the statute *De donis* was directed. It made this interpretation illegal and declared that conditional grants must be interpreted strictly according to the terms of the grant. It thus restored the logical feudal development and perpetuated the system of entails, but this of course only made it necessary for the lawyers to devise some other method of breaking the entail.

It is not necessary for the purposes of this book to follow in detail the historical development by which the devices for defeating the purpose of these statutes against free alienation, especially of *De donis*, were put into final form, notwithstanding many opposing acts of parliament by the way. It is important that the two chief results be briefly stated. Early provisions against grants in mortmain had been met by a collusive lawsuit called a recovery. A wishes to convey a piece of land to the monastery of X but cannot obtain permission to do so. By common understanding the monastery brings suit against A for the land, alleging a title to it superior to his. A allows the suit to go by default, and the land is transferred to the monastery by judgment of the court. This forms the basis of the action later called a common recovery, which was put into final form by the end of the fifteenth century and was used generally to break, or "bar" entails. The common recovery was the recovery elaborated, chiefly by an application of the doctrine of warranty, a doctrine which goes back in some of its forms into Saxon times and which was used in this case to make the title of the new owner more secure. B wishing to purchase from A an entailed estate brings suit as above, but A instead of defaulting himself "vouches to warranty" a third person C, from whom he alleges he obtained the land and who is under obligation to warrant his title. C appears in court and accepts the obligation, thus taking the place of A in the case, but then disappears leaving the case to go by default

and the land to be transferred to B by a judgment of the court. By this process the claims of the heirs of A were effectually cut off since they would be told that C was the one against whom they must proceed and not B who really had the land, and for C's duties a man without property was carefully selected usually a subordinate of the court. In time all pretence of an actual trial was dropped, and all that was necessary was to have the records of the court made out as if the trial had taken place and to pay the required fees. The common recovery continued in use until a simpler method of barring entails was introduced in the nineteeth century.

The other method of defeating the statutes against free alienation of land, and at the same time of accomplishing a variety of other purposes, was also a development of an earlier practice, the practice of nominally conveying property to one person really for the use of another. In law the ownership was vested in A; in practice the use and enjoyment belonged to B. This method, as developed after the legislation of Edward I, gave rise to the doctrine of uses, and in more modern times, in application to a wide variety of purposes to the law of trusts. Naturally, as in the case of recoveries, the history has been one of elaboration and the earlier stages are the simpler, but the development has been so logical that the simpler serves to explain the more elaborate.

If A wishes to give an estate of land to a church or monastery, a thing he cannot do directly after the statute of Mortmain, he conveys it instead to B, stating in the deed the fact that it is for the use of the church. In law the grant is not to the church but to the man B. He is trusted by the donor to allow the church to have the management and proceeds of the land. The trust is considerable, because, if he does not choose to do so, there is no remedy in law. The land is his on the face of the documentary evidence, and the common law will not go behind that. The statute of Mortmain, however, is avoided, because no land has been in form given to the

church. The practice in this simpler form was soon forbidden by another statute, but its application to a great variety of needs, and the ease with which the form was varied, led to its employment for a wide range of purposes. A man could escape his obligatory feudal payments, break an entail under the statute *De donis*, escape some of the penalties of treason, or, since he could not make a will bequeathing land feudally held, convey his land to the use of his last will and testament. Several trustees came to be named instead of one, with power to fill vacancies, in order to get a nominal owner who would not die. Statutes were made in vain from time to time against these various forms; some way was found to avoid them all. Before long equity took notice of the practice and began, especially in the fifteenth century, to enforce the trust, as a matter of justice and conscience. Thus from the original simple beginning, there followed in time a vast development which has come down to us, and corresponding to this, there was an equally great enlargement of the body of equity jurisprudence.

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CHAPTER VII

THE ORIGIN OF PARLIAMENT

Vastly important as was the legal development of the thirteenth century for the whole Anglo-Saxon world, there was taking place at the same time an institutional change which was of greatly wider influence, for its results were in the nineteenth century to be extended to the advantage of all mankind. This change was the transformation of the great council into parliament which was not quite but nearly completed before the century closed.

It is accurate enough to call the process one of change, but in truth the old great council went on in the new parliament with only slight changes and is present in it today in the house of lords almost exactly as it existed under Henry II. The process by which parliament was formed was the introduction into meetings of the great council of certain elements of the community which, in the days when unmodified feudal ideas were ruling, had no standing in it. In tracing the origin of parliament, we have to trace the steps by which these elements were introduced and the probable reasons for the innovation.

A great economic and social change was taking place in the thirteenth century, one of whose results began to make itself felt soon after the middle of the century. This change was the rise to an interest in public affairs of two new classes alongside the older feudal ruling classes or, if it is too much to say to an interest in what we should mean today by the political control of the state, at least to a position of interest in the influence which public policy might have on their own affairs. They speedily became also of importance in their

support and resources to the ruling classes, or to the government of the day. These two classes were the knights of the country districts and the burgesses of the towns.

The knights were of course an older class, one of the feudal classes, but the change which was taking place in the thirteenth century made out of them a new class, in some respects peculiar to England, whose peculiarity and significance will be discussed later. The smallest of the minor barons who was the tenant in chief of the king for a single knight's fee or less could never have had any great interest in political feudalism. He could have only a domanial court from which he could hope for no political independence. His military service could never have been a source of much pride or consideration, and his court service to the king, so far as we can tell, was generally left unperformed, performed only on special occasions. The decline in political feudalism, which in the thirteenth century affected all feudal classes, affected the knights most rapidly and thoroughly. The demands connected with the Provisions of Oxford show that fact clearly. Meantime their class was being enlarged. The distinction in anything but form between these minor tenants in chief and the rear tenants of single knight's fees, who held of mesne lords, must always have been somewhat artificial, and rather early in the long reign of Edward I it was even in form swept away. All holders of twenty pounds' worth of land of whomsoever holding were brought under the same military regulations and the same distraint of knighthood. With the rise of prices during the century many holders of fractional fees also came to have the required income and became in law knights as they had undoubtedly been earlier classed by custom. A class was forming, the beginning of the country gentry of England, which finds a chief political interest in the management of county business, long in their hands and greatly increased in importace by the itinerant justice system, and which finds by degrees its personal and sometimes its public interests not quite the same as those of

the major barons. It is a substantial class, of solid position, of good income and local consideration, and ready, as class consciousness develops, to speak for and maintain its own views and interests.

The burgess class was newer and less strongly rooted, certainly in the past and for the present in the country. Its strength lay in its increasing wealth through rapidly developing commerce and in its possession of ready capital. England was a producer chiefly of raw materials, and commerce which centered in the towns was of more importance to the country than the beginnings of industry, which were as yet limited. Her freedom from foreign invasion and from destructive civil wars had enabled her to develop at an early date her future chief staple, wool, and even in the twelfth century the possibilities of government income to be found in the wool trade had attracted attention. By the reign of Richard I the number of chartered towns had noticeably begun to increase and under John the increase was still more rapid. The introduction of feudalism at the Norman Conquest had not disturbed the condition of local independence which the Saxon territorial organization had favored, but it had brought the towns into the possession of the king or of some other lord, bishops and churches held many. As belonging to a lord, the town formed a part of his domain lands and was therefore subject to the disabilities and exactions of the serf.

From the limitation of this condition, the practice of conveying all sorts of rights by charter, greatly developed in feudal times, might relieve the borough more or less completely. Rights conveyed by charter to boroughs in England, some to one, others to another, all only to the most favored, may be put into four classes:[1] freedom from the lord's domanial rights over serfs, like his right to a fine for marriage; economic, freedom from tolls, the right to a fair,

[1] Stubbs, *S. C.*, 103–107; 128–130; 195–199; 304–312; Cheyney, *Readings*, 208–211.

etc.; legal, the right to hold a court, with freedom from other courts, and from jury trials; and governmental, the right to exclude royal officials, to collect themselves the royal dues, the *firma burgi*, the right to elect their own officers and to provide for their own local government. Most of the fully chartered boroughs occupied the position of separate hundreds in the county, but a number of them attained before the end of the middle ages to the position of counties in that they possessed the privilege of electing their own distinct sheriffs. The boroughs of more full right enjoyed the privilege of appearing as independent units in the county court which was summoned to meet the itinerant justices.

Notwithstanding the fact that occasionally some person who stood in no feudal relationship to the king was asked to be present at a meeting of the great council, it would have seemed impossible to twelfth century England that men should be admitted in large numbers to the assembly on no ground of tenure and as delegates of non-feudal classes or communities. It is no slight sign of the decline of feudal ideas that it did seem possible to the thirteenth. In the formation of parliament then there were brought into the feudal great council new elements, not on a feudal basis and representing classes in the community which were essentially not feudal. The result was a structural change, very similar in character to that by which the earlier Teutonic national assembly was made over into the feudal great council. It was like that the introduction of a new principle of composition, the principle of representation. But the extent of the change should not be exaggerated. It should be remembered that there is no evidence to show that these new elements in parliament were allowed during that century any share in its determining and deciding functions over any class or interests except their own. Also the old great council remained unchanged. For a long time it still acted now and then alone as parliament, and for a longer time yet traces of its independent powers and functions survived.

The new elements were grouped around it for the time being, not organically absorbed into it changing its nature.

Scholars have not yet come to an agreement among themselves as to the source from which the idea embodied in the representative system, as we understand it, was derived. It seems altogether likely that the final decision will be that the idea was derived from one source and the institutional forms, through which it was given expression in the constitution of the state, from another. At any rate it seems certain that the representative idea is first to be found expressed, in language which conveys something like the modern meaning, in documents relating to the synods and councils of the church. On the other hand it is equally clear that the preliminary, formal steps by which non-feudal representatives were introduced into the great council were taken entirely free from influence of the church. What we have to see in the events as they took place is, first, that delegates of local communities were summoned to the council before there existed any idea of representation in the modern sense, for that idea does not mean merely that the delegate reports to the assembly a decision which the local community has already made, but that he comes with full powers to take part, as speaking for it and on equal terms with the other members of the assembly, in discussing and settling questions yet undecided, questions indeed which may not have arisen when he was chosen. And we have to see in the second place how, as the practice of summoning such delegates increased in frequency, the representative idea entered, not with its full later clearness in the thirteenth century, but clearly enough to be consciously applied. From that beginning these two have grown together through uninterrupted experience into our present day conception of representative government.

In considering the actual series of events which transformed the great council into parliament, we must not overlook the significant fact that no one at the time perceived that any change of importance was taking place. It at-

tracted no special attention to itself. Neither in the records nor in the chroniclers is there any evidence that anything thought to be unusual, or to make a sharp break with customary ways of doing things, was seen to be going on. Whatever explanation is offered of the origin of parliament, it must be one that shows the first steps to have been taken in line with things already familiar, with no wide divergence at any rate from processes in common use or from current ideas. The function of the new elements in the curia regis during the first half century or more after their introduction must have seemed so nearly identical with some similar function already performed by members of the same class, in circumstances of the same kind, as not to appear to contemporaries a departure from things habitual.

It is generally considered that the first step in the continuous evolution of parliament was taken in 1254. Early in that year the king in Gascony, finding an extraordinary need of money for his expenses, determined to attempt raising an aid in England from those who were not coming to his assistance in person. His experiences in such attempts in recent years had not been happy. He had quite as much reason to expect refusal as consent. By some one in the king's counsels the suggestion seems to have been made that, if the consent of the counties could be obtained in advance, and that consent made known authoritatively to the council, the chance of success would be greatly increased. It was probably also thought that, if the king's necessities were fully explained and put in the right light by the sheriffs to the county courts, they would readily agree to such a tax. This was the plan at any rate which was adopted. On February 11 a writ was issued by the queen and the earl of Cornwall, who were conducting the government in the absence of the king, directing the sheriffs to act upon such a plan.[2] The writ indicates clearly that the decision is to be made in the county court, and that the function of the knights is

[2] Stubbs, *S. C.*, 365–366; A. and S., 55–56.

no more than to carry it to the council and to certify it officially. That this interpretation is correct is made more evident by the language of the writ issued upon the same day to the archbishop of Canterbury directing him to convoke the inferior clergy subject to him, to induce them in the same way to grant a liberal aid, and to see that they certify the council at the same date by discreet men the amount and manner of aid. Clearly the function of the delegates was to report a decision already reached by the local body. The modern idea of representation is not to be found here, except so far as it may be involved in mere delegation, the knights speaking for the county in making known officially its decision.

There can be no doubt but that the practice in use at the time which seems to have been most closely followed in this summoning of the knights from the counties in 1254, and in what they were asked to do, was that long employed in sending the record of a case tried in the county court to the central king's court. The practice was not an uncommon one and evidence of it occurs frequently in the court records with all the characteristics of the incident of 1254. Here was certainly a direct line of connection between the county court and the king's council, already established and in frequent use. The action, of the knights in 1254 was the same. They brought to the king's council, in order officially to attest it, a record which had been made in the county court. That the function which they performed had indirectly much in common with that of the jury is also evident: they made known to the council the local feeling and opinion proposed. The practical result is not different. But if the two processes are compared step by step, it will be clear beyond question that the action of the two knights in 1254 corresponds far more closely with that of the knights carrying a record than with that of the jury.

Already at the date of this action in 1254 knights had been extensively employed in public business for nearly a

hundred years. We have learned earlier of their employment in the business of the county, under the national judicial organization established by Henry II, as those who selected the accusing juries as in the commission of 1194, and composed them also, if there were knights enough. The assize juries were composed in the same way and the jury of the grand assize selected in the same way. The method by which the four knights who began these processes in the county court were themselves chosen was probably, though not certainly, one of election by the assembly of the court. It comes to be election at any rate before 1254. In other county court business they were also employed: in making a record for the county in another court, in testing an essoin, in making a view of lands to determine boundaries, etc. We have seen them also acting for the local communities in taxation, a national business, and in some cases, not yet noted, they had brought reports of an administrative character for their counties to the council. To enumerate the cases in the reign of Henry III: In 1220 two knights were chosen in the county court to assess and collect a carucage for the county; in 1225 four knights were chosen from each hundred to assess and collect the fifteenth; in 1226 four knights were summoned from each of eight counties to report to the council on the conduct of the sheriffs in their counties, and in 1227 we have the same summons for the same purpose from twenty-seven counties; in 1232 knights were to supervise the assessment of a fortieth and in 1237 of a thirtieth, and in 1235 and 1242 to assist in the collection of scutages; again in 1258, four years after the incident of 1254, four knights were elected in each county to report on the sheriffs. The summoning of knights to the council in 1254 to report for the county a decision which had been reached in the county court about a proposed tax must have seemed to every one a most usual and normal proceeding.

But in 1254 the knights reported to a small not to a great council and their function was one distinctly limited. The

first step may have been taken, but it was not a very long one and much yet remained to do. It may however have been a longer step in the thirteenth century than it seems to be to us, for the rest followed somewhat rapidly. In September, 1261, Henry III issued writs to the sheriffs in which he said that the insurgent barons had called three knights from each county to meet them at St. Albans on the twenty-first to treat with them "concerning common affairs of our kingdom." He directed the sheriffs to cause these knights to come to him at Windsor to hold a colloquy with him on the same day where the barons were to meet him to treat of peace.[3] Apart from the summoning of knights from the counties to meet with some central body, the important thing in this writ is that, both by barons and king, they seem to have been summoned to discuss public affairs not previously referred to the counties for decision. For this reason in spite of the fact that we do not know how these knights were to be selected nor with what body they were to meet, we must reckon this case a step in the formation of parliament.

The next advance is clear and covers all the points that could be expected at that date. In June, 1264, Simon de Montfort, as ruler of England after the victory of Lewes but in the name of the king, directed that there should be sent to London to the coming parliament four of the most legal and discreet knights from each county, elected for the purpose with the assent of the county and for the whole county, to treat with the prelates and magnates concerning the business of king and kingdom.[4] In this incident we have brought together for the first time everything necessary to make the beginning of the transformation. This is not to say that the representative idea was yet present or that the representative system was yet established. This advance which we have traced is the institutional preparation merely,

[3] Stubbs, *S. C.*, 394–395.
[4] Stubbs, *S. C.*, 399–400.

but this line of preparation has now gone so far, though it is not yet complete, that it can easily be made to give full expression to the representative idea when the time for that has come. We must not forget also that the writ of June 4, though in form a king's writ, was really issued by the insurgent barons lately victorious at Lewes. An innovation of this kind made by a revolutionary party, in the full tide of revolutionary influences, and needing to maintain its internal union as closely as possible, is not the same thing as if made by the historical and established government. The final adoption of the change may even be delayed by such a fact.

Notwithstanding the advance of 1264, there still remained one step to be taken in order to complete the line of institutional preparation. This also was taken by Simon de Montfort and in the same year, in writs of December 1264, calling the famous parliament of January, 1265.[5] Since the battle of Lewes Earl Simon's party among the barons had grown decidedly weaker and to this parliament were summoned only five earls and eighteen barons and, probably to get the advantage of his strength with the middle classes, he caused two knights to be summoned from each shire, and then in addition, the special innovation of this parliament, two representatives from each of the cities and boroughs, the writs being sent in this last case not to the sheriffs as in the later practice but directly to the towns.

These writs add nothing to the writ of the preceding June except the summons to citizens and burgesses. As the evidence has come down to us, we must say that the summons of December is less clear and explicit than that of June. It is probable, however, that it would be understood to mean as much and be acted upon in the same way. If we make this assumption, we may suppose at this time as well as in June, election, representation, and participation in the business to be done. It is I think fair to say that the writs of June are as much Simon de Montfort's as those of December, to con-

[5] Stubbs, *S. C.*, 403–404.

sider the two practically one case and therefore to attribute to him the entire innovation, of which in complete form we have here the first evidence. This includes not merely the admission of burgesses but of knights of the shires to full standing in the great council, to full standing so far as the form of words used in the summons is concerned, whatever position they may have occupied in actual discussions. Undoubtedly, as Bishop Stubbs says, this meeting "was not primarily and essentially a constitutional assembly." It was a revolutionary assembly of the party of the barons. But in the forms observed it was constitutional, evident pains were taken with that side of things, and it was beyond question the theory of Simon de Montfort and his supporters that it was legally a great council.

Though this parliament of Simon de Montfort contains all the constituent elements of the historical English parliament, lords, county members, and borough members, it is easily possible to estimate too highly its influence on the future. It falls still within the age of preparation. It is the beginning of an epoch of change, not its full fruition. To call it the origin of the House of Commons in any except the narrowest sense, the sense of the occurrence together for the first time of these new elements, would be an error. The act determined nothing, rendered nothing necessary. It merely foreshadowed what was to be, and its greatest importance to us is as a sign that the vast economic and social changes, which in the end determine the legal and constitutional, and which we can trace at work in England from the dawn of the century if not before, were beginning to affect the forms of government. These ultimate forces were certain to accomplish this result before very long. It was inevitable at a time when stricter feudal ideas were rapidly disappearing and in a regime which was one of classes only, that a class so distinct as the burgesses, having so many interests peculiar to themselves in the conduct of government, and having also such rapidly increasing

power and such means of making their power promptly felt, should be drawn into the central assembly, not perhaps so much from any desire or demand of their own as that their support and concurrence had become important. The same changes with the same constitutional effects were taking place in many European states, and in the history of the movement as a whole the place of England is late rather than early.

It is of course true that if the burgesses were certain to be admitted into the older institution, there was nothing in that fact nor in any other circumstance of the time that determined the form and character which the new institution was to assume, and this was a question of vital importance for the future. Upon its answer depended the existence of the constitution as much as upon the survival and broadened significance of the ideas of the Great Charter, for in the course of a century parliament was to assume the task of forming the limited monarchy in place of the inefficient baronial opposition. Before the middle of the fourteenth century indeed the barons had shown themselves incapable of the constructive work demanded of them. The Provisions of Oxford stand as their high water mark above which they were never able to rise. The future of the constitution, the possibility of the limited monarchy, depended on the character of the new institution which was coming into existence during this formative age.

To understand how easily a different and far less efficient form might have been given to this institution, or indeed how little effort it would have required to have prevented altogether the formation of a really effective parliament, it is only necessary to study the forms which the institution assumed during the transitional period of experimentation from 1265 to 1295. In the two later parliaments of Henry III's reign 1267 and 1269, there is no evidence of any membership but that of the great council. To Edward I's first parliament in the spring of 1275 four knights were

summoned from each county and six or four burgesses from each borough through the sheriff, but this form was not followed again before 1295.[6] They were summoned to treat with the magnates upon the business of the kingdom. In the autumn of 1282 Edward, after trying to raise money for his war in Wales by negotiation with the separate counties and boroughs, called two assemblies, of the five northern counties at York and of the others at Northampton, to which were summoned four knights from each county and two representatives from each city and borough,[7] it being specified that both knights and town representatives should have full powers. In 1283 an assembly was summoned to meet in September at Shrewsbury to decide what should be done with David of Wales who had been captured. Writs were sent to the sheriffs for two knights from each shire and directly to twenty-one towns for two representatives from each, both knights and burgesses according to the writs to take part in deciding the question about David.[8] The knights appear to have done so, but the burgesses may have withdrawn from what became a trial for treason, in which they would have no share in law, and by themselves at Acton Burnell have authorized the so-called statute *De mercatoribus* which was in legal form an ordinance of king and council. At the end of May, 1290, a great council of bishops and barons, in full parliament the record says, granted the king an aid for the marriage of his daughter "for themselves and the community of the whole kingdom as much as in them is."[9] Then two knights from each shire were summoned to join the others in July "with full powers to council and consent." But without waiting for them to arrive the statute *Quia emptores* was passed, though the interests of the knights would seem to be directly concerned in it. In 1294 the

[6] Stubbs, *S. C.*, 440–442.
[7] Stubbs, *S. C.*, 452–459.
[8] Stubbs, *S. C.*, 460–461.
[9] Stubbs, *S. C.*, 470–474.

clergy in a separate assembly made a grant to the king and the lay barons by themselves in another assembly to which two knights from the counties had been summoned on October eighth "to consult and consent" in the language of 1290, and on the next day two more "to hear and do what we then enjoin upon them," but no burgesses were summoned.[10] In the same year the merchants granted to the king an increase of the duties on wool.

What is especially instructive in this list are the occasions when we find the two forms which were later most successfully employed by the French kings in weakening the Estates General and reducing them to the service of the crown — the division of the national parliament into provincial assemblies and its division into distinct assemblies of the different estates. These forms occur without especial comment or protest. The danger which lay in them was not evident. Their competence within their separate fields was not less than that of a full parliament of the next century, considering the difference of date. Nothing indicates that there would have been any difficulty in directing the future development of parliament along the line of these precedents. Indeed the kings for some time continued to negotiate separately with some of the classes to avoid the difficulty of dealing with parliament and were induced to give up the practice only by the skillful management of the house of commons in the fourteenth century, and irregularities in membership continued through the reign of Edward I at least. It is not necessary to say that if these had been controlling precedents no parliament would have been formed in the English sense and no constitution.

What saved parliament and the constitution in this crisis was ignorance, was lack of experience. Had it been possible for Edward I to foresee the future in this respect, as it was for Charles V and Charles VII of France some generations later, and to understand the danger to the monarchy which

[10] Stubbs, *S. C.*, 474–477.

lay in the growth of a strong parliament, he could, so far as we can now see, and he probably would, have prevented it. It was hardly possible to do this after the close of his reign; it was entirely impossible after the deposition of Edward II.

Through all the irregularities of the period something in the way of progress is to be discerned. For one thing the association of representatives of the local communities with the prelates and magnates in the great council was growing more customary. There is no evidence as yet that rules or fixed forms were being evolved, but the practice was becoming more common. There is also during this time somewhat clearer expression of the fact that the representatives were called to take part in the public business before the curia along with the older members. There is nothing to warrant us in saying that they were invited to anything like the free discussion of a later parliament, or that they were to be allowed an actual voice in making the decision wished for. Both these things are highly improbable, unless it be in matters which concerned themselves primarily, but in some way their report as to local opinion was thought to be important and was regarded by those who did make the decision as one of the considerations in view of which they acted. The request in the writs that representatives be clothed with "full powers" probably means no more than that they should have proper credentials to validate their report and to bind the community to the action taken.

It should be evident also from the events of this period that it was not alone from a desire to get advance local consent to taxation that the new elements were brought into the great council. Undoubtedly that was one, perhaps the chief, motive. The new land owning middle class, which was forming and was in possession of attractive taxing resources, would be very inadequately reached by the older feudal methods of getting in extraordinary revenues and many of the boroughs, those outside the royal domain, not at all. The feudal principle of an advance consent to an extraor-

dinary tax had been so deeply impressed upon the consciousness of government by the events of the thirteenth century that it had not been violated since 1215, and it is not to be wondered at that it expanded, with expanding taxation, to all forms of revenue. But it is clear also, it is especially clear in the writs with regard to the trial of David, that the government equally wished to know the opinion of the communities about questions of policy, especially about those involving an element of unusual doubt or entailing extra expense. With medieval difficulties of intercommunication and in the absence of all modern methods of expressing and collecting public opinion, bringing together in one place well-informed and instructed delegates was the only method possible of ascertaining or forming the opinion of the whole, and this would apply both to questions of policy and to taxation. This fact is to a large extent the key to what takes place. Form and purpose will be clear to our minds if we can make real to ourselves the problem presented by the difficulties of thirteenth century intercommunication at the time when men became more conscious of common interests and of new classes whose opinion should be known and whose resources should be made available for public service.

The experience of thirty years was gathered up and, in the opinion of later times, confirmed and secured in the so-called model parliament of 1295. It is in this sense, as a culmination of past progress, that this parliament can be called a model, not as stating the ideal nor as copied in the future, for neither in composition nor in organization did it serve as a model. It was however an unusually complete representation of all classes in the nation. At the end of summer, 1295, Edward I was in the midst of serious difficulties. An expensive struggle with Welsh rebels had only just closed; war with France was still going on and with Scotland just beginning. He needed and wished to feel both that he had the support of the nation behind him in his foreign policy

and that they were ready to bear the heavy expenses necessary. Both motives acting together in Edward's mind undoubtedly account for the character of this parliament.

In addition to the old great council, the prelates and magnates, there were summoned two knights from the counties and two burgesses from the boroughs,[12] and also representatives of the lower clergy under the so-called *præmunientes* clause in the writs to the archbishops and bishops, these representatives of the clergy forming an element in this parliament which did not become permanent. When the parliament came together it organized itself in three houses, corresponding to the three "estates" of feudal society: the first the clergy, the second the barons, and the third the burgesses. The knights joined the barons in forming the second estate, to which according to feudal ideas they belonged. Each estate also taxed itself separately and at a different rate from the others. This composition and organization corresponded to that which became permanent in the French "Estates General" which was coming into form at about the same time. It evidently meant nothing to Edward in the way of rule or precedent. Twelve of his twenty later parliaments contained no representatives of counties or towns. Three only followed the model of 1295.

Many students of the period have attributed to Edward I in summoning the parliament of 1295 a clearer idea of the representative system and a more deliberate purpose to embody it in a permanent legislative organ of the central government than the facts will warrant. Edward was one of the greatest statesmen among English kings but, if he could have foreseen the future to this extent, he would be the greatest statesman in history. His statesmanship consisted in seeing clearly what he had to do, chiefly in building up the greatness of England as he understood it, and in knowing how to adapt to his purposes the tools he had to work with, not with entire but with remarkable success.

[12] Stubbs, *S. C.*, 477–482; A. and S., 82–84.

He probably knew nothing about the use of the Roman maxim, in the writs of 1295, which is often referred to in this connection — *quod omnes tangit ab omnibus approbetur*, what concerns all should be approved by all — until he saw it in his writs; then it probably meant no more to him, or indeed to the person responsible for its use, than the earlier phrases already commented on. What Edward and the men of his time were really doing, we can see clearly enough because we know what the later history was to be, but they could not, and here, as in so many other places, the permanent result was not planned nor deliberately intended. Indeed we have no right to say that what was done in England to the end of the thirteenth century was different in character or meaning from what was being done at the time in most countries of western Europe. What gives to the English parliament its great place in history is the use which was made of it, the meaning which was given to it, after its age of origin was past.

Nor is it likely that any one proposed to make parliament finally correspond in the elements of which it was composed, as really was done, with the assembly of the itinerant justice court as that had been determined by the reforms of Henry II. The writs of the middle of the century calling the county court to meet the justices indicate the union in it of three different elements, the barons, including the clerical barons, the freemen, and the burgesses, with the knights standing between the barons and the freemen. At the end of the thirteenth century it was still uncertain with which element the knights would permanently identify themselves, but it was even then clear that two new elements which had no place in the older great council had been added to it, making it correspond in the classes composing it to the county court. These two elements have remained in parliament distinct from the baronial and from one another down to the present time in theory at least.

Finally these additions had the effect of carrying through

in the great council a structural change, making the new institutionally different from the old. It was a change which was in character and significance closely similar to that by which the Anglo-Saxon national assembly had been made into the great council of the feudal age. It was brought about, like the earlier change, by the introduction of a new principle of composition, the principle of representation, or what was to be representation in the end.

The period of the origin of parliament may fairly be said to close with the parliament of 1295, but as yet the new institution was unformed and its future place among the institutions of government uncertain. To the great work which it was in the end to do in the formation of the English constitution, the protection and carrying forward of the tradition begun by Magna Carta, the accumulation of precedent upon precedent by which the limited monarchy was created, it was still unequal. For the present the less trustworthy and consistent baronial opposition, which had made the beginning, must carry it forward if it was to be continued. It is an interesting fact that almost immediately after the parliament of 1295 the next step forward was taken and that, upon the principle then laid down, almost the whole parliamentary advance of the next century was based.

The grants of the parliament of 1295 did not relieve Edward of his financial troubles. These continued rather to increase because of the difficulties and ill-success of his war with France and Scotland. Neither barons nor commoners were as interested in the war as he, and he found it impossible to obtain by regular grants the money which he needed. The clergy also were resisting taxation by the state and were commanded to do so by the bull *Clericis laicos* of Boniface VIII of 1296.[13] In these circumstances Edward believed, no doubt honestly, that he was justified by the necessity of defending the realm in levying taxes without previous consent, and he excused his action in appeals to the nation on

[13] A. and S., 84–86.

this ground. He obtained the form of a grant from the barons and the towns in an irregular assembly which was neither in summons nor in composition a parliament or great council. He seized the wool which the merchants were about to export, giving tallies for it with a promise of repayment, and he practically outlawed the clergy and seized a good portion of their lands.

His exactions were a great burden upon the people of all classes and excited general opposition. The great barons had other reasons which led them to oppose the king, as a class in the *Quo warranto* proceedings, and as individuals in grievances peculiar to one and another. They furnished the leaders of the opposition as in 1215 and 1258, but we must recognize here, as appearing more plainly than before, the influence of personal reasons and selfish motives. If the barons took advantage of the general situation to serve to some extent their own ends, there is no doubt but that the general situation did exist and that it was in truth what would have been regarded by a later age as a constitutional crisis. The full meaning of such a designation was no doubt beyond the minds of 1297, and yet it was the constitutional point which they settled and it was into constitutional form that they threw the settlement. The demand of the barons and the concession which they secured were manifestly in line with the work of the baronial opposition earlier in the century, and the result forms the greatest advance in the development of the limited monarchy since Magna Carta.

In spite of all the opposition of the barons and of their refusal to serve with him, Edward went on with his preparations in the summer of 1297 to cross with an army to Flanders. About the middle of August the barons presented to the king in their own name and that of "the whole community of the land," a formal statement of their grievances which they desired the king to redress. They complained of the heavy burden of taxation which reduced them to poverty; that they were not treated according to law and cus-

tom; that the provisions of Magna Carta and the Charter of the Forest were not observed; and of the new customs duty which the king had imposed on wool and which they declared amounted to one fifth of the value of the land. Edward, about to sail, dodged the issue. He could not answer, he said, without his council part of which was already in Flanders, and he did sail on the twenty-second, leaving his son, the young Edward, as regent to grant the barons' demands, for there can be no doubt but that it was understood that he should do so. Early in October the concession was made by the son, and under date of November fifth it was confirmed by the father in a formal grant known as the Confirmation of the Charters.[14]

Clauses 6 and 7 are the essential ones of this document in permanent influence on the future. After an enumeration in the 5th of the taxes and exactions of Edward, the 6th declares: "moreover we have granted for us and our heirs, as well to archbishops, bishops, abbots, priors and other folk of holy church, as also to earls, barons and to all the community of the land, that for no business from henceforth will we take such manner of aids, mises, nor prises from our realm, and for the common profit thereof, saving the ancient aids and prises due and accustomed." Clause 7 relates to the new custom on wool, "the maletote," and provides that the king "shall never take this nor any other without their common assent and good will; saving to us and our heirs the custom of wools, skins and leather granted before by the commonalty." The reservation to the king in clause 6 corresponds to that in Magna Carta chapter 12 and that in clause 7 refers to the "ancient custom" granted Edward in 1275. In a document from the same time whose exact origin we do not know, perhaps a statement of the barons' demands, perhaps an unofficial abstract of the Confirmation,[15] but known to later times as the "statute" *De tallagio*

[14] Stubbs, *S. C.*, 490–493; A. and S., 86–88.

[15] Stubbs, *S. C.*, 443–444.

non concedendo, though it was certainly not a statute, tallage is included among the exactions for which consent must be obtained. It is probable that the word was used in mere carelessness, for that age had not forgotten what tallage was.[16] As an exaction from serfs, theoretically at the lord's disposal with all their property, tallage was not a tax but a return upon capital invested, an altogether different matter. As such the barons had no right to insist that the king should give it up, and he had no idea that he had done so, for he laid a tallage on his domains in 1304.

The document of 1297 is called the Confirmation of the Charters, but the name gives no indication of its place in the history of the constitution; it rather conceals it. As a part of the foundation on which the constitution was built, the Confirmation is hardly less important than the Great Charter itself. If we except the two fundamental principles which underlie everything else, the most important provision of the Charter in its bearing on the building up of the constitution was that previous consent must be obtained for any extraordinary tax, for any not included in the customary feudal payments. The language used is feudal but usage gave to the word "aid" a wide range of meaning, and no doubt to the men of that time such non-feudal forms of taxation as had occasionally been levied, if they thought of them at all, would be covered by it. However this may be, the principle expressed became the ruling one for the century not merely for feudal but for non-feudal taxation, and what is characteristic of the century is the steady growth of non-feudal taxation, as we have already seen. That this provision of the Charter of 1215 was left out of Henry III's reissue in 1225, which became the Magna Carta of the law, made no difference with the practice. The requirement was a part of current feudal law, and it was more consistently obeyed than some of the provisions which remained in the Charter. What the Confirmation of the Charters of 1297

[16] Stubbs, *S. C.*, 493–494; A. and S., 88–89.

did was to restore it to the tradition of Magna Carta and pledge the king and his heirs strictly to observe it, not now however expressed in feudal language but broadened out to cover all the non-feudal taxation of which the time had knowledge.

There can be no question but that the men who framed this document intended to cover all forms of taxation, except the feudal dues, and believed they had done so. And in the future whenever this issue was squarely raised this was the interpretation which was placed upon the principle. From this date on it was never called in question, as a fundamental rule of action, by any English king. Successive kings might try to avoid its effect by inventing new forms of revenue to which they could say it did not apply or by unwarranted extensions of old revenues, but from 1297 it was definitely established as a fundamental law of the constitution that the king was dependent for his revenue upon a previous grant. It is in the form given it in the Confirmation that this principle becomes the foundation of the power of parliament in the fourteenth century and ultimately of the whole constitution.

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CHAPTER VIII

THE GROWTH OF PARLIAMENT

The two great ages in the growth of parliamentary power in the history of the constitution are the fourteenth and the seventeenth centuries for, although there was also great advance in this particular in the sixteenth and nineteenth, the relative advance in these two ages of progress, as determined by the point from which they started, cannot be compared with that in the former two. If the end of the fourteenth century was to see parliament firmly established in its own place in the state, in possession of a considerable body of definite rights which it had defended successfully against the Crown, and clearly to be recognized by us as already the successor of the baronial opposition to be the protector of the fundamental principles of the constitution, it was something very different at the beginning of that century. Notwithstanding all the progress of the thirteenth century, parliament entered the fourteenth still vague and formless, with composition, organization and methods of working still undetermined.

So accustomed are we to think of the English constitution as one in which parliament, or more specifically the house of commons as representing the nation, is in supreme control of all the functions and operations of government that it may require an effort for us to remember that at the beginning of the fourteenth century we stand at the beginning of parliament as the organ of representative government not merely in England but in all history. What it was to be, the share which it was to take in actual government, was still to be determined. As yet nothing was

fixed; the rights and functions of the new institution were vague and undefined; nothing was known even of its possibilities. As the successor of the feudal great council and heir of the principles into which feudal consent to taxation had been transformed during the thirteenth century, that each class in the community should give consent to its own taxation, parliament had a starting point of the greatest strategic value from which to begin its advance to power. How conscious parliament was of the meaning of this advantage we hardly dare to say and at most it was a starting point only. In all probability we must say, as of the age of formation just before, that it was the practical purpose of the moment rather than any theory of government or foresight of a free constitution, that determined each step as it was taken.

The struggle to win full control of national revenues and expenditures was to be long and severe. In legislation hardly even a starting point for the new institution had yet been found, and in the determination of the general policy of the government, parliament foresaw its own future so little that it sometimes vigorously repudiated such an ambition and laid the foundations of its later power in entire unconsciousness of what it was doing. Yet to secure these three things was necessary before modern parliamentary government could come into existence: complete control by parliament of all national revenue and expenditure; the exclusive exercise of the legislative right by parliament, including the house of commons as an equal partner in every act; and the power to determine the general policy which at any moment of time should give character and purpose to the government. At the end of the fourteenth century no one of these had been so far secured as to be beyond future danger, but great progress had been made towards them all and in regard to the first at least but little comparatively speaking yet remained to be done.

If parliament entered the fourteenth century still vague

and formless with respect to its composition and its own internal organization, these questions were speedily settled. Steadily it became more and more the understood thing that a parliament of full powers should contain the two new elements, the representatives of the counties and of the towns. The great council meeting without the new elements retained for a long time something of its old powers, and even the small council acting with the king, in ways that infringed upon the field of parliament, but from this century on these were merely survivals of steadily diminishing significance. A true parliament with full legislative and other rights is the new institution, not the old.

The final form of organization was closely connected with the final method of composition. The ecclesiastical element, the representatives of the general clergy, withdrew before the middle of the century to perform their parliamentary duties in assemblies of their own, called "convocation," which had existed as legislative assemblies of the clergy for a century. This act of theirs was brought about by their determination to keep in their own hands the right to grant their own taxes and, while it is evidence of the thirteenth century right of each class separately to decide what it would give the state, it indicates to some extent a fear on their part that this was a disappearing right. They continued for some time to be summoned to parliament by the *premunientes* clause, but they did not attend as an estate, and retained the right separately to vote their taxes until 1664. By their withdrawal parliament was left to be composed of the second and third estates only, for the bishops and abbots remained in the house of lords as barons, as members of the great council, not as clergy.

By this renunciation of the clergy, however, the question of the number of "houses" in the new institution was not definitely settled. In the thirteenth century the practice of uniting the new elements in one assembly with the great council had been common. In Europe at large practice was

not uniform. In Aragon the knights formed a house by themselves, in most states they joined the barons. In Sweden there were four houses, the representatives of the country freemen acting by themselves; in Scotland there remained only one. Nearly everywhere however the representatives of the towns formed a separate part of the assembly. In England the problem was: will the knights finally associate themselves with the barons in the upper house or join the burgesses in the lower. In the first part of the reign of Edward III the question was settled. In spite of the fact that they were drawn from an aristocratic land-owning class, a minor aristocracy, the knights joined with the commercial class of the towns to form the house of commons. This peculiar result in England was no doubt due to peculiar conditions which were briefly indicated in the last chapter.

The merchant burgher, the political equal of the minor baron in the county court, was in fourteenth-century England regarded as his social equal also, married his sons and daughters into knightly families without exciting opposition, and found no obstacle to the purchase of land or even, if he wished, to the foundation of a knightly family of his own. While barriers of custom and interest were being raised between the great and minor barons, they were being broken down between the latter and the burghers. In the fourteenth century the English knights finally found themselves more at home with the burgesses, and the house of commons was formed by the combination of these two classes. This is probably all that we need to say by way of explanation, the knights found themselves more at home with the burgesses.

This unintended event probably had much to do with the rapid advance of parliament in power during the fourteenth century, for that advance in reality was not that of both houses of parliament equally but of the house of commons. The house of lords considered by itself was relatively of

less importance at the close than at the beginning of the century. The house of commons evidently had in that age admirable leadership, a high degree of self-confidence, and a feeling of equality with lords and royal ministers which were not generally characteristics of the third estate in the Europe of that day nor for long afterwards. The bicameral legislature has been highly praised by many students of politics and by some has been attributed to the political genius of the Anglo-Saxon race. In nearly all constitutions deriving from the English it has been the preferred form, and the choice has vindicated itself in practice. It should be clear however from the history of the formation of parliament that in the fourteenth century it was not the result of deliberate choice, that there was no exercise of political genius in the matter, but that accident, the withdrawal of the clergy, largely determined the result.

It must be noticed also that the formation of parliament created, if not precisely the house of lords since that was the old great council, at least the peerage of England as that came to be understood later. Undoubtedly the essential fact in this creation is that parliament received its definite constitution before any idea of a nobility, of a modern social nobility, took the place of a baronage. The peer was summoned to the house of lords as a baron for a given barony which could be held by only one man at a time. The other members of his family had no place in the house of lords but were free to go into the house of commons and were held as commoners in all legal matters. From this fact largely it happened that the English nobility never become a caste with closed ranks and privileges hereditary in all branches, but was constantly reinforced from the commons and constantly reinforced the commons with its own best blood.

In entering upon the period of its growth parliament had one foundation stone of power already laid for it in the principle of the Confirmation of the Charters of 1297 that

the king must depend for his revenue upon a previous grant. It seems quite certain, however, that parliament discovered only by degrees the use which it could make of this principle in fortifying its position in the state, and that it discovered even earlier that the principle was not quite so comprehensive as the men who framed it probably intended it to be. It was the beginning of a foundation, but the real work of building up the power of parliament had still to be done. If it was to be accomplished, the three things already indicated upon which that power depended had first to be accomplished: first, the establishment of the control of parliament over all forms of public revenue; second, the establishment of the right of the house of commons to an equal voice in all law-making; and third, the establishment of the right of parliament to supervise and direct the general policy of the government. Progress towards these ends, more rapid and farther in some directions than in others, forms the history of the fourteenth century.

Almost immediately after the Confirmation of the Charters the next step forward was taken, the first in the slow process of learning how to use against the Crown the weapon which 1297 had furnished. The guardianship of the constitution which was beginning to form was still in the hands of the baronial opposition, as we have seen, rather than of parliament, but the new step was the first move in the slow crossing over of constitutional development from the line of baronial to that of parliamentary supervision and protection. Edward II was successful before he had been many months in possession of the throne in exciting against himself a vigorous and determined opposition, and, though we must notice that this opposition to Edward II was the most short-sighted, narrow and selfish of any down to its time, it still did follow the precedents of the thirteenth century, it did throw its demands and results into constitutional forms, and it did carry farther the fundamental principles of Magna Carta. In the parliament of 1309, a parliament of

the new type not a mere great council, a grant of taxes was made to the king "upon this condition" that he give attention to a certain list of grievances attached to the grant, of which the commons complained, and find a remedy for them. The list in itself is not important and marks no constitutional advance. It was also a generation or more before the attaching of conditions to grants of money became a recognized feature of parliamentary procedure, and we are hardly justified in beginning with 1309, or with any of the less complete instances which preceded it, the continuous history of parliament's use of the financial necessities of reluctant kings to force them to grant reforms. It is interesting, however, to notice how quickly after it became possible, the new parliament began to make experiment with this weapon, and certainly to establish the precedent afterwards followed.

The reign of Edward II (1307–1327) was of value constitutionally, not so much in the positive contributions which it made towards the up-building of the limited monarchy, as in the precedents it established of coercion of the king which were of assistance later in constitutional crises of a more real kind. A new clause in the coronation oath recorded the progress which had been made since 1215 in clearer conception of the fundamental principles of Magna Carta. Edward was asked: "Sire, do you grant to hold and keep the laws and righteous customs which the community of your realm shall have chosen, and will you defend and strengthen them to the honour of God and to the utmost of your power?" In 1311 the barons, following the precedent of 1258, put the Crown once more into commission in an act called the "ordinances" and made the filling of all the great offices dependent on the consent of the baronage.[1] The ordinances regulated many matters according to the views of the barons, but they were ntirely in the spirit of the Provisions of Oxford and they did not advance the con-

[1] Extracts, A. and S. 92–95.

stitutional development beyond that point, except by making a new and more recent precedent.

In 1322 the king was again strong enough to secure the repeal of the ordinances in an act of parliament whose constitutional importance has been greatly exaggerated. It contained this sentence: "The matters which are to be established for the estate of our lord the king and of his heirs, and for the estate of the realm and of the people, shall be treated, accorded and established in parliament by our lord the king and by the consent of the prelates, earls and barons, and the commonalty of the realm, according as it hath been heretofore accustomed."[2] These words have been supposed by some to secure the constitutional right of the commons to a voice in all legislation, and by others in all legislation of a constitutional character, but both inferences are improbable. The language plainly indicates that no change in past practice was intended, and as a fact none was made, for it was long before either of the suggested rights was gained by the commons. It is not likely that any special emphasis was attached to the word "commonalty," and the sentence does no more than to indicate the advance which had been made in recognizing the place of parliament in the state.

In 1327 King Edward was deposed by a revolution which left him without support. The reason for the deposition was personal hostility to the king, but the "Articles" of accusation placed it upon constitutional grounds,[3] and the precedent rendered a valuable service in the more significant cases of Richard II and James II. The real work of the baronial opposition in the reign has been well summed up in these words: "The best that can be said of the baronial opposition in general is that it sought to subject the king, no less than his people, to the rule of law. The great principle contained in Magna Carta that the king was under the

[2] A. and S., 96–97.
[3] A. and S., 99.

law, was very open to misinterpretation, and the policy of the barons partly lay them open to this charge. Viewed from the best light the aims of the opposition were to secure the omnipotence of law and to lessen the powers the king might exercise to the detriment, or in negation, of law."

In the remainder of the century, in the reigns of Edward III (1327–1377) and of his grandson Richard II (1377–1399), large additions were made to the positive laws of the constitution and the way prepared for others at a later time. These were chiefly, as has been already said, in the increase of the power of the house of commons in the government.

It was in the control of taxation that the greatest progress was made in this age, and from the starting point which parliament thus secured in its sole power to provide revenue, it even reached forward to begin the practice of examining and criticizing the way in which the revenue was used. The men of 1297 when they pledged the king in the Confirmation of the Charters to take no taxes without previous consent may have thought that they had cut off all important sources of revenue, but within a few years they discovered their mistake. The largest and most lucrative product for export of the England of the fourteenth century was wool, and English wool was the chief supply of the rich manufacturing cities which had grown up in the Low Countries across the Channel. The foreign merchants who traveled through England to buy up the wool from the monasteries and manorial lords were not interested in the English constitution nor in the problem of controlling the king through taxation. On the other hand, they were greatly interested in the protection and privileges which the king could give them in the port towns, in the markets, and on the highways of the country,[4] and they stood ready to pay him for what he had to give. Even the native English merchants, though comparatively few in number, were not

[4] *Cf.* Stubbs, *S. C.*, 496–497.

oblivious to the immediate advantage. It was a simple matter to arrange between the merchants and the king an export duty on the sack of wool which was easy to collect and richly productive not merely from the size of the crop but also from the high money value of the pound of wool. This was a difficult matter for parliament to deal with because Edward III argued with much plausibility that the foreigners paid the tax and, though parliament detected the fallacy and insisted that the tax was deducted from the purchase price,[5] it was only towards the end of the reign that the king was finally brought to renounce the practice for good and all.

This method of raising new customs duties by separate negotiation with the merchants was based no doubt on the thirteenth century principle of separate class taxation. There was also left the king by express sanction in the Confirmation of the Charters the possibility of raising some revenue by the old feudal aids and other payments. Of these the only source of revenue approaching the character of a tax was the right to tallage the domain towns.[6] Tallages were taken in 1304, 1312, and 1332. But the towns were now speaking with so weighty a voice that it was not likely that they would long submit to an arbitrary exaction, made even at infrequent intervals. In 1332 at the request of parliament, which granted a general tax, Edward III withdrew the tallage and promised that he would not make use of it again except "as had been done by his ancestors." In form this was really not a renunciation, but tallage was not again demanded.

The power of separate negotiation with the merchants was a more serious matter because of the annual recurrence of the tax, the value of the wool crop, and its relation to the wealth of the country. In 1303 Edward I with the merchants established the *parva* or *nova custuma* on wools and other articles. This was annulled by the ordinances of

[5] Compare A. and S., No. 65, p. 110, with No. 68.

[6] Stubbs, *S. C.*, 497–498.

1311 but renewed by Edward II in 1322 and confirmed on the accession of Edward III, who later with his council imposed other taxes of the kind. Repeatedly parliament or the commons petitioned against these exactions or attempted to set up a precedent in its own favor by granting a similar tax. In 1253 the *nova custuma* was made a legal grant by parliamentary action incorporating into it the statute of Staples. In 1340 it was solemnly enacted, as one of the conditions of a grant of money, that no charge nor aid should henceforth be made but by the common assent of the prelates, earls, barons and the commons, and that in parliament.[7] This act was intended to remedy the defects of the Confirmation of the Charters, but the king yielded reluctantly, and it was necessary to repeat the prohibition in 1362 and 1371. It can be said however that the precedents of the reign do fill out the deficiencies of the Confirmation of the Charters, so far as experience had yet revealed them, and vest the granting of all legal revenue, not now in the vague "common consent of the realm," as in 1297, but clearly and definitely in a parliament of which the house of commons was a fairly equal part.

Through these experiences also parliament was brought to a full understanding of the nature of the weapon which its control of taxation had given it. In 1339 the commons, complaining of grievances, postponed a grant to the next parliament and in 1340 drew up a formal list of reforms which they attached as conditions to their grant and which the king consented to make.[8] In 1344 the same precedent was followed, and in 1348 it was insisted that the redress of grievances must precede the granting of a tax, and the precedents of 1340 and 1344 were followed on an even larger scale.

The long war with France which filled so much of the reign of Edward III created a situation peculiarly favorable

[7] A. and S., 104–105.
[8] A. and S., 102–104.

to parliament. The king was in constant need of money and it would very naturally seem to him more than once that what he expected to gain in France was more important than the concession which parliament was at the moment demanding. No earlier English king had been obliged to ask for such frequent grants of money as Edward III. To the members of parliament, not familiar with the heavy expenses of the war, it seemed not unnaturally that the money must somehow be wasted. They were disposed to demand an explanation and to say to the king: What have you done with the money which we gave you last year for this same purpose? The king knew very well, however, the weight of expense which the war entailed, and it may quite likely have seemed to him that an easy way of proving his faith was to allow parliament to elect the treasurers who should collect and spend the money granted, and to allow the treasurers to exhibit their accounts in parliament, or to let them be audited by a parliamentary committee.

In 1340 a parliamentary committee was appointed to examine the accounts of the collectors of the last grant. In 1341 it was enacted that commissioners should be appointed for the same purpose. In 1344 parliament demanded that the money granted should be spent for the purpose for which it had been asked. In 1348 it granted money specifically to defend the realm against Scotland. In 1353 the wool tax was to be used for the war alone. In 1377 parliament appointed two persons, sworn in parliament, to receive the money granted and to spend it for the war and for nothing else.[9] Edward knew the honesty of his own intentions and what interested him most was that by such a simple expedient parliament could clearly be convinced that the king had spent the money as he had engaged to spend it. Neither the king nor parliament understood what was involved in this innocent-seeming beginning. It was in truth the starting point of parliamentary appropriations, of

[9] A. and S., 136–137.

appropriating the national revenue to government expenses in detail, which modern Anglo-Saxon parliaments practically regard more highly than the more fundamental right of granting the revenue, because it secures in a high degree though indirectly a control of government policy. If parliament refuses an appropriation for a specific purpose, government must abandon that purpose. No one in the fourteenth century, however, saw this possibility and though the practice begun under Edward III became the rule under Richard II and was carried still farther in the Lancastrian period, parliament was not fully enough developed even in the fifteenth century to understand all that this right might mean and to defend it. Modern appropriations to minute details of government expenditure had to await the full establishment of parliamentary powers at the end of the seventeenth century.

It was an easier and simpler matter to establish parliamentary control of all taxation than to secure the equal voice of the house of commons in all legislation. In taxation an old process, the granting of money by the separate estates, was naturally inherited by parliament and merely expanded to meet new conditions. In legislation there was much less to inherit and expand. Legislation, as a process in which the actors had a clear consciousness of what they were doing, was newer than taxation. There had been much legislation during the feudal age but of a different type from the modern. It was closely associated with the judicial functions of the assembly, and in feudal theory the actual decision that a thing should be law was the king's act only, as the decision in a law-suit was his alone. In both cases the decisions must be with the advice and assent of his barons, but in both cases his veto was absolute and no initiative belonged to the barons except by way of petition. The new representative elements which had been united to form the house of commons appeared nowhere in the feudal process of legislation, except as knights may occasionally have at-

tended the great council as minor barons, probably without influence on its conclusions.

Change had been slowly coming on in the thirteenth century. A more definite idea of law had been growing up. Before the middle of the century the distinction was beginning to be felt between enacted law and the law which was custom only. The word "statute" was coming into use and the statute itself was being recognized as something by which the courts were bound whatever the custom might be. As yet the distinction between the old method of legislation and the new, between statutes and ordinances, could not be made, though both words were in use, because the new method had not yet begun. It was in that century, however, that the rise of the third estate to a new position in the community began to affect the process of legislation, as we have seen in the enactment of the statute *De mercatoribus*. The model parliament of 1297, though so far as we know it did not legislate, may be taken to date the admission of the new elements to the possibilities and rights in legislation of the old great council. But it was at first to no more possibilities or rights than the great council had; parliament in the fourteenth century had no right of initiative except by way of petition, and the king and the great council, or the king and his small council even, had for some time an equal right to legislate.

In this situation we have the elements of the parliamentary struggle of the fourteenth century over legislation. We have also the fact clearly indicated that the chief practical difficulty to be overcome in establishing modern legislative methods was not to get the right of the house of commons to start the process of legislation by petitions recognized. That was an easy matter. The difficulty was to establish an exclusive right for the new legislation, to drive the older method of council legislation completely out of the field and limit all law making to parliamentary petitions. This was the purpose which the house of commons set before

itself in the fourteenth century, perhaps unconsciously, perhaps because it seemed to be the only way to accomplish the practical purpose they had for the moment in view, and so great was the task to prove that it was not completely accomplished until many generations later.

A part of the difficulty was to make sure that the statute, as recorded on the statute roll, conformed to the petition of the commons. The practice inherited from earlier times was that the formal statute to be entered on the roll was written out from the petition and usually after parliament had dissolved. This gave to the king an opportunity to tamper with the statutes of which he did not approve without making a square issue at the moment with parliament. In some cases nothing was done; the petition was quietly passed over. In 1341 Edward III refused to recognize as a statute the demands of parliament to which he had formally consented before the dissolution. Sometimes a saving clause was introduced into the statute changing its effect; sometimes it was left without provision for its execution; sometimes additions were made changing its application. The abuses from these unsettled practices were more extreme in Richard II's reign than in Edward III's, but in the earlier period a consciousness of the principles involved was growing. In 1344 and 1377 parliament petitioned against statutes made by king and clergy without consulting it. In 1340 parliament itself appointed a committee to convert its petitions into statutes. In 1348 it insisted that the answer given in parliament should not afterwards be altered. The statute of laborers was first in 1349 an ordinance and afterwards a statute. The same was true of the statute of the staple in 1353. In 1363 parliament was asked whether it preferred that legislation on a given subject should be by ordinance or statute and it chose the former in order that amendment might be easier, showing that ordinances were not considered of so permanent a character as statutes.

Practically in the fourteenth century the right of the com-

mons to have a voice in the making of every statute law was indeed conceded, but this concession did not entirely solve the problem. King after king, who desired a little more freedom in the making of laws than parliamentary restrictions allowed, found a suggestion in the tradition of the powers which king and council had once possessed, and tried to galvanize something of life into the survivals of council legislation in ordinances and proclamations, as he tried to escape complete financial dependence by inventing new forms of revenue. Even today the "order in council," which is the surviving descendant of the older form of legislation, though now made under strict parliamentary supervision, has a wide range of possibility. We easily remember the part which such orders have played in affecting relations between England and the United States, and a modern English scholar has said of his country: "the extent to which we are governed at present by orders which hardly come within the direct cognizance of the legislature is much wider than most people are aware of."

In the third particular, in securing control of the policy which should be followed by the government, parliament made even less progress during the fourteenth century than it did in the other two lines of advance. We have already noticed briefly how by taking advantage of the king's financial dependence the foundation was laid of the modern practice of appropriations, and by a development of the practice such a control might have been reached, but no more than a beginning was made in this way. The old method of the baronial opposition also was not developed, though not forgotten, for in 1341 a demand was made that the great officers and the judges should be appointed in parliament. Not long after the middle of the century, however, another process was devised, better suited to medieval conditions and, when put into use, very effective in checking the carrying out of an anti-parliamentary policy. It may indeed be looked at as wider in its range than the mere control of a particular

governmental policy and be regarded as the best of the medieval attempts to find institutional expression for the limited monarchy, of the attempts to devise institutional forms through which the king could be controlled without the danger of revolution and civil war. Considered in this way, it was the highest and most successful institutional expression of the limited monarchy until the most recent times, so successful indeed that in theory it still forms a part of the Anglo-Saxon constitution — the process of impeachment,[10] first used in imperfect form in 1376 against ministers of Edward and in 1386 against Richard's minister, the earl of Suffolk.

As a process it is not necessary to describe impeachment since such a description forms a familiar part of the constitution of the United States into which impeachment passed from the English constitution. We need merely say that the new elements, the house of commons, not forming part of the old curia regis did not inherit a share in its function of trying cases and therefore was left free to act as the accusing body in the new process. In principle the process rests on the doctrine of ministerial responsibility as the middle ages understood it, a doctrine which came to be expressed in the maxim "the king can do no wrong." This political maxim is not, as it seems to be at first sight, the corner-stone of an absolute monarchy. It is rather one of the foundation stones on which the limited monarchy was built. For it does not assert that no wrong will be done by the government, nor that anything that may be done by the government is right. What it says is that when wrong is done by the government, it was not the king who did it but his minister. As was said by Sir Dudley Digges in opening for the house of commons the impeachment of the duke of Buckingham in 1626, one of the first steps of parliament against the royal ideas of Charles I: "The laws of England have taught us that kings cannot command ill or unlawful things.

10 A. and S., 132–135; 148–150.

And whatsoever ill events succeed, the executioners of such things must answer for them."

In this interpretation of the impeachment process may be seen both the part which it played in the development of the constitution and the way in which it fell into line with earlier attempts to give institutional expression to the limited monarchy. If the king were personally held to a direct responsibility for his acts, there would always be great danger of civil war. For it is not often in history that a king is found so thoroughly bad that no party is left that will rally to his defence. But a minister can be held to a strict responsibility with far less danger. And yet when the ministers of the king have been taught that, if they insist upon carrying out his policy in opposition to the will of parliament, they will be held to a strict accountability for their acts, a very serious obstacle has been placed in the way of an irresponsible and arbitrary monarch.

The practice of impeachment rested clearly upon the doctrine of ministerial responsibility, as does modern cabinet government, but the medieval doctrine was so different from the modern in idea and in method of enforcement that the two must be recognized as distinct in character and in origin, as will be shown in more detail later. The modern minister is not responsible to parliament in form at all, but to the king. The responsibility which he is actually under is indirect and disguised. The medieval minister was responsible directly and immediately to parliament. The impeachment process was a criminal trial. The lower house of parliament, the house of commons, acting as an accusing body, drew up charges against the minister and brought him to trial upon them before the house of lords acting as a court of law in continuation of the judicial function of the old great council. The trial might end in acquitting the minister or the upper house might find him guilty and inflict upon him heavy penalties or even a sentence of death. It was a responsibility terribly direct and immediate, as if parliament

had appointed the ministers itself, as medieval parliaments did in some cases. Its purpose and effect are, however, equally clear. It was the final and best result of the medieval experimenting to devise some constitutional form which, like the board of twenty-five barons in Magna Carta or the commissions created by the Provisions of Oxford, should be able to hold the king to a real responsibility while avoiding as far as possible the danger of civil war and revolution. It was because the result reached by the middle ages in this direction was so good, that it passed into the modern constitution, where it is really an obsolete survival.

Impeachment is the sign and striking evidence of the growth of parliament in power during the fourteenth century, but it is a sign of far more than appears on the surface when it is regarded as an institution merely. It should in addition be considered as result, and as result it not merely brings into a single expression the advance made during the century, but it also indicates how all the lines of progress of the century, brought to a focus, became the vital impulse of a new progress in the future.

In establishing its power in various particulars — the financial dependence of the king, the legislative dependence of the king, the dependence of the king at least partially in matters of government policy, parliament had really been doing one greater thing. It had been enlarging the body of law which the king was bound to observe as that had been stated in Magna Carta. It may be said rather that it had been transforming it. Political feudalism no longer existed. The services to the state, for whose performance it had once been necessary, were now better got in other ways. Many of the rights on which the barons had once insisted in Magna Carta were obsolete and forgotten. The baron himself was disappearing. He was becoming the modern noble to whom a title and a good income and a place at the king's court were more important than his old feudal independence. But the fundamental principle of Magna Carta was neither obso-

lete nor forgotten. At no moment in all the progress and transformations of the past had it been lost to sight. The king was bound to keep the laws which seemed to the nation at any stage of its advance necessary to its interest and fundamental statements of its rights.

In more specific statement, in making a place for itself in the state during the fourteenth century and laying the foundations of its future power, parliament had bound the king almost completely in taxation, a little less firmly in legislation, and slightly in fact, though decidedly in possible developments, in the control of government policy. These were the new fundamental laws of the state which took the place of, were transformations of, the principles of feudalism which Magna Carta had formulated. They were the new foundations of the constitution by which the king was limited, in addition to some surviving principles of the Great Charter which occupied, however, a less conspicuous place in public law, like those relating to purveyance and judicial matters. Inevitably it followed that parliament by establishing these limitations became the guardian of the constitution which rested upon them, in place of the baronial opposition which through the whole thirteenth and early part of the fourteenth centuries had performed that function. This change was of immense importance in the formation of the limited monarchy. Leadership passed from the unorganized, short-sighted and self-centered opposition of the barons, so often personal in character and to which a continuity of purpose was scarcely possible, nor even the intelligent accumulation of precedent. The directing of the advance passed over to an institution whose activity was never suspended, which allowed nothing that had been gained to be forgotten and which was capable of continuous growth and adaptation. The process of impeachment as resting upon the principle that the agents of the king's policy were responsible directly to parliament, and that therefore the king was under parliamentary control, is the

institutional expression of the fact that the guardianship of the constitution was in the hands of parliament. Putting all these things together we may say, that the large outlines of the constitution had now been fixed, to be filled in more fully in later times, and from now on the formation of the limited monarchy went on, not without reaction, but consistently and without permanent loss.

In describing this change, I have not intended to imply that parliament was conscious that it had taken this place or that it understood the larger significance of its own position. The events of the next generation, however, were of a sort almost to give us the right to say that the king for his part was conscious of the situation, and what it implied for the future of the royal power, and the results of what he attempted to do in consequence certainly advanced parliamentary understanding. The reign of Richard II began with a minority during which the practical supremacy of parliament was evident and the precedents of Edward III's reign were confirmed. Even the council, the special organ of the king's activity, was almost a creature of the parliament.

The last quarter of the fourteenth century was an age of revolutionary tendencies in several directions. A great economic change was taking place, affecting decidedly the position of the agricultural laborer, partly as a result of the Black Death, and leading to the peasant insurrection of 1381 and to the more rapid extinction of villenage. Wycliffe and his followers were teaching doctrines revolutionary in religion and theology with possible political applications equally revolutionary. Revolution in the field of government was favored by the almost too rapid advance of parliament's power, by the prevalence of faction, and later by the character of the king. Factional strife was an inheritance from the bad days at the end of Edward's reign, but it was encouraged by the circumstances in which the first strict application of the principle of primogeniture had been made

to the succession to the Crown. Richard as a minor had succeeded his grandfather while his uncles were men of mature age, of wealth and influence and not lacking in ambition. If we were sure of the interpretation which we ought to put upon the policy of the king, the reign of Richard II might easily seem to us the most interesting and instructive period of the medieval history of the constitution. As it is it sums up the progress which parliament had made and reveals a constitutional monarchy already in existence, not as yet in the details of government but in broad outline.

Parliament took full advantage of the minority of the king to follow the precedents which it had inherited both from the baronial opposition, precedents of control of the council and official appointments, and from parliament's gains under Edward III, precedents of control of taxation and expenditure [11] and the use of grants to compel concessions and also of its sole right to legislate. When Richard came of age, he showed himself of violent temper, disposed to extravagance and to selfish disregard of public interests and impatient of restraint or criticism. During the stormy periods of the reign, there was a combination together against the king of the traditional baronial and of the new parliamentary opposition. Emphatic acknowledgment of the power of parliament was more than once made, however, beginning before the death of Edward III, by the careful packing of the house of commons with the adherents of one faction or the other, accomplished through the control of the sheriffs who were the returning officers.

During the time of extreme opposition, near the end of his minority, Richard was expressly threatened with the fate of Edward II,[12] and was twice forced to yield completely to parliament or to the "lords appellant." Finally by a *coup d'état* of his own, he overthrew the latter and brought his minority to an end. Then followed a period of nearly eight

[11] A. and S., 136–140.
[12] A. and S., 150.

years of almost constitutional government. The character of the king seemed to have changed, but many have thought that he was merely waiting his opportunity of revenge. A king who knew anything at all of the meaning of monarchy could hardly fail to appreciate the position in which Richard had found himself as a result of the growth of the constitution. We cannot say from any direct evidence that Richard had learned this lesson and that he determined to reëstablish the personal and unlimited government of the Crown which his ancestors had possessed. We can say, however, that what he did in the last years of his reign is what he would have been likely to do, if he had understood his position and with great skill formed such a plan. His acts seem consciously and definitely shaped to carry out such a purpose.

It is significant of the power of parliament and of Richard's perception of it that he felt obliged to use it to carry out the first items of his programme and to get the foundation laid for his absolutism. He both packed it with men whom he could trust after earlier fashion, and overawed it with troops of Welsh archers in his pay. His first step was to establish the principle that members of parliament could be held to a direct responsibility to himself for their words and acts in parliament and severely punished under an accusation of treason, by securing, in 1397, a sentence of death upon Haxey, a member of the house of commons, for introducing a bill to which he was bitterly opposed. The sentence was not executed, but the principle, put into operation, would destroy all possibility of opposing the king through parliament. He then obtained from a parliament which would refuse nothing a grant of the revenue from wool for his life and the appointment of a committee, controlled by himself, in which the powers of parliament were vested.[13] In the form given it, this was only a beginning, but it was one that could have been developed in time into complete legislative independence. He added unauthorized,

[13] A. and S., 159–160.

arbitrary taxation, and he took an even more extreme step without parliamentary sanction and assumed the right to nullify acts of parliament by falsifying the records or by the suspension of a statute by prerogative action.

If these different successes of the king be considered together, it is hard to avoid the conclusion that he was acting upon a definite plan and it is easy to see how little of the constitution would be left, if they were made permanent. They would constitute the foundation stones of an absolutism as complete as that which Richelieu afterwards perfected upon the same foundations, just then beginning to be laid by Charles the Wise on the other side of the Channel. The last three years of Richard's reign form the first dangerous crisis through which the English constitution passed because of the skilful and systematic attempt of the sovereign to turn back the tide of advance. Happily his attack on the fundamental laws of the state was accompanied with acts of personal tyranny which furnished the opposition with a leader. Under Henry of Bolingbroke the nation rose against the king and it was speedily discovered that Richard's conduct had left him for the moment almost without supporters. The revolution of 1399 was practically bloodless.

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CHAPTER IX

PREMATURE CONSTITUTIONAL GOVERNMENT

Henry of Bolingbroke, in leading the revolution which overthrew Richard II, probably had little personal interest in the constitutional aspect of the crisis. His was naturally a personal interest to secure the Lancastrian inheritance, which the king had seized, and the ambitious prospect which the opportunity offered. But he was interested to make full use of the advantage which the opposition to Richard's tyranny had created and without it he could not have succeeded. That opposition, though very likely to a great extent a factional baronial opposition, little more far-sighted than the opposition which at various times in the thirteenth century had wrested concessions from the king, gives, as in the earlier cases, a clearly constitutional character to the revolution of 1399. In forming an estimate of the revolution, we must also take into the account the progress made by the house of commons under Edward III for, though the commons do not play a leading rôle in the overthrow of Richard, the total absence of any support for the king is significant. As an objective historical fact, as truly as in the later revolution of 1688, the action of the nation saved the constitution from the destruction threatened by the policy of the king. It cannot be asserted that in 1399 the nation understood either the constitution or the danger as clearly as in 1688, but it is asserted that both existed as truly in the earlier as in the later case and that both were at the time to some extent consciously perceived. As to the constitution, all the main lines of it as it exists today had been laid down in principle by 1399. Hardly anything had

yet been done in applying its principles to the details of goverment. The fifteenth century was to be the first age in the process of making such application; but the principles existed. Many facts make it evident to us that what we may possibly begin to call the public opinion of the nation was coming to understand something of the character of constitutional law and of the importance of doing things even in a revolutionary time as nearly as could be according to precedent and established forms, that it was beginning to appreciate the position which parliament had secured in the conduct of government, the position to which the king had been reduced and the practical difference which would be made if the king should succeed in throwing off the restrictions which had been put upon him. If, however, one considers not how complete the national understanding was in 1399, but the historically more important question what was really at stake in that crisis, as we can see it from our knowledge of the later history, the accuracy of the parallel with 1688 is clearly established. It was also undoubtedly its constitutional character which gave the revolution its speedy success.

It was in this respect also complete. The house of Lancaster came to the throne dependent upon the support of the nation for the possession of a crown won by revolution, logically pledged to recognize the rights which parliament had secured during the fourteenth century and to allow the full exercise of the powers which Richard had attacked. The new king was pledged also to the same policy by the force of circumstances, for Henry IV, the product of the revolution, himself in constant danger of counter revolutions, was too dependent upon such support as he could win to adopt a policy of aggression in any direction, or to antagonize so strong an institution as parliament had become. His reign seems a very mediocre one, despite Henry's undoubted abilities, because he found himself obliged in everything to take a moderate and middle course. His son and successor,

Henry V, the Prince Hal of Shakespeare, felt himself strong enough to renew the war with France and made himself a great name by the victories he won, but his long campaigns kept him away from England and left the government there necessarily in other hands. His premature death brought his son, Henry VI, to the throne while a babe in arms, and a long minority and, after he came of age, the king's mental and physical weakness, tended still to maintain parliament's general control.

For this long period of sixty years parliament's authority was unquestioned, nor did the Lancastrian kings show at any time a disposition to question it. Their natural inclination seemed to be, so far as we can judge it, to rule in harmony with parliament. It was a period of unbroken constitutional government. Startlingly and prematurely modern, I have called it in another place, and though the machinery of constitutional government had as yet been worked out in few details, it was in spirit modern. Parliament seemed aware of the security of its position and busied itself on one hand with perfecting details and on the other with strengthening its control. It used the king's council as its own instrument, and, most remarkable of all, we seem to be able to detect the faint beginnings, amid somewhat similar conditions, of that change in the relations between council and parliament out of which, in more modern times, the English cabinet system grew. But even parliamentary control of the council, through which the daily government of the country was carried on, could not prevent the rise of those factious rivalries among the great men of the day which led in another generation directly into the civil wars of the Roses.

It was indeed a period prematurely modern. It was constitutional not because the constitution was solidly founded and firmly fixed and fortified in possession of the government, not because the constitutional way seemed the only natural way of doing things, but rather because of circum-

stances somewhat temporary in character: the insecurity of the king, his absence, his infancy, or his personal weakness, left parliament really alone the strongest factor in the government. It was the best result of such a period that constitutional government grew to seem more normal. The habits of thought and action then formed were more important than the precedents established, and one great reason why the constitution survived the next age was that in this one it had become more firmly a part of the national life.

What conclusion the best thought of the time had reached about the place of the king in the government may be indicated in the words of a contemporary student of the English constitution, which are "so explicit and weighty that no writer on the English constitution can be excused from inserting" them, as Hallam says, in the third part of his chapter on the English constitution in his *Europe during the Middle Ages*. Sir John Fortescue, who had been chief justice of England, had had his training and almost all his active life in the Lancastrian age. In his book *In Praise of the Laws of England*, written early in the reign of Edward IV, he said of the king: "He can neither make any alteration or change in the laws of the realm without the consent of his subjects, nor burden them against their wills with strange impositions." And again: "As the head of the body natural cannot change its nerves and sinews, cannot deny to the several parts their proper energy, their due proportion and aliment of blood, neither can a king who is the head of the body politic, change the laws thereof, nor take away from the people what is theirs by right, against their consent. Thus you have the formal institution of every political kingdom, from whence you may guess at the power which a king may exercise with respect to the laws and the subject. For he is appointed to protect his subjects in their lives, properties and laws; for this very end and purpose he has the delegation of power from the people and he has no just claim to any other power but this." These

may be the words of a philosophical student of government, but there can be no doubt that in essence Fortescue was right. At that date the principle had been in reality established that the royal power was a delegation from the people, although it was to be two hundred years longer before that principle could be fully carried out in the practical government of the country.

One new parliamentary right which the revolution of 1399 went a long way towards establishing should not be passed over — the right of determining the succession to the crown. By this is not meant the larger and more important right of deposing a king who could not otherwise be controlled. The right of deposition had been made in a sense constitutional by Magna Carta, as the foundation upon which rested the smaller and included right of temporary suspension asserted in chapter 61. That right of temporary suspension for bad conduct had been exercised by the great council in 1258 and again in 1310, and the more complete right of deposition had been exercised against Edward II in 1328. But more than this was done in 1399. Parliament assumed the right to pass over the line marked out for succession by the principle of primogeniture, lately established in English law, the principle of strict hereditary succession by blood, and to place upon the throne the younger line, the house of Lancaster.

Henry IV was the son of John of Gaunt, Duke of Lancaster, the third son of Edward III. The elder line was represented at his accession by Edmund Mortimer, Earl of March, grandson through his mother of Edward's second son, a child of eight years of age. Late in the reign of Henry V, this title to the throne passed to the house of York through a sister of the earl of March. There is plenty of evidence to show that the men of the time were quite aware that in making Henry king they were passing over the direct line according to the principles of succession by that time established in English law. There is

less evidence to show that they understood the enlargement or new application of the powers of parliament which they were making in the act. They were in reality giving the throne to the house of Lancaster by what came to be later called a parliamentary title and to be regarded in constitutional law as the best of all titles.

Whether there was in the mind of any one at the time antiquarian justification for this action of parliament in a reminiscence of the acts of the Saxon national assembly in regulating the succession among the members of the royal family, or of the great council in passing over Arthur in favor of John two hundred years before, is really not of importance. There is no historical line of connection between the earlier and the later facts; there had been no continuity of practice, no inheritance of constitutional law. The action of 1399 was, as a part of the constitution that was taking shape, new and formative.

Logically this right was of course involved in the older right of deposition, but its exercise in the new form was destined in the immediately following centuries to attract to itself more general interest and to be more useful to parliament than the greater right from which it was derived. Indeed as early as 1460 it led to a most significant declaration of the power of parliament clearly anticipating the future. When the duke of York after a decisive victory over the Lancastrians in the field unexpectedly called upon a Yorkist parliament to recognize his better right to the crown, as standing for the elder line, the house of lords gave as one of its reasons for refusing his demand the fact that the entailing of the crown upon the house of Lancaster by act of parliament created a better title to the throne than any other could be.

The fifteenth century stands in sharp contrast to the fourteenth, not in the exercise of parliamentary power but in its increase. The great creative advances possible to the political foresight of the middle ages had been made. There

was no experience of constitutional government in the past to which the leaders of the fifteenth century could turn for guidance. They could have no ideal of a perfected limited monarchy, institutionally complete in all its parts, which they could strive to reach as a final result, nor any clear conception of the future dangers to their work from which they ought to guard it. In all the stages of this historically new work of creating government by the people, it was the practical need of the moment which determined what was done, not any theoretical conception of the end to be reached. The fifteenth century was satisfied with the results which had been gained, and felt no immediate need of farther advance. Since this work was new to all experience, it was fortunate also that there came after the rapid progress of the fourteenth century a period of three generations, as medieval generations must be reckoned, of comparative quiet, comparatively stationary. The operation of constitutional government, the supremacy of parliament, the doing of all sorts of things by parliamentary action, became to a degree in so long a period things of habit, and this habit of parliamentary authority, as has been said, formed a solid substratum of constitutional right underlying all the superficial reaction of the next century.

And so parliament from 1399 to 1460, carrying on the government as a matter of course, concerned itself in strengthening its position not in large things but in small ones. It was busy about the establishment of the so-called privileges of parliament: freedom of debate, which perhaps can hardly be called a small thing; the freedom of members from arrest; the right of the house of commons as distinguished from the upper house to originate taxation, to determine the qualifications of members, and to discipline and punish members and disrespectful outsiders; the regulation of the right of suffrage in the counties; the extension of the practice of appropriations; and the improvement of the process of legislation.

The question of freedom of debate was an inheritance from the despotism of Richard. The case of Haxey had revealed the necessity of guarding against the interference of the king, if parliament was to exercise any check upon arbitrary government, and shown also the dangerous weapon at the command of the king in a charge of treason. It was natural that a right so fundamental to the power of parliament should be one of the earliest attacked in the first attempt of the executive to overthrow the constitution and that its real character as the parliamentary privilege "without which all other privileges would be valueless" should not be fully understood until called in question by such a crisis. Haxey had been released before the fall of Richard, probably because he was in holy orders, but in the first year of Henry IV he petitioned that the judgment against him be reversed and this was done by the house of lords, and the reversal was repeated the same year on the petition of the commons,[1] together equivalent to action by the whole parliament. The next year the speaker of the commons declared to the king that certain members of the house were accustomed to report to him, the king, on matters before them "before the same had been discussed and agreed upon among the said commons by which the king might be incensed against them or some of them" and asked him not to take notice of such reports, and this the king promised not to do.[2] In 1407 a more formal declaration was made by the king "that it shall be lawful for the Lords to commune among themselves in this present Parliament and in every other in time to come, in the absence of the king, of the state of the realm and of the remedy necessary for the same. And that in like manner it shall be lawful for the commons on their part to commune together of the state and remedy aforesaid."[3] These declarations established the

[1] A. and S., 167.
[2] A. and S., No. 108, p. 172. *Cf.* Nos. 107, 109.
[3] A. and S., 175–177.

theoretical principle, as the basis of the privilege, that the king does not know what is said in debate, and they remained the constitutional form of the principle until the case of Strode in 1512. Strode had been tried and punished by a local court because of measures he had introduced into parliament relating to the tin miners of Cornwall. Parliament thereupon passed a statute declaring his condemnation void and forbidding all such action in the future against members of the house of commons.[4] This meant freedom from interference by outside authorities rather than the principle of freedom of debate, but this latter, though it may have been admitted by the king, was not certain to be always respected, because in times of tendency towards a strong and arbitrary government it would be almost necessarily limited in some form.

Of far less importance except in the earliest times and of scarcely any importance today, is the privilege of members of parliament to freedom from arrest during a session and in going to and returning from one.[5] The privilege had existed from the days of the Saxon assembly, which had possessed it in common with other Teutonic assemblies, but it was formally recognized by Henry IV in 1403 and regulated and extended by statute under Henry VI. Of some public value in times when arrest upon civil process was frequent, it was never extended to arrest upon criminal charges and it was always most difficult to protect against the infringement of the sovereign in times when it was most needed.

During the fourteenth century the older practice of the separate taxation of each estate by its own representatives was gradually abandoned, except for the clergy, and a grant of money approached more nearly the character of an act of parliament. So far as we know, this change was first expressed in the form of the grant of 1395. The grant of that year was said to be made "by the Commons with

[4] A. and S., 224.
[5] A. and S., 191–193, 196–197.

the advice and assent of the Lords," a form of words which seems intentionally to emphasize the originating function of the commons. This was emphasized again by Henry IV in the declaration of 1407 already quoted. He agreed that no report should be made to the king "of any grant by the Commons granted and by the Lords assented to . . . before the Lords and Commons shall be of one assent . . . and then in the form and manner accustomed, that is to say, by the mouth of the Speaker of the Commons." [6] These citations indicate, not the formulation of a constitutional right in legal form but the growth of a custom, and the right of the commons remained a customary one until into the seventeenth century, though it must be noted that, so long as the old great council continued to be occasionally summoned to meet by itself, it remained possible for it to grant a tax to be paid by the second estate only. It should be noted also that the conscious meaning and binding force of these precedents at the time may easily be exaggerated, and undoubtedly the seventeenth century did exaggerate them in its struggle with the Stuarts. As the beginning of a tendency, however, they gave legitimate foundation for the conclusion which was later based upon them, even if that was more nearly a logical deduction than a historical fact. Looked at in another way, moreover, as demands of the house of commons, they reveal a consciousness of position and power which shows the progress which had been made in the fourteenth century.

It was with reference to the representatives of the counties that parliament first began to lay down qualifications for membership in the house of commons. Little concern was shown during the middle ages for the qualifications or the manner of election of the burgesses. But the county members were "knights of the shire." As feudal distinctions had declined when parliament began and membership in the commons had not yet become in itself attractive, the

[6] A. and S., 175–177.

first precedents of parliamentary control of qualifications were made in trying to maintain the requirement of a rank for the representatives of the counties above that of the common freeman. In the fourteenth century the king had found this difficult to do and in 1445 the attempt was made to do it by parliamentary statute,[7] requiring those elected to be gentlemen born. This legislation scarcely produced immediate effect, though the increasing power of parliament gradually brought about the desired result by making membership more attractive. An enactment of 1413, repeated in 1430 and 1445, required that members should reside in the locality they represented, but probably this act was intended less to define the qualifications of members than to check the practice of the sheriffs, as returning officers, of packing the commons with their own nominees.[8]

The first statute determining who should be electors in the counties belongs also to this period. By an act of 1430, added to in 1432, which remained in force for four hundred years, until the reform bill of 1832, the right of voting in the election of county members was limited to the famous forty shilling freeholder class: the elector must have "free land or tenement to the value of forty shillings by the year at least above all charges."[9] This act has been called a disfranchising statute, but it is a question whether the preamble does not honestly state the reason for its enactment: to prevent the rioting and disorder occasioned by the unruly numbers gathered at elections. It seems to have made little difference in the kind of persons elected and the statute of 1445 was still thought necessary. There was no regulation of the borough franchise by parliament until the nineteenth century, each borough being left to regulate the matter itself according to its own local customs of election.

In the control of expenditure and the appropriation of

[7] A. and S., 195.

[8] A. and S. 179–180; *cf.* Nos. 111 and 113.

[9] A. and S., 190–191.

supply to particular objects, parliament developed the precedents of the previous century to such an extent that, if constitutional growth had continued steadily along the lines of the Lancastrian age, modern practices might have been shortly established.[10] It was commonly specified that the grants of general taxes made the king were for the defence of the kingdom, tunnage and poundage, now beginning to be granted for life, was assigned to the navy, a portion of the customs on wool to the maintenance of Calais, and the income of the crown domains to the expenses of the household. The beginning was in the right direction, for in the daily carrying on of the government modern parliaments have found the limiting of expenditure a more effective means of controlling the executive than the power to withhold supplies, but in the reaction in favor of a strong monarchy which followed the Lancastrian period this advantage was lost and had to be recovered or perhaps more accurately gained anew, in the seventeenth century.

In the improvement of the process of legislation the chief change was that parliament finally overcame the danger that the statute based upon their petition might be something different from the one they had requested. In 1414 a definite pledge was obtained from Henry V that nothing should be added to petitions beyond what was included in them, the king expressly reserving the right to reject petitions and apparently also parts of petitions.[11] Under Henry VI a further and final step was taken by what is commonly referred to as the substitution of bills for petitions. The bill embodied the statute requested exactly in the form in which it was to be enacted, so that the opportunity of making changes in drawing the statute up was cut off. If this form of legislation was first made use of by the king for convenience' sake in the bills originating with him, the commons were not slow to see the opportunity offered

[10] A. and S., 178–179, 182–184.

[11] A. and S., 181–182.

them to take advantage of it, really putting themselves on a par with the king in the initiation of legislation in possibility if not in present fact. Some relics of the form of petition long survived in the forms of acts of parliaments, and in financial legislation to the present day. An act of Elizabeth's reign opens: "In their most humble wise beseech your most excellent Majesty your faithful and humble subjects . . . in this present Parliament assembled . . . that with your Highness' favour and royal assent it may be enacted . . ." [12] The preamble of a modern money bill reads: "We your Majesty's most dutiful and loyal subjects the Commons of the United Kingdom . . . have freely and voluntarily resolved to give and grant . . . and do therefore most humbly beseech your Majesty that it may be enacted and be it enacted . . ." But these forms had long lost all practical meaning.

In one particular a considerable change was made in the work which the fourteenth century had accomplished and the change illustrates well the character of this time and for a different reason of the following time. Impeachment fell into abeyance and the bill of attainder was substituted for it. A bill of attainder declares that a certain man is guilty of a certain crime and that a specified punishment shall be inflicted upon him. If the bill is passed it becomes a statute, and the man is by statute law guilty and he is punished according to the statute. Attainder was a sharper and quicker process than impeachment and avoided some of the difficulties of the judicial trial necessary to it, though parliament sometimes heard the accused in his own defence. But constitutionally it was an even more important change from impeachment. The latter had for its object the coercion of the king, and it would necessarily be in times of serious conflict between king and parliament that it would be resorted to. Attainder was a sign that king and parliament were in agreement, since the king must sign the bill; as a matter

[12] Prothero, *Documents*, 22, *cf.* 2.

of fact in its actual use, until we come to the seventeenth century, it was commonly a sign that parliament was under the control of the king and was ready to do what he might ask. Theoretically attainder served the same purpose as impeachment, the parliamentary control of the king's minister, but practically it was always an abuse, and, when parliament learned the new, modern method of controlling the ministry, it disappeared. In the United States, though it had been considered a proper proceeding in the colonies, it was forbidden in the Constitution.

Comparatively considered the gains established by parliament in this century, commonly called privileges of parliament rather than rights, were small things, but in that stage of progress important. As with the greater advances of the fourteenth century, not all of these privileges were completely established at once. Some of them, like freedom of debate, were called in question for a long time. But a substantial beginning was made in them all during the Lancastrian period. In comparison with these, the special facts in which the parliamentary control of the council expressed itself, which seem on the surface the most striking facts of the period, are of minor interest because they did not become precedents of constitutional importance. The responsibility of the council, that is of the executive and administrative departments, to the legislature, had to be reestablished at a later time, after the results of the Tudor reaction had been overcome, and it was then done from a different beginning and in a different way. But the history of the council during the period is interesting, partly as showing the extent of parliamentary control, partly as showing the continuation of the methods devised by the baronial opposition in the thirteenth century, and partly as a foreshadowing of later growth.

It is impossible to understand the history of the council, in its various transformations and sloughing off processes through centuries of time, unless the fact is clearly held in

mind that it is the direct descendant of the small council of the feudal age and continues that institution in capacities and functions unaltered into modern times; continues it to the middle of the seventeenth century at least, though there are changes of emphasis, changes in the relative importance of the functions exercised. In the early Norman period, as has already been explained, in the intervals between the meetings of the great council, the small council was for practically all purposes in powers and capacities identical with the great council. There are some things which it would probably not have been asked to do, for example the sanctioning of an extraordinary aid to be paid by all barons, but for all the ordinary operations of government the small council possessed, when the great council was not in session, supreme legislative, judicial, advisory and administrative powers. It was the special organ of the king's prerogative, that is, it was the instrument through which he exercised those powers in which he was placed above the law. The special bearing of these facts upon our understanding of council history is to be found further in the fact that, whatever transformations the council may undergo, whatever new institutions are thrown off from it to exercise some of its functions, the powers and capacities of the original council are not thereby extinguished in its descendant, nor are they reduced except perhaps in emphasis. These facts which are simple enough in themselves are the solution of the chief difficulties which trouble us both in the history of the council and in the early history of the institutions derived from it.

In our study of English history before the fifteenth century, we have already seen three important institutions thrown off to exercise, as their peculiar work, administrative and judicial functions of the council, that is exchequer, chancery and king's bench, and there have been transformations affecting the emphasis placed upon two other functions, the advisory and the legislative. In the case of exchequer and chancery, the fact which has given particular difficulty

is not the retention of the original faculty by the council after the differentiation, but rather the apparent retention by the new institution, after it seems to have been thrown off, of the power to act occasionally as if it were the council itself. The same thing is true in a somewhat different way of the king's bench court. The fact which is common to all these cases throws a helpful light on the process of differentiation and its wholly unconscious character. In all cases what is first set apart from the council is not an institution but a class of council business: in the exchequer, financial; in the chancery, administrative and then judicial; in the king's bench, common law problems for judicial solution. In each case it is at first the council which acts. The business is separately classified, the institution is not divided. At a session at which its chief business is financial, it can still try a suit at law because it is the council. But more and more the division becomes institutional. More and more the particular business settles into the hands of those members of the council who have an official connection with it, or a special fitness for it, and becomes the exclusive business of these sessions. But even when this separation becomes practically complete, it is still not clearly perceived that an institutional differentiation has taken place. Exchequer business had been set apart from the ordinary business of the council at least as early as the first part of the twelfth century, but in the first part of the fourteenth the exchequer still occasionally did council business and contemporaries indicate no feeling that the action was improper or even irregular. It was only slowly perceived in any of the cases of council differentiation, medieval or modern, that a new institution had been created and therefore very naturally there was for a long time what seems to us like the appropriation of the function of one institution by another, and facts which should help us to understand what has taken place really help to puzzle us.

So far as the history of the council in the fifteenth century

is concerned, we have to consider changes in emphasis rather than the differentiation of institutions. Two important changes of the kind had already occurred. During the minority of Henry III, in the first part of the thirteenth century, the conciliar or advisory function, the business of the council to assist in determining and directing the policy of the government, had been, in troubled times, emphasized as never before. So clearly is this the case that it has sometimes been said that there was then a new beginning in council history. Such a statement is an exaggeration of the change, but it is true that from that time on the special function of giving counsel is more noticeably regarded; the council as council is more prominent; men are appointed to it with special reference to this function; and an oath begins to be taken by them that they will perform it loyally. The second change is in the opposite direction, the dwarfing of a council function, and it is brought about in the fourteenth century by the more and more exclusive assumption of the function of legislation by the new outgrowth of the great council, that is, by parliament. Ordinances by kings and council, either great council or small council, continue possible for some time, and in very attenuated form the function survives in the council to the present time, as we have seen, but the change of emphasis in the fourteenth century is decided.

A third change of this same kind should be included to make the history of the council complete, though we are not able, at present at least, to say anything definite as to dates of beginnings or of the forms in which the changes showed themselves. This change is the growing importance of the council's administrative business. The council had always been the supreme administrative organ of the government and a good deal of what had been in the earliest times its administrative business had been set off to the new institutions which had been formed, as being attendant in those times upon their business proper, especially to the itinerant justice court, exchequer and chancery. And yet it is clear that the council's

business of this sort had not decreased but rather steadily increased. It is probable that the change is not to be attributed to any one time or situation, like the minority of Henry III in relation to the advisory function for instance, but that it reflects and is caused by the growing complexity of affairs, public and private, the growth of population, commerce and wealth, the larger amount of business which the government must do and the larger expenses it must meet.

The things which are most interesting to us in the history of the council during the fifteenth century are not in reality parts of its permanent growth. They are rather the apparent development of a constitutional position which is not permanent, or which is at most a premature foreshadowing of something to be reached at a much later time and in a quite different way. It is indeed not into one constitutional position that the council seems to be growing during the century but at different times into two contrasting, perhaps they should be called opposing, positions. At one time the council seems completely under parliamentary control, hardly more than a subordinate organ for carrying out the policy determined on in parliament, or, so far as practical result is concerned, not very different from the cabinet of today. Such was its position during a good deal of the time in the reigns of Henry IV and Henry V, and during the minority of Henry VI.[13] At other times the council was independent of parliament, seems indeed more powerful than parliament, and to be the real organ of government acting for a stronger king. Such was its position for a time after the end of Henry VI's minority and under Edward IV, and such is the view of the council's place in the government which was inherited by the Tudor monarchy of the next age. The parliamentary control of the earlier Lancastrian period was not exercised in the direct fashion of modern times, but it was the kind of direct control which had been demanded by the baronial opposition of the thirteenth and fourteenth cen-

[13] A. and S., 184–190.

turies. Parliament named the members of the council or insisted that the king should name them in parliament, which gave it a virtual veto; it made the councillors dependent upon itself for their salaries, prescribed the oath which they should take, and adopted regulations regarding their business. While this relationship between parliament and council is not a permanent contribution to the formation of the constitution, it is a striking indication of the power which parliament had acquired at the time.

The separate jurisdiction which chancery had established upon the basis of the equitable or prerogative powers of the council was much enlarged and strengthened during the fifteenth century. It had so far developed in the previous century that petitions began to be addressed directly to the chancellor and more and more, indirectly if not directly, his independent jurisdiction was recognized in law and in official documents. The right of the chancellor's court to enforce the dictates of conscience in cases where the common law, limiting itself to the face of a document and to direct evidence producible by the plaintiff, had no means of enforcing an agreement, was one of the chief sources of its growth in the fifteenth century. This right brought into chancery a rapidly increasing amount of business as the practice of conveying land to uses became more and more frequent. The common law courts renounced the right to protect the interests of the person for whose benefit the trust was created (the *cestui qui use*) because the conveyance to the trustee was complete on its face and the business therefore fell naturally to the chancery court.

One royal prerogative received a definition in this period which gave rise to a serious constitutional danger in a later age — the so called dispensing power. The struggle between parliament and council over the right of legislation was in reality a struggle with the king's sole right to make laws, a prerogative which the feudal state recognized and which was destined to survive in the modern state in something like

its original form in the royal absolute veto. But if the king could by himself make the law, he ought logically to be able to set the law aside, or the pains and penalties of the law in a particular instance.[14] The great practical advantage, almost the moral necessity, of such a power in the case of a convicted criminal afterwards found to be innocent has kept one phase of this prerogative in operation almost without question to the present time. But if it was a desirable power in this case, was there any logical limit to its use? Might not the king grant a pardon in advance, or a license to act contrary to a statute, or dispense with obedience to civil as well as criminal statutes, or even suspend the operation of a statute entirely? As parliament came to understand more clearly what was involved in its claim to a voice in all legislation, it began to remonstrate and strive to hold the prerogative within limits which it considered reasonable. The effort was really part of the wider struggle to limit prerogative in relation to the making or the administration of law which characterizes the fourteenth century: to limit for instance the right of chancery to issue writs not based upon a previous precedent, an attempt which had been begun by the opposition in the thirteenth century before there was any parliament; or again to limit the extraordinary or arbitrary jurisdiction of the council, especially in cases alleged to be criminal, a jurisdiction which the opposition vigorously asserted to be in violation of chapter 39 of Magna Carta but which was exceedingly hard to regulate and the foundation in the next period of the dangerous jurisdiction of the court of star chamber.

The dispensing power found a considerable extension in practice with the passing of the anti-papal statutes under Edward III of provisors and praemunire, and we may say was almost sanctioned by the law itself in the earlier statute of Mortmain. Dispensations from these acts naturally had the powerful influence of the church in their support and

[14] *Cf.* A. and S., 108–109.

were troublesome precedents. Parliament found it exceedingly difficult to establish limits which could be maintained in practice between the useful on one side and the dangerous on the other. The law courts in this and the next period succeeded not much better in recognizing the king's rights to grant dispensations in the case of a crime created by statute (*malum prohibitum*) and in cases where he alone would suffer from remission of penalties, and denying it in the case of a crime by divine law (*malum in se*) and in the cases where others would suffer loss by his act. The right passed on to the sixteenth and seventeenth centuries clearly recognized in principle, gravely questioned by parliament and the courts in some of its application, but with no clear limitations fixed either by law or precedent.

The reaction against the Lancastrian constitutional monarchy began before the end of the fifteenth century. The wars of the Roses, which were at first only a factious rivalry for influence in the government under a helpless king but which passed soon into a dynastic civil war, were a predisposing influence. The political skill and determined character of Edward IV and Richard III were matched by no leadership in opposition which had any understanding of constitutional principles or any interest in maintaining a limited monarchy. On the other hand the kings themselves seem to have no such foresight of the dangerous situation into which arbitrary kingship had been drifting as we may possibly attribute to Richard II. They were determined to be the most powerful force in the state because of the dangers which threatened them from insurrections rather than because of those which threatened from constitutional progress. They began some of the methods of a practical absolutism which were afterwards carried farther by the Tudors, but with no conscious intention of founding absolute monarchy. They packed the house of commons with their adherents; they kept parliament from meeting during long intervals of time in sharp contrast with the fourteenth century; and they

provided themselves with an independent revenue at least partially sufficient for their needs by means of forced loans and forced gifts, "benevolences" they called them. But perhaps it was the mere accession of the house of York to the throne, emphasizing the right of strict hereditary succession in the teeth of a statute, which was the most severe blow to parliamentary supremacy struck at the time.

There are certain principles of civil liberty which at the end of the fifteenth century protected the individual from the arbitrary action of the government. They had been established in England in the common law, that is, in private rather than in public law, but in America we have made them parts of the constitution. As a part of his résumé of results already attained, Hallam calls attention to them near the beginning of his *Constitutional History of England* in these words: "No man could be committed to prison but by a legal warrant specifying his offence and by a usage nearly tantamount to constitutional right, he must be speedily brought to trial by means of regular sessions of gaol-delivery. The fact of guilt or innocence on a criminal charge was determined in a public court, and in the county where the offence was alleged to have occurred, by a jury of twelve men, from whose unanimous verdict no appeal could be made. Civil rights, so far as they depended on questions of fact, were subject to the same decision. The officers and servants of the crown, violating the personal liberty or other right of the subject, might be sued in an action for damages to be assessed by a jury, or, in some cases, were liable to criminal process nor could they plead any warrant or command in their justification, not even the direct order of the king."

To this may be added, as a general conclusion, the striking summary of Bishop Stubbs of the constitutional situation under the Lancastrian Kings, for what had been then accomplished in the making of the constitution is what becomes permanent and passes on to the Tudor age. The Yorkist kings did indeed establish a practical absolutism but not a

theoretical or institutional one, such as apparently Richard II had tried to set up. They controlled parliament by packing it with their adherents and by their military strength, but they did not attempt themselves to assume the functions of parliament. They raised much money which parliament had not granted but in the form of loans or gifts, not nominally as taxation. They thus laid the foundation not merely of Tudor power but of Tudor practice, the practice of ruling according to the king's will by means of the forms of the constitution and the help of a subservient parliament.

Says Bishop Stubbs: "It is true that neither in the vague promises of Henry IV nor in the definite recommendations of Sir John Fortescue are to be found enunciations of the clear principles or details of the practice of the English constitution. But the constitution did not now require definitions. The discipline of the fourteenth century, culminating in the grand lesson of revolution, had left the nation in no ignorance of its rights and wrongs. The great law of custom written in the hearts and lives and memories of Englishmen, had been so far developed as to include everything material that had been won in the direction of popular liberties and even of parliamentary freedom. The nation knew that the king was not an arbitrary despot, but a sovereign bound by oaths, laws, policies, and necessities, over which they had some control. They knew that he could not break his oath without God's curse; he could not alter the laws or impose a tax without their consent given through their representatives chosen in their county courts. They knew how, when, and where these courts were held, and that the mass of the nation had the right and privilege of attending them; and they were jealously on the watch against royal interference in their elections. And so far there was nothing very complex about constitutional practice: there was little danger of dispute between lords and commons: the privilege of members needed only to be asserted and it was admitted: there was no restriction on the declaration of gravamina, or on the im-

peachment of ministers or others who were suspected of exercising a malign influence on the government. When the king promised to observe their liberties, men in general knew what he meant, and watched how he kept his promise. They saw the ancient abuses disappear; complaints were no more heard of money raised without consent of parliament, or of illegal exaction by means of commissions of array; the abuses of purveyance were mentioned only to be redressed and punished, and if legal decisions were left unexecuted, it was from want of power rather than from want of will."

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CHAPTER X

THE TUDOR STRONG MONARCHY

The revolution by which Richard III, the last of the Yorkist kings, was overthrown and the house of Tudor established on the throne in the person of Henry VII excited little interest in the nation at large. It was not a constitutional revolution as that of 1399 had been. At the moment no one could tell that it was not another of the many ups and downs of the wars of the Roses, in which also as a whole the nation had not been greatly concerned. The only constitutional principle which it could be cited in the future to support was the right of Parliament to determine the succession in the return to the younger line, which it then decreed at the expense of the elder. But this principle was by no means so clearly asserted as in 1399 and was not strengthened by the later marriage of Henry VII with the heiress of the Yorkist Edward IV. The Tudors came to the throne as the result of no national movement in defence of the constitution and under no implied pledge to respect the powers of parliament.

Nor was the general situation an aid to constitutional government. It was a new and stormy age on which Europe as a whole was then entering, the transition in political history from medieval to modern times. The modern nations had assumed something like their final form. France had acquired, not quite its final eastern boundary, but its general geographical outlines; the great feudal baronies, earlier independent, had been overcome or absorbed; the government of the state had been centralized in the sovereign, not with the perfection of detail to be obtained in the seventeenth

century, but to the exclusion of any rival powers. In the Spanish peninsula the chief kingdoms which had been so long pushing back the Moors were now brought under one rule by the marriage of Ferdinand and Isabella, and by a sharper and quicker process than in France, largely of force, an absolutism practically as effective as the French had been established. The house of Austria, which had added to its southeastern dominions the most of the great Rhenish combination, the patchwork which had been formed by the ambition of the dukes of Burgundy, was just entering upon the great period of its history.

New ambitions were rising before these new states soon to be the first "great powers" of modern diplomacy, which was then itself also new. Medieval conditions had passed away. In the immediately preceding centuries the pressing problem before every government was national or internal consolidation and centralization. If a ruler of the later middle ages sought to build up an interstate alliance, in the great majority of cases his purpose was not dominion outside the boundaries he was striving to establish, but he hoped by foreign help more easily to overcome some difficulty within those boundaries. Those difficulties were now so far overcome in these great states that the ruler could give his chief interest to other things. Then opened out a new vision of empire, not now of a Holy Roman Empire co-extensive with Christendom and founded in the divine plan for human history, which was the medieval dream. This conception was not a part of fifteenth century plans, and the word empire took on then a new meaning. It began to mean the dominion and power of a state outside its national boundary lines; in a few cases perhaps, it included the annexation of other states or parts of states, but more truly it meant the conception and inauguration of the struggle for the domination of Europe by a single state. This has been the conception, broadened later into an idea of world domination, which has brought on all the great wars of European history

since that date, and we can only hope that in the great world war of 1914 we have seen its last stage.

In this first phase of modern international rivalry, the great contestants were France and Spain. Between them England was a little state hardly sufficient to furnish a balance of power; but she had well in hand resources somewhat out of proportion to her size, and her geographical position then as always gave her a peculiar security. But it was a dangerous age for a small state. The great powers of the continent were eager to use her for their own ends, and it was only by the most skilful management that she could avoid entangling her fortunes and fate in one alliance or another. The danger became far more acute when the religious revolution of the sixteenth century complicated the situation, pushed international rivalries to extremes and introduced new elements of fanaticism and hatred. The danger then came to be for England not merely one of foreign entanglements but one of domestic civil war and revolution as well.

It is no wonder that in such an age, with the tacit consent of the nation, the constitution, the limited monarchy, was practically suspended. The wonder is that it escaped destruction. The English nation had just passed out of an age in which the horrors of civil war had been made very real and a strong monarchy had been found something of a relief. It had passed into an age in which the general atmosphere of Europe was absolutist, and in which foreign and domestic problems seemed to demand concentration of national will and a single control of national policy and resources. Clear-sighted statesmanship might easily justify a return to practical absolutism with the general support of the nation.

We should have, however, a wrong impression of the sixteenth century if we regarded it merely as an age in which the growth of the constitution was suspended and an absolutist reaction had full sway. It was in two particulars at

least something quite different from that. In the first place in important respects the constitution continued in operation. The Tudor sovereign found it easier, as we shall presently see, to get what he wanted done with the help of parliament and by the forms of the constitution than do away with parliament and build up instead an institutional absolutism. During some part of the time it was really true that what the king wanted the nation also wanted; sometimes parliament was controlled and induced to do what perhaps the majority of the nation did not sanction; at other times, especially towards the beginning of the period, parliament was thrown somewhat into the background and long intervals were allowed to pass between its sessions, long at least as compared with the greater part of the period since the accession of Edward III; and in the opposite direction occasionally parliament asserted a will of its own and refused to be led by the king, though not usually in large matters. But under all these varying conditions parliament was used. It was the legislating, authorizing, creative instrument. The use which was made of the constitution was no doubt the use of forms of which the spirit had departed. The forms were used to carry out the sovereign's will, not to limit it or to carry out a will in opposition to his. But, it must be emphasized, the forms were used. The constitution in the matter of parliamentary powers and functions at least was kept in operation. Nothing was lost or forgotten which had been gained. Everything was ready to be filled again with the spirit of a truly constitutional monarchy when conditions should so change that the struggle with the king, which would be necessary, could be entered upon without national danger.

The second particular in which the Tudor age may be seen to be not one of mere reaction was given its peculiar character, and indeed was rendered possible, by this use of constitutional forms to carry out the king's will. Briefly and in general form the fact may be so stated: It was the

most important positive work of the sixteenth century to bring the national church under the same degree of parliamentary control which had been at that date established over the monarchy. The medieval church withdrew from the government of the state and kept within its own sphere a larger share of the public life of the community than we should think likely from the position of any modern church. Large fields of law, wills and inheritance, marriage and divorce, were its exclusive province. Some administrative functions of the modern state, like the care of the poor, were in its hands. The papacy was a great international state with all the organization and machinery of a political government. To its capital went up from all the countries of Europe a constant stream of reports, appeals, and taxes, and an equal stream came down of orders, commissions, and judicial decisions. In some respects the papacy was more than an international state for it assumed to represent the divine government more directly and to speak with a higher authority than any merely political state. England was in a few matters in a somewhat more independent position than most states of the time, but still in a large part of its public life it was dependent not upon its own government but upon a foreign government.

This dependence upon a foreign government it was, which was the first thing to be broken in the sixteenth century. With the religious past of the church no break was then intended, but the government of the state assumed full control of all public interests that had formerly fallen to the charge of the papacy and with them it assumed governmental control of the church itself. This was in itself a revolution, and it drew logically and inevitably a larger revolution in its train, but the larger revolution, the religious revolution, it does not belong to us to consider. Nor is it important for us to know how far personal desires of King Henry VIII in seeking a divorce from Catherine of Aragon, or wise statesmanship in fear of a doubtful succession, brought the result

about. What is important for our subject is the fact that this great political change, this revolution, was accomplished by act of parliament. By a series of great statutes adopted in successive sessions of the Parliament of 1529, which remained in existence for seven years, one bond after another which bound England to the government of the pope was broken and the king put in his place as governor of the church. Even considered no further than this, these acts were an extraordinary exercise of parliamentary power, but they go much farther. In them was laid the foundation of future parliamentary control of ecclesiastical matters which has been exercised in the last hundred years in ways that would have seemed drastic in the extreme even to the revolutionists of the sixteenth century. And more than this even: that the king should have asked the sanction and secured the authority of parliament for changes on which his heart was so deeply set was not merely a striking recognition of the position of parliament, but a precedent of creative value for the future.

This ecclesiastical revolution was a great forward move in bringing the entire round of public affairs under national control, and when we take it into account, it is no longer possible to say that the sixteenth century was an age when the growth of the constitution was suspended. In comparison with this advance, some improvements in executive and administrative machinery, some increase in the activity of the council, not now under parliamentary control but directly representing the sovereign, are of minor importance. The great thing is that the powers which parliament had gathered into its hands in nearly two centuries of earlier growth had not been dropped, but had rather been confirmed and enlarged in its possession, as marking out its definite and secure function in the state. It was to parliament that the king turned as if to the source of final authority and sanction in his revolutionary reorganization of the state. New precedents of far-reaching importance had been estab-

lished and all was ready, when conditions should become more favorable, for the reconstruction of a constitutional limited monarchy upon a broader and more solid foundation than ever. In other words, the constitutional importance of the sixteenth century must not be judged by considering that age in itself alone, nor by estimating the methods and character of the government merely, as it was carried on from year to year, but by taking into the account the results which followed in another age, as truly consequences of the Tudor policy as the immediate results, but very different in character.

Nor is what has been so far said a complete statement of the constitutional meaning of the sixteenth century in English history. The economic and social historian points out also a condition of things which the historian of constitutional development is bound to regard. The constitutional monarchy of the fifteenth century was premature in one way because as yet there was no nation in the modern sense prepared by political discipline and social advancement to work in its own interests the constitutional machinery which had been so rapidly built up since the meeting of the parliament in 1295. The baronage was the controlling power in English political life during the long reign of Henry VI, and the baronage of the fifteenth century was far more interested in its own factious ambitions than in parliament or nation. From 1455 to 1485 the great fact in English history seems on the surface to be the wars of the Roses; but that was a war of the baronage, not of the people, and in spite of continuous civil war the economic and social development of the country at large was going rapidly forward. It needed the strong absolutism of the Tudors to bring the nobles and their private armies into subjection to the law and reëstablish an orderly public life.

The heaviest burden of this task of reconstructing the power and efficiency of the central government fell to the first Tudor sovereign, Henry VII. Not the least part of this

task was to determine the way in which it should be done, the instruments which should be used, and to carry out the institutional changes which might be necessary. In both regards, constitutionally, in the general character and aspect of the government, and institutionally, in the details of machinery by which the government was operated, the character of the Tudor age was largely determined by Henry VII. It was as creative work in its way as that which went on in the reign of Edward I, or Edward III, though it touched less nearly the foundations of government. To be sure the way had been pointed out by Edward IV, in the use of the king's council, in pushing parliament into the background, in attacking the older and stronger nobility, in the encouragement of commerce and economic development, and in some details of financial measures. But no Yorkist king had been able to carry his policy far enough to demonstrate its final success or to combine all his measures into a coöperative whole. Even where Henry VII may be said to have followed most closely the Yorkist model, he gave to his work a more permanent and constitutional cast, and in some particulars came nearer than any other king had done to giving constitutional body to an absolute monarchy.

The first serious problem of domestic government which Henry had to solve was the repression of disorder, the punishment of crime, and the restoration of the authority of the national courts. At times during the war of the Roses almost unbridled private war had prevailed. The practice of forming private armed forces by using the livery of a noble house as a kind of uniform, and of overawing the courts when they attempted to punish the lawless acts of these retainers, called the practice of livery and maintenance, had been complained of by parliament for a hundred years and legislated against at least by ordinance, and even special authority had been given the council to try these offenders. Now, as one of the first domestic measures of the reign, the matter was taken up with determination. A special com-

mittee of the council, which is known to history as the court of star chamber though strictly the name was older, was appointed by act of parliament in 1487,[1] to deal with these and other similar cases where the offender was too powerful for the ordinary courts. The actual measures adopted were not so new as the vigorous spirit in which they were enforced.

As we have seen, no change which had taken place in the council, no development of its advisory function, no broadening of its power in supervising the general administration, no differentiation which had thrown off the common law and equity courts as judicial bodies or the exchequer and chancery as administrative bodies, had diminished its supreme judicial power as the organ of the king's prerogative justice. There had been complaint of the way in which it had been used; application to it had sometimes declined; but the rightful power had never been curtailed. It was especially to exercise this power of the council in criminal cases that the new committee was appointed. There was no extension of the council's jurisdiction in the act, nor really an enlargement of the council, though the two chief justices were added to the committee, and oftentimes during the sixteenth century the court of star chamber was really the council acting in a special capacity. In reality there was beginning a new differentiation from the council, carrying its criminal jurisdiction over to a new court, but differing from earlier differentiations in that it had the sanction of an act of parliament and in that it was never completed.

The special characteristic of the court of star chamber, which made it useful in the repression of disorders of powerful men and for a long time popular, was that it was a court of prerogative justice. As such the council had never adopted the common law procedure, and it was not bound to maintain the safeguards by which the common law was

[1] A. and S., 214–215, 216–218.

already trying to protect the accused man from injustice in his trial. It had no jury; it could force the accused to testify on oath; and it could use torture in examination. For these reasons it has been called a court of criminal equity, and rightly so. It secured for the time being at least justice which could not be otherwise obtained, for the fact that it exercised directly the king's prerogative fitted it to deal with the man who defied the ordinary courts. It was a serious matter to defy the king. It is evident, however, that it contained the possibility of becoming a very effective engine of an arbitrary tyranny, and such in the end it did come near to being. For nearly a century it served a useful purpose and, when the time of a more deliberate absolutism came, its existence saved the king from the temptation to make over the courts of common law into instruments of his power.

The council itself during the Tudor age, while less independent than it had sometimes been in the fifteenth century, possessed an authority and power in the every-day business of government never before equalled. In this sense the Tudor was the great age of the council's business, when its position, not in the determination of the larger concerns of policy but in the management of the details of government, was not unlike that of its youngest off-shoot — the modern cabinet. The term privy council which had been for a long time in occasional use, often as a term of reproach, tends to become a regular designation and to be appropriated particularly to that form of the council, which, before the middle of the period, was in regular attendance upon the king and occupied rather with governmental than judicial business which fell in the main to the council in the star chamber. Yet the distinction between these two forms of the council was more that of emphasis upon particular functions than any hard and fast line that could be drawn between them — a sure sign that the differentiation beginning was a natural

one. The privy council retains all the characteristics of the old small council, while the star chamber represents a special function being slowly thrown off to a special body.

The council in the past had done much of its work through committees or commissions, and under the Tudors the court of star chamber was not the only one set up or revived. The court of requests was especially for the cases of poor men; the court of augmentations and that of first fruits and tenths were formed after the breach with Rome, to deal respectively with lands and with revenues which had fallen to the king from the church; the court of wards looked after all the cases, mostly feudal, in which the king had the right of wardship; the councils of Wales and of the north were to exercise the king's authority and keep order on the borders, and there were other branches of the council in Calais and Ireland. The court of high commission will be considered later. All these were offshoots of the council or under its direct supervision, and more temporary commissions might be sent to any county or be appointed to investigate any happening. Oftentimes on very great matters the king seems to have acted without formally consulting his council, but nothing was too small for their attention.

While the old connection between the king's official household and the council still continued, there began in this age a new official connection with the council which is distinctly modern. Certain of the older offices had become modernized and certain new offices had been created to take care of increasing business. The lord chancellor was still the highest of the council in rank, but he was now less a political minister of the crown than he had been and more a judicial officer. The lord keeper of the great seal sometimes took his place, made equal to the chancellor in powers and jurisdiction by statute under Elizabeth. The lord treasurer was then the real head of national finance. The lord president of the privy council was a new office, not always filled. The lord privy seal had charge of that instrument, now as im-

portant in the details of government as the great seal. Most significant for the future was the new office of king's secretary, or secretary of state as it began to be called. For its remote origin the office goes back to a king's clerk of the thirteenth century, but it is in the fifteenth that it becomes of greater significance, and in the sixteenth definitely the original from which the modern offices bearing that title have been derived. The secretary was often a man of great influence and ability, like Thomas Cromwell and Lord Burghley; he stood close to the person of the king and was his channel of communication with other officers and with foreign countries; he often represented the king in one house or the other of parliament, and had supervision of a great variety of interests, as indicated by the five modern offices into which the sixteenth century secretaryship has been separated. Often the pressure of business was so great that there were two secretaries appointed.

There was no definite cabinet in the Tudor period, and the sovereign decided without outside influence with what persons he would consult, changing often with time or subject and often from personal caprice, yet all the processes of government were gradually assuming a more modern aspect. So it was also of the connection between council and parliament. Parliament did not influence, and had no means of influencing, either the membership or the policy of the council. But the members of the council were members of one house or the other, and had a controlling influence upon the decisions of parliament, to which at certain periods they gave great attention.

The relation between the council and parliament may be illustrated by legislation of great importance in the constitutional history of Ireland and of considerable interest in more recent controversies. In 1495 the Irish parliament passed a statute one provision of which was that no parliament should meet in Ireland until the king and his council had approved of the meeting and of the acts which were to

be passed.[2] This statute, known as Poynings' law, came later to interfere very seriously with the liberty of the Irish parliament, but at the time of its adoption it enacted nothing which was not also true of England. No English parliament could meet without the approval of the king and his council, and when it met it still had no initiative, at least before the very end of the period, and passed only what would be called today government bills.

Based upon the original legislative right of the council, a considerable extension took place in the sixteenth century, not of the principle but of the frequency of royal proclamations. It was probably the difficulty of bringing disorder to an end in the first part of the period, and later the necessity of defining new offences and providing for their punishment which came with the reformation legislation, that encouraged recourse to a quick and peremptory method of making regulations to be enforced by the summary procedure of the council. In 1539 an act of parliament declared that royal proclamations should be obeyed and observed "as though they were made by act of parliament," though they might not infringe any act, common laws or lawful customs of the realm. It also created a form of council court to try those who disobeyed them.[3] The act was probably declaratory rather than creative. It seems to have been followed by no change in the subject or character of proclamations and was repealed in 1547. This revival of council legislation, like other matters under the Tudors, which look like extensions of the royal power, met apparently with general approval, but the precedents established had a different meaning in another age.

It is easy for us to see the increased prominence of the council as an instrument of government in the sixteenth century. It is not so easy to see in the events of the time the fortification and improvement of the position of parlia-

[2] Robertson, *Statutes*, 205.

[3] A. and S., 247–250.

ment. The evidence which we occasionally find of a determined effort of the government to make sure of a subservient parliament obscures the constitutional importance of even the most subservient parliament. It seems to us that a legislature so controlled must end by becoming nothing but a tool of the executive. The key to the difficulty is to be found in the motive of the king in obtaining the control and the character of the objects which he sought.

Parliament did not meet so often in the Tudor age as in the fourteenth century. Henry VII in twenty-four years held but seven parliaments, only one in the last half of his reign; Elizabeth in forty-five years summoned ten. Yet it can hardly be said that the Tudors deliberately kept parliament from meeting because of its power. At most they found it an inconvenient instrument and were glad to do without it when it was not necessary. But often it was indispensable for their policy and, when it was most indispensable, they took some pains to secure the kind of parliament they needed.

The house of lords never recovered the relative importance in parliament which it lost during the fourteenth century, but it was still not inferior to the house of commons in power, and the control which it could exert over the members of the lower house through social influence and personal connection was not slight. As a house of hereditary members, it should be theoretically independent of the king, but it is easy to understand that it was not. During most of the time to the Reformation parliament of 1529, the clerical members, bishops and abbots, were in the majority, and they owed their offices and their chance of promotion and of other favors to the king. The majority of them voted for Henry VIII's measures against the papal power. The lay nobility had been weakened by the war of the Roses but not so nearly destroyed as has sometimes been said. Henry VII's first parliament contained twenty-nine lay peers, which is not greatly below the average number of that century. It sank

once in Henry VI's reign to twenty-three, hardly ever rose above fifty, and in the sixteenth century only once reached sixty. Though many new families were given titles during the period, peerages continued to become extinct almost as rapidly as during the war of the Roses. It was the more or less constant policy of the Tudors to place their chief dependence upon new families which they raised in rank instead of upon the older nobility, and many of the families most distinguished in later history, Cavendish, Cecil, Paget, Russell, Seymour, Spencer, and others, gained at least the first steps of their promotion in this period. In no part of the age did the house of lords furnish leadership to anything like the old traditional opposition to the crown.

In regard to the house of commons it is necessary first of all to fix in mind the fact that the class represented by its members was still a narrow one — reaching not at any time below what we should call the upper middle class. Boroughs sent knights and esquires as their representatives, as often as they sent burgesses, and there is no evidence that, either in the character or the chief interests of the membership, there was any difference between boroughs and counties. And in reality it may be said with truth that it was the chief interests of the membership which determined the policy of the commons, rather than the special desires of the sovereign. It is also true, however, that the two were often identical and as often easily made to seem identical.

The Tudor age was one of great economic advance, and the economic interest was at the bottom the chief interest of the membership of the house of commons. A widespread change was taking place in agriculture, caused by the increasing profits in wool raising, and was transforming arable land into pasture, by which the class represented in the house was greatly affected and saw its advantage, whatever may have been the effect upon the laboring class.[4] Foreign commerce was developing rapidly and occupying

[4] Cheyney, *Readings*, 353–354.

more and more the attention of the trading towns. The great companies of merchant adventurers were beginning to be formed, commercial treaties were breaking down barriers against commerce, navigation acts were developing English shipping and ship-building,[5] bounties, monopolies, and tariffs encouraged national industries, interest was increasing in the exploration of new routes of trade, and before the close of the period England was looking forward to the founding of colonies, for trade at least, and was definitely cherishing the vision of a great future on the sea. The real heart of the middle class was in these things, and the constitutional bearing of the fact is to be emphasized. Never was there an age when the taunt sometimes heard, that the Anglo-Saxon will contentedly endure any kind of government that gives him security of trade, came nearer to justification.

There is some further reason for the support of a strong government to be added. During the first part of the period the destructive civil war of the Roses was fresh in mind. The nation wanted no more of it. The dangers of a disputed succession and of a weak government must be averted. During the last half of the century the dangers of foreign invasion and of insurrection from religious discontent were equally great. A strong government was certain to rally to its support all those classes in the country which had a share in deciding what the national policy should be and those whose chief desire was security. If the government was strong enough to protect commerce abroad and to maintain order and independence at home, it might have and do almost anything that it wanted. Almost, not quite. It must not be understood that in every particular the Tudor sovereigns had their way. They sometimes met with opposition which they could not overcome and were obliged to withdraw or modify their measures. In their great measures of policy, however, they had their way, and in almost all these measures parliament apparently supported the king because the classes

[5] A. and S., 213–214; *cf.* p. 144.

which formed parliament wished, or were at least willing, to carry out the policy which the king desired.

Occasionally, either to make sure that the policy of the sovereign or of his ministers could be carried out, under Henry VIII, Edward VI, and Mary at least, deliberate efforts were made to secure a house of commons that could be counted upon. This was done by making use of the sheriffs as in the fifteenth century, by influence upon individual constituencies or individual members, and by one measure which had a permanent effect upon the composition and finally upon the character of the house—the creation of new boroughs. In the short reign of Edward VI forty-eight members were added to the house of commons, twenty-two for a single election; under Mary twenty-one, and under Elizabeth sixty or more. A large proportion of the new boroughs were in Cornwall, which was almost entirely owned by the crown, and many of them became in later times the pocket or rotten boroughs of the unreformed house. It was not possible in this way, however, to obtain a certain or permanent control. In the next century Sir John Eliot and John Hampden represented Cornish constituencies, and in the other house the family of Russell made itself famous for its liberal leadership.

Of the greater measures of the Tudors, two of Henry VIII's are especially noteworthy as both illustrating and strengthening the position of parliament—the regulation of the succession, and the breach with Rome. A disturbed succession had been characteristic of the last half of the fifteenth century, and parliament had been called upon more than once to determine the line to be followed, but the hold of Henry VIII upon the throne and upon the nation was so great that no questions to disturb the future arose until he created them himself by his matrimonial complications. Before the close of his reign the situation was such as to compel a recognition, by logical inference at least, more complete than ever before, of the supreme authority of parliament to

determine the succession, for it was not possible that, outside of statute law, both Mary and Elizabeth should be at the same time legitimate. First Mary was declared by parliament illegitimate and the succession settled upon Elizabeth.[6] Then Elizabeth was declared illegitimate and the crown entailed upon the offspring of Henry and Jane Seymour. By this act also authority was given to Henry to limit the succession after himself, by letters patent or by his last will, to such persons as he chose, no exception being specified — a plain delegation of authority to the king, which logically he acknowledged that he did not otherwise possess. By virtue of this authority Mary and Elizabeth were restored to the succession after all the other descendants of Henry VIII and after them the line of his younger sister Mary preferred to that of his elder sister Margaret, who had been married to the King of Scotland, and this disposition received again parliamentary sanction. That it was not carried out on the death of Elizabeth shows less the weakness of statute law than the superior power of what we may already begin to call public opinion.

The breach with Rome involved a recognition of parliamentary authority, perhaps logically less complete, but more striking and immediately felt, because it broke off the whole current of English history down to that date and involved interests very near to the mass of men. It is not the place here to discuss the reasons for the steps taken nor the question of their justification. To believe them unwarranted, is to recognize most fully the power of parliament in carrying them through.

Whether Henry's desire to have his marriage with Catherine annulled arose from personal reasons only or in part from motives of genuine statesmanship, matters had gone so far by the time the pope's refusal to agree became evident that Henry was determined to go through with his purpose at any cost. To do this in such a way that the result should

[6] A. and S., 235–239, 264–267.

be unimpeachable in English law required three things: the authority of the pope over the English church must be set aside and the king put in his place; all appeals from English courts to Rome must be made illegal; and all subjects must be bound by oath to recognize the results. These measures were adopted, gradually and not in the order stated, by the parliament which met first in November, 1529, and continued until April, 1536, holding seven sessions. These measures were necessarily accompanied or followed by others, many of them financial in character, and together they brought about a change in English law, practical government and formal constitution equivalent to a revolution.[7] They illustrate the extent to which the recognized power of parliament could go, and their effect was to establish the complete authority of parliament over the constitution and the practical government of the church. This supremacy of parliament is illustrated and acted upon in the act of supremacy, which put the king in place of the pope as head of the church, more fully than in any other one act.[8]

An incidental result of importance followed from this legislation. Henry VIII had not intended to make changes in doctrine or religion, but he had put the English church in a position in which it could not remain stationary. In the next reign the drift towards protestantism was very strong, with the result that a new declaration of doctrine and a new prayer book were framed, and these were made obligatory in all religious service by the act of uniformity, renewed by Elizabeth in 1559 in undoing Mary's restoration of catholicism.[9] But on one side probably less than half of England was protestant, and on the other a good part of England believed it necessary to go in that direction considerably farther than parliament was willing to go. Uniformity of religious faith and worship could be preserved only

[7] A. and S., 226–235; Cheyney, *Readings*, 340–346.
[8] A. and S., 239–240.
[9] A. and S., 253–259, 272–281.

by pains and penalties, and to enforce these a new court was set up, the ecclesiastical court of high commission, given its historical form and authority under Elizabeth.[10] In function this court was really an offshoot of the council, though it had many members not belonging to the council, and like that body its procedure was free from the restraints of the common law and inquisitorial in character, though it could not make use of torture or sentence to death. Like the council it was a court of prerogative powers, enforcing the authority of the sovereign as head of the church. As an instrument of arbitrary government dangerous to liberty its history belongs chiefly to the next century.

In financial matters the Tudors sometimes overstepped the proper limits of the constitution, and without much opposition. The benevolence had been invented in the fifteenth century [11] — in theory and form a free gift to the government, but in practice the suggestion of the gift came from the government and the individual generally thought it best to agree. These gifts were forbidden by parliament under Richard III, but were exacted both by Henry VII and Henry VIII. The latter employed also forced loans, written promises of repayment being given in return, called "privy seals" because sealed with that seal. At times these methods of raising money threatened to develop into something like regular taxation with assessments based upon a valuation of property. In 1525 Henry VIII attempted to levy a sixth from laymen and a tenth from clergy without previous parliamentary sanction, but the resistance was so great in this case that the attempt had to be abandoned. In theory the right of parliament to decide upon taxation was recognized, and extra-legal taxation was under some form of evasion.

In local government we may say that the Tudor age is the time when the transition from medieval to modern methods was completed. The king's courts of the common law had

[10] Prothero, *Documents*, 227–242.

[11] Cheyney, *Readings*, 300; A. and S., 212.

continued their steady development at the expense of the local and private courts, but they had come to be more and more exclusively law courts, even the itinerant justice courts, and to abandon more and more their administrative duties to other agencies. County, hundred, and private courts, though they continued in possible use in some particulars into the nineteenth century, had become really insignificant. A clause in the statute of Gloucester (1278) had been interpreted to deprive the county court of jurisdiction over cases involving forty shillings or more of value, and criminal cases had practically ceased to be regarded as private causes (appeals) and were treated as king's pleas only. The county assembly was no longer summoned to meet the itinerant justices; and the grand jury alone stood for the county. The hundred still existed as a territorial division, but as a unit of administration and jurisdiction it survived the period only in the courts leet here and there. It was of so little importance that, though it was brought over into several American colonies, it was preserved in one only — Delaware. Private jurisdictions, though still possibilities, survived in practical use only in some of the leet courts and in the transfer of servile land, the copyhold, but this last use required no court session; the entry on the roll of the court signifying the change of ownership was as purely formal as an American record of a land transfer.

An office which was to play a great part in the local government of the future — the justice of the peace — had been steadily increasing in importance since the thirteenth century. It grew out of experiments beginning near the end of the twelfth century to find a satisfactory local officer to look after the king's pleas, to see that they were all brought before the justices and in proper shape for trial. The first experiment, which did not prove successful, gave us the office of coroner, soon limited to its present duties. The next experiment was the appointment of conservators or keepers of the peace, whose powers were much extended under Edward

III. In 1360 they were authorized to imprison persons indicted before them for felonies, and soon after they began to be called justices of the peace.[12] In 1388 they were directed to hold their sessions four times a year — the origin of the later "quarter sessions." Gradually their duties were enlarged and made administrative as well as judicial, to put down riots, to regulate wages, to supervise weights and measures, trades and industries, highways, apprentices, and paupers. They were given a police jurisdiction, and so multifarious were their duties that they have been called "the Tudor maid of all work." As an organ of the central government in all localities, they supply the place of the sheriff in his early administrative functions, for the sheriff had now become the executive officer of the courts, as he still is in the United States. As representing the medieval organization of local government, they had succeeded to many of the activities of the original town, of the private court whether domanial or franchisal, and of the ordinary hundred court. They had also inherited a considerable part of the local functions of the itinerant justices, and they supervised and controlled the parish officers.

But just before the Tudor age began, another new factor in local government had begun to be active, or perhaps we ought rather to say that an old and almost obsolete institution had awakened to new life — the parish meeting. The town assembly of original Saxon days had tended to be absorbed into the manorial court of feudal times. Its business, however, was not in all cases identical with manorial business and, as the changing economic conditions of the later middle ages, and especially the rise of the new agriculture, of grazing and enclosure, reduced the importance of the manor, the permanent interests which must be looked after by local government acted to revive something like the old township moot. But the township had long ago disappeared as a unit of real political significance, and the local unit which at the moment

[12] A. and S., 127–128, 194–195, 321–324; Prothero, *Documents*, 144–150.

had an active existence, and which often corresponded with the township in area, the parish, stepped into its place and inherited its functions in local government. The priest, as the local leader and guide, who would naturally be looked to to assist in the difficulties of a transitional time, had very likely a good deal to do with securing this succession. At any rate the parish meeting, the assembly of the parishioners, became the local governing body, and one very much like the old township assembly, looking after both the ecclesiastical and the secular interests of the community. When towards the end of Elizabeth's reign the state awoke to the duties towards the poor which had fallen to it from the medieval church, it made the parish the unit in the administration of the poor laws which were passed, and thus gave it legal recognition and a permanent position in the state. From that time to the present, the parish with the parish meeting, or vestry, has had as large a part in the conduct of local government as the American town meeting, though under a supervision in some particulars by the justice of the peace which has nothing corresponding to it in America.

The conditions which had given character to the Tudor age began to change before the death of Elizabeth. The execution of Mary Stuart and the successful defence against the threats of Spain gave something of security against both domestic and foreign danger, though the nation was not fully conscious of how great a change in these respects had really taken place. But parliament began towards the end of the century to be somewhat restless; to show an inclination to greater independence, and a disposition to be more critical of royal methods. We seem to ourselves to detect the beginning once more of something like an organized opposition and a group of men acting together, almost like a modern party, ready with a legislative programme not foreordained by the council. There was, however, no real interference with Elizabeth's action which can be said to have amounted to a matter of principle. It was only that all things were

ready for a new age and, if Elizabeth herself with all her political skill could have continued to reign for another twenty years, it is not likely that she could have repressed the opposition that was forming. As the history actually went, it was reserved for a new dynasty to raise for the first time in English history a square issue between two types of monarchy and two types of constitution.

To the final settlement of the problems of that new age the great contribution of the sixteenth century, based upon the earlier history, was the parliament and its position in the state. As a contemporary estimate of the place of parliament, a passage from Sir Thomas Smith's *Commonwealth of England*, published in 1589, to which special attention has been called by Professor Maitland, may be quoted: "The most high and absolute power of the realm of England consisteth in the parliament. . . . That which is done by this consent is called firm, stable and *sanctum*, and is taken for law. The parliament abrogateth old laws, maketh new, giveth order for things past and for things hereafter to be followed, changeth rights and possessions of private men, legitimateth bastards, establisheth forms of religion, altereth weights and measures, giveth forms of succession to the crown, defineth of doubtful rights, whereof is no law already made, appointeth subsidies, tailes, taxes, and impositions, giveth most free pardons and absolutions, restoreth in blood and name as the highest court, condemneth or absolveth them whom the prince will put to that trial. And to be short, all that ever the people of Rome might do either in *centuriatis comitiis* or *tributis*, the same may be done by the parliament of England which representeth and hath the power of the whole realm, both the head and body. For every Englishman is intended to be there present, either in person or by procuration and attorneys, of what preeminence, state, dignity or quality soever he be, from the prince, be he king or queen, to the lowest person of England. And the consent of the parliament is taken to be every man's consent."

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CHAPTER XI

PARLIAMENT VERSUS THE KING

James VI of Scotland began to reign when a babe in arms and could never remember a time when he had not been a king. He was something of a student and he read, not without a natural inclination to believe, current philosophical arguments in favor of the divine right of kings, and even restated them in a book of his own writing. He was the king of a poor country, but he knew himself heir to the English crown and could look forward with pleasant anticipation to its wealthier resources and to the headship of a liberal and aristocratic church in place of the hard and narrow republicanism of the Scotch presbyterians. He knew the history of the Tudor monarchy and Elizabeth's methods of rule and her overbearing ways of dealing with individual opposition. He knew also that his right to the throne was shadowed by the provision for the succession which Henry VIII had made under the authority of parliament, by which his own elder line had been postponed in the inheritance to the younger line of the descendants of Henry VII. But he knew too, when he came to the throne with the sanction of the nation in the teeth of this arrangement, that the principle of succession by direct descent, the principle of divine right, had made no small gain over the principle of parliamentary authority. It is not at all strange that James became king of England with the determination to go on with the practical absolutism which the Tudors had exercised and indeed with clearer theoretical ideas than they had had of monarchy as the natural government intended for mankind and of his own right as the particular monarch divinely selected.

Over against the determination of the king was the deter-

mination which had been slowly growing in parliament for some years. It would probably be going too far to say that this was a conscious determination that the absolutism of the Tudors should come to an end. It was rather a determination that the king should be held to the law where law existed. The particular events in which this determination of parliament expressed itself were so entirely shaped by the action of the king, parliament came so slowly, as the years of the seventeenth century went on, to an understanding of what its opposition meant as an interpretation of the constitution and an assertion of the position of parliament in the state, that it is hardly possible to say that it began the conflict with the crown with any definite plan, or any foresight of the result for which it ought to strive. The practical situation created was, however, the same as if it had been designed. A square issue was joined between a king determined to go on with a virtual absolutism and a parliament determined that the king should be limited by the law.

This issue had never before been joined in English history. Since the working out of the limited monarchy and the establishment of its principles in 1399, these two interpretations of the constitution had never entered the field together. Each in turn had had possession for a long period, and government had been carried on according to it with no serious interruption from the other. The Lancastrian period was in fundamental principles, though these had not been worked out in all details, an age of constitutional monarchy. The Yorkist and Tudor periods formed an age of practical absolutism, though an absolutism which for its own convenience made use of some of the machinery of a constitutional monarchy and in so doing strengthened and confirmed it. In this most important respect, the joining of issues between a traditionally strong royal power and a parliament strong in accumulated rights and privileges, the accession of James I opened a new epoch in the history of England.

The great practical question to be solved was: Would it be possible to make these two conceptions of government work peaceably together? Would it be possible in practice to mark off a boundary line between the king's prerogative action and those things in which he must allow parliament to be supreme? Was any compromise between these two powers in the state possible? Was not the real question which was involved in the rivalry between them the question of the ultimate political authority in the state of which there could be in the nature of the case but one? Somewhere in every state there must reside a power of making decisions from which there can be no appeal; a final authority to which in the last stage of discussion every great question must be referred and whose answer will at once be seen to end all controversy. This ultimate authority in any state is the sovereign authority whether it be a sovereign monarch or a sovereign people, and the question where does sovereignty reside in any given state is the question where is to be found the power of making decisions which we know no other power can call in question. In the conflict between the king and parliament in the seventeenth century in England this was the question really at issue and really decided. Growing slowly more and more clear through the cloud of special issues, forced by progressive dispute and argument more and more definitely into the foreground, the great question, where does political sovereignty reside in the English state, what is the ultimate source of all authority, though it was never distinctly formulated nor answered in specific words, was in the end really answered by the facts, by the actual situation left as the result of the struggle.

The joining and the settlement of this issue make the seventeenth century like the fourteenth century a great creative age in English constitutional history, creative not of institutions nor of constitutional procedure, but of meaning and interpretation fixed beyond future question. If we say that by 1399 the English constitution had been

brought into existence so far as its fundamental principles are concerned, we have by no means said that the work of making the constitution was completed. There was much of a creative sort still to be done. Most important work still remained in seeing that these principles were consistently carried out in all the details of government. The importance of this work may be seen in saying that it was especially to be done in the control of national finance, in making the judiciary independent of executive interference, and in the directing of foreign policy—this last an item in which the work is perhaps not yet complete. Much had still to be done in devising machinery for the operation of practical government according to these principles, and this in its chief instance has given us the English system of government by a cabinet of responsible ministers. And perhaps most broadly fundamental of all, much had still to be done in ascertaining what these principles logically implied as to the nature of government, the source of its powers, and the seat of sovereignty in the state. This last was the work of the seventeenth century and it was truly creative although a work of interpretation.

The work of the seventeenth century was creative also not merely in the general result to which it was to lead but also in many details by the way. Seventeenth century England was deeply interested in its past history, and the leaders on both sides of the conflict made an appeal to precedent hardly equalled in any other age. But it must be admitted that precedents in favor of the claims of parliament were many times interpreted and urged in the light of what they logically implied rather than of what they originally meant. The king also more than once asserted that he possessed a general right of action on the basis of precedents which related only to a much more limited range of cases, as in the instance of the so-called impositions, a supertax added by proclamation to the customs duties fixed by law. Impositions indeed had been added in this way to the legal duties

by earlier kings but always for special administrative purposes, not for raising revenue, and in justifying his use of the right by the earlier precedents the king was certainly carrying them beyond their legitimate application. The case is typical of the kind of legal justification asserted for many other things done by the Stuarts during the century.

On the whole, however, it must be said that history was with the king. The stretching of precedent during that time, in a way which history finds the most unwarranted, into something which it did not originally mean though perhaps logically implied, was on the side of parliament. The seventeenth century is for instance the great age of the perfection of the writ of *habeas corpus* as the means of securing the citizen against arbitrary executive action. But parliament began the struggle to obtain this result, in the dispute which led to the Petition of Right of 1628, with the assertion that the most of what it was to gain in the end was already historically its rightful possession. But however clearly history must condemn the literal form such claims assumed, the fact, which was in truth the essential fact, should not be overlooked, that the extended meaning which parliament gave to precedents was really logically involved in them. *Habeas corpus* as it existed before in 1628 did logically imply what parliament asserted it had meant, as a means of defending the individual against the arbitrary action of the executive, though it may never have been actually so used.

What parliament was really doing through all the faulty history it employed, was to apply logically in new ways, to new details, in further extensions, the fundamental principles which the past had established, and this was truly creative work. The struggle between parliament and the Stuart kings was the process through which the nation was learning to understand what these principles really implied for the whole constitution of the state. Indeed the keenness with which the opposition of the seventeenth century pressed to their logical limit past precedents against the king, often

to a meaning which the makers of the precedent would not have recognized as their own, leads us to suspect that during the long interval of the absolutist reaction, there had already formed, unconsciously and beneath the surface no doubt, a clearer conception than ever before of what the constitution was and what it might logically involve; that the sixteenth century had in this way really laid down a solid foundation for later advance on which the seventeenth century was building.

Against extensions of this sort, if they be really logical, history can urge no objection. The historical argument is never of any validity against the results to which the living process of a nation's growth has brought it. However far they may go beyond the beginning the past has made, if they are the genuine results of national life, genuine outgrowths of the past, they have a rightfulness of their own which history cannot question. This is what we must say of the main things which parliament was striving to obtain in the seventeenth century. They were new claims in form, but they were logical applications of established principles, and the time had now come when it was necessary that they should be made if the English constitution was not to cease to grow.

To the immediate development of the conflict between king and parliament, two features of the situation at the accession of James decisively contributed. One was the strength and spirit of the puritan party, and the other was the condition of national finances. The puritan party had arisen in the reign of Elizabeth. It embodied the demand for a thoroughgoing reformation of the national church in the direction of protestantism, and especially of Calvinism, whose doctrines, including their logical inclination towards republicanism, it had adopted.[1] It had not yet begun to prove itself a great political power in the nation, but it had strongly reinforced and even led the growing opposition to the queen's arbitrary government in her last years. Already the separation into

[1] Prothero, *Documents*, 196–226

two wings had begun which is so important in the seventeenth century: the presbyterian, believing in a national church with a representative and republican government, and insisting on a strict conformity to its theological standards; and a left wing, in theology more tolerant and liberal, but in government more extreme in the application of their principles both to ecclesiastical and political organization, going to the extent of an actual democracy. This wing was known at first as the Brownists or separatists, later as independents, and in modern ecclesiastical history as congregationalists.

In the reign of James the presbyterian wing was in control of the party, both in numbers and leadership, and the separatists chiefly distinguished themselves by the beginning of the New England colonies in 1620. In the reign of James also the presbyterians had not come out of the national church. They were "comprehended," or most of them were, within it, and it was through the puritan spirit and ideals within the church, rather than by open rebellion against it, that their influence was exerted. The chief thing to notice at the beginning is that it was a fighting faith. It held that it was the duty of man not merely to believe the truth but to defend it and make it prevail. The preparation for conflict was further completed by the rise of a high church party in the national church, at the opposite wing from the puritans, and by the dislike of presbyterianism which James had conceived during his youth in Scotland. So closely intertwined are ecclesiastical and political opposition, ecclesiastical and political principles during the seventeenth century, that it is often impossible to separate them.

The financial problem which confronted the government at the beginning of James's reign would have been a serious one under any circumstances; it was made doubly so by the extravagance of the king and his ignorance of the value of money. A price revolution, due to the decline in the value of the precious metals, had been going on in the sixteenth century which made it impossible to do the business of the

state with the old revenues. The star chamber dinners, which cost the treasury £2 in 1500, cost £20 or more in 1600, partly owing perhaps to an increase of luxury, but mainly to the increase of prices. Elizabeth's court had been on the whole economically conducted, and the plunderings of Spain had furnished some income, so that in her reign taxation had not been increased in anything like the necessary proportion to meet the increased costs of government. The nation had not been trained to understand the situation, and now, with an extravagant king who thought his new resources practically unlimited, the burden fell suddenly upon them. As almost always in such cases, neither government nor people understood the real causes of their difficulties, and until nearly the middle of the century the necessary demands of the government and the natural reluctance of an uninformed parliament were frequent occasions of conflict.

James had received the "millenary petition"[2] of the puritan ministers in the national church for further changes, and in the Hampton Court conference strongly expressed his condemnation of their tendencies, before he met his first parliament in March, 1604. It was in this parliament that the fundamental issue was first drawn, and the fundamental principles first expressed, though still undeveloped, which were to characterize the conflict through almost the entire century. In summoning this parliament the king undertook to rule that certain classes of persons of doubtful character should not be elected to the house of commons and to assign to chancery the function of deciding whether his prescription had been complied with in individual cases or not. This would be to deprive the house of commons of the right to decide upon the qualifications of its own members and upon disputed election cases. A conflict immediately arose between the house and the king over the matter, in the course of which the king asserted that the house "derived all matters of privilege from him and by his grant," and the house in a

[2] Prothero, *Documents*, 413–417.

formal document called "a Form of Apology" in defence of its position, probably not presented to the king, declared that "our privileges and liberties are our right and due inheritance, no less than our very lands and goods," that is, possessed by the same title as private property and as little subject to withdrawal by the king. This was a square issue squarely drawn but it was not at this time further developed. In the end the king had to abandon the attempt which he had made, though the lesson that a body of law existed in the state superior to his will was very imperfectly learned.[3]

Two years later financial difficulties first led to action typical of what was to follow. Undoubtedly the king was in real need of money for the necessary expenses of the state but, instead of applying to parliament, he placed, by an act of prerogative, an extra duty of five shillings per hundred weight on imported currants. This is the case of "impositions" already referred to. A merchant, John Bate, or Bates, by refusing to pay the extra duty, brought the question before the court of exchequer, and the judges gave a unanimous decision in favor of the king's right to do as he had done.[4] Undoubtedly the right of earlier sovereigns had been recognized to raise and lower tariff duties by proclamation. But the right had been used to regulate trade, to secure protection or retaliation and fair trade. In using it not for such purposes but to raise revenue, James was assuming an important constitutional power which the precedents did not warrant. It was perhaps natural, however, that a court of law, bound normally by the letter of precedents rather than by the remote consequences which might be involved, should decide as it did.

The judges, however, went beyond what was required of them by the case before them, and laid down certain general principles with regard to the prerogative which illustrate the fact that the theoretical basis of absolute government was

[3] Prothero, *Documents*, 280–281, 286–293.

[4] Prothero, *Documents*, 340–355; A. and S., 329–331.

more clearly developed at the time than of constitutional. The chief baron said: "The king's power is double, ordinary and absolute, and they have several [i.e., different] laws and ends. The absolute power of the king is not that which is converted or executed to private use, to the benefit of any particular person, but is only that which is applied to the general benefit of the people, . . . as the people is the body and the king the head . . . and as the constitution of this body varieth with the time, so varieth this absolute law according to the wisdom of the king for the common good. . . . And whereas it is said, that if the king may impose, he may impose any quantity that he pleases, true it is that this is to be referred to the wisdom of the king, who guideth all under God by his wisdom, and this is not to be disputed by a subject."

The case, though only involving a small matter and merely making a beginning, is thoroughly characteristic of the conflicts of the century. The king stretches a precedent, which according to the letter covers his action, to make it cover a substantial increase of royal power, and the courts hold that the precedent justifies the new application. On the basis of the judicial decision in his favor, James shortly afterwards issued a new "book of rates," in which heavy additional duties, impositions, were placed on a great number of imported articles to be permanently collected, and parliament acquiesced, though not without discussion and remonstrance in which there was some advance in the understanding of the principles involved. Parliament in this session, the fourth of James's first parliament, also complained of abuses in the operation of the court of high commission and of the misuse of proclamations. The question of the king's power in the matter of proclamation being referred by the council to four judges, including the two chief justices, they gave it as their opinion that the king could not by proclamation create any new offence nor make an offence punishable by the court of

star chamber if it was not so by law.[5] This expressed opinion acted as something of a check on the tendency to extend the royal power by this means, but did not end it.

James dissolved his first parliament in February, 1611, and did not call his second until April, 1614. He was reluctant to meet parliament again, but some of his friends had urged him strongly to do so because of his financial difficulties, and had assured him that ways could be found to manage the house of commons in the king's interest. The attempt to do so, however, had a contrary effect, and the spirit of the house was declared in a vote against impositions, that the king had no right to impose taxes without parliament's consent. So angry was the king at the refusal of parliament to make him a grant before discussing grievances, that he dissolved it early in June before it had voted a tax or passed an act, and, following the example of Elizabeth, sent four members of the house of commons to the Tower in punishment of their conduct.

The third parliament did not meet until January, 1621, and during this period of ten years, from 1611 to 1621, with no parliament except that of 1614 which did nothing, the king thought himself justified in resorting to extra-legal means of raising revenue. Privy seals, that is, forced loans, were again made use of, old debts and fines rigorously collected, titles sold and a new title, that of baronet, created to sell; and after the failure of the parliament of 1614, a general benevolence was imposed, which met, however, with great opposition. Oliver St. John was heavily fined and imprisoned for written criticism of the measure.

In 1615 an important constitutional question was first brought into prominence by the action of the king, whose later settlement forms one of the positive advances of the century — the question of the independence of the judiciary. The case was that of Peacham, a puritan minister accused

[5] A. and S., 334–337.

of treason on doubtful evidence because of language against the king in a sermon that he had not preached nor published. The king directed that the judges of the king's bench should be separately consulted, undoubtedly in the hope of influencing them to take his view of the evidence. This the other judges did, but Chief Justice Coke at first objected against consultation of the judges separately, and later gave a written opinion that the evidence was insufficient. At this time Coke did not object to the consultation on constitutional grounds, but he did so later, and the case at least served to call attention to the abuses possible in the practice.

In the next year these were strikingly illustrated in another case, known as that of "commendams." The king attempted to interrupt the trial of the case which was going on before all the judges of the common law courts in the exchequer chamber, in order to hold a consultation with the judges about it. On their unanimously refusing to delay as contrary to the law, they were summoned before the king and the council and severely rebuked by James in person. All humbly submitted except Coke, who still declared the delay contrary to law. They were then required to say whether they would not delay a case before them to consult with the king if he judged his interests directly involved in it. All agreed except Coke, who would say only that he would do what was proper for a judge to do. He was shortly after dismissed from his office of chief justice.

In this case, as in the case of impositions, the historical precedents were with the king. Many kings had consulted the judges. The house of lords had done so many times, and the law officers, Coke himself, as representing the crown. The practice continued after the century in infrequent instances into modern times, and the constitutions of a number of American states authorize such consultation. But certain distinctions are important, and especially so in the history of the seventeenth century, in which the question frequently arose. In the first place, as underlying all phases of the

question, it must be borne in mind that the judges can never be ordinary law advisers. They are advisers who make the law; that is, they not merely say what the law means, but they say what it means with the power to make their interpretation the actually controlling law. This should make clear the nature of the Stuart abuse, for there is a vast difference under such conditions between consultation of the judges to settle a real doubt, or honestly to find out what are the legal limitations of official action in order to be guided by their advice, and consultation in order to impose the opinion of the executive upon the judges in a future case which must come before them for decision. If, when he does so, the executive has the power to punish the independent judge by dismissing him from office, we have the whole extent of the danger. When at the close of this period the judges were made irremovable except for cause the danger was ended, and it perhaps does not exist in a state where all officers, including the judges, are elected for fixed terms. It must not be forgotten, however, that a democracy may sometimes be tempted to impose its opinion upon the judges.

It should not be overlooked, that the devotion of the common law courts and of the lawyers practising in them to fixed forms and to the binding force of the precedent comes here, and later in the conflict, to the assistance of constitutional liberty. The rule of fixed forms had begun, as we have seen, in the thirteenth century. It had not always operated in the interests of justice, and the system of equity jurisprudence had arisen to correct the defects it occasioned. But the rule of the precedent trained the common lawyers to distinguish sharply between the legal and the illegal and to believe that the illegal should not be allowed, a belief easily transferred to the field of constitutional law. The struggle of the first two Stuarts with the opposition was indeed a struggle of precedents, which were freely quoted on both sides, but the characteristic difference running through both argumentative discussions and judicial opinion was that, upon the

king's side, the precedents were cited in the most narrow and literal sense to justify an application of powers not originally contemplated, while on the side of the opposition far less emphasis was placed upon the literal sense of the precedents than upon the principles to which a logical extension of them would lead. Both sides made something new out of the precedents, but while there can be no doubt but that the king's use more nearly corresponded to the formal meaning of the original, the use by the opposition stated more accurately the true logical application. Of course there was in past English history a considerable body of precedents wholly on the king's side, and a smaller body wholly on the side of the opposition, and to these this paragraph does not apply. It has reference to precedents bearing on specific applications of royal power, as in impositions or the treatment of the judges.

The refusal of the judges in the case of commendams led the king to declare, in the rebuke which he administered to the judges, that his prerogative was twofold, one "ordinary," which might be and was made the subject of frequent dispute in the law courts, the other higher, his supreme power and sovereignty, which could not be so disputed or discussed. By this declaration the king intended to make known the royal interpretation of the fact that the king was at once under the law and above the law. Already several times the king's understanding of his prerogative and its relation to the law had been clearly announced by himself or his supporters: in his own *True Law of Free Monarchies*, 1603; in the judicial opinion already cited in Bate's case, 1606; in Cowell's *Interpreter*, 1607, a law dictionary in which the absolutist doctrine was stated with such extreme plainness that the king himself was not able to support the book against parliamentary objection and the book was withdrawn for modification; and finally in a speech of the king's to parliament, 1610.[6]

[6] Prothero, *Documents*, 293–295.

In such assertions as these the king almost necessarily had a certain considerable advantage. In the past it had been natural for thinkers to say that sovereignty resided in a person. Historically there had been little experience in practice of a sovereign people, or of a sovereign legislature, and the sovereignty of the people had not yet been worked out in any theory capable of practical application. It had been sometimes stated in philosophical speculation, but not with any reference to working forms. It had been sometimes stated in legal treatises but only in the most abstract way as a principle on which might be based a very different actual form of government from any democracy, the imperial government of Rome for instance. The Roman law declared that the emperor possessed the supreme law-making power because the people had vested their authority in him—*cum populus ei et in eum omne imperium suum et potestatem concedit.* But it was not a sovereign people of that kind towards which the seventeenth century was working. Parliament could only work by degrees, through gradual experience, towards equal clearness in the understanding and statement of the doctrines on which its position rested.

In the last years of James I an open conflict between king and parliament was rapidly drawing nearer, and the opposition showed that it was beginning to perceive more clearly the fundamental principles involved. The outbreak of the Thirty Years' war between the catholic and protestant states of Germany, and especially the misfortunes of the protestant leader, Frederick, Elector of the Palatinate, the son-in-law of James, had made the nation anxious to go to the aid of their co-religionists and bitterly opposed to the king's policy of securing the peace of Europe through an alliance with Spain. The invasion of the Palatinate by Spanish troops in the summer of 1620, while he was still negotiating, awakened James's anger, and he summoned a parliament to meet at the end of January to provide for a war if it should prove necessary. When parliament met, the king pressed for

money for an army and asked for £500,000. Parliament departed from its usual practice of granting money only towards the end of a session by voting at once two subsidies, or about £160,000, and then turned to take up certain abuses of which there was increasing complaint. This it did at first with no sense of opposition to the king and not directing its action against him. They supposed rather that they had the approval of the king.

The abuse of monopolies, which had been attacked even in Elizabeth's time, was first taken up.[7] The monopoly of those days was a grant by royal patent of the exclusive right to deal in some commodity, often one of general use, the holder of the grant making his profit by an increase of the price to the consumer and paying a proportion of his gains into the royal treasury. James had increased the use of monopolies to some extent in his attempts to raise money without parliamentary grant. By this time so undeniable were the abuses complained of that the king made no attempt to prevent parliament from dealing with them. No statute was passed against monopolies by the parliament of 1621, but the investigation of them led to a much more important constitutional result, the revival of impeachments, and their revival in such a way, so clearly for the punishment of acknowledged corruption, that the king, even if he had wished to do so, could find no ground on which to object. Thus, without appearing openly to attack the king, the most effective weapon which the middle ages had invented for combatting an arbitrary government was restored to the hands of parliament.

Impeachments had not been in use since the middle of the fifteenth century because for one reason or another, during the whole of nearly two centuries, parliament had not attempted seriously to oppose the sovereign. In such conditions, whenever the punishment of an official had been desired, a bill of attainder was a shorter and more convenient method,

[7] Prothero, *Documents*, 111–117, 275–277; A. and S., 325–326, 337–339.

and impeachment had fallen into abeyance. By the constitution of the United States attainder is forbidden, and impeachment by direct inference is confined to office holders and expressly made a political trial with punishments limited to political penalties. None of these things, however, was true of the original impeachment. The original of the house of lords, the old great council, could try any person for any offence, if the king thought fit to bring the case there for trial. The house of lords of 1621 had for all ordinary matters forgotten its connection with the old great council, and the relation of its powers with those of the earlier assembly from which they were derived. Many things in the seventeenth century, however, which have disappeared today, illustrate that connection. The house of lords was still a criminal court, not merely for its own members but for any one, if the case was brought to them. The fact is important in connection with the revival of impeachments.

The first of the new impeachments was not in regular form. The conduct of Mompesson, the holder of a monopoly, was investigated by the commons and the evidence of his abuses was laid before the lords, but there was no formal prosecution by the lower house. The lords examined the evidence, found Mompesson guilty, and sentenced him to heavy punishment. His colleague, Michell, was dealt with in the same way, as were also Sir John Bennet, a judge, and Dr. Field, a bishop, both for corruption. In the impeachment of Francis Bacon, the lord chancellor, in the same session, a great forward step was taken, not in the revival of forms, but in the punishment of a high officer of the court who had been a faithful instrument of the king's. Yet in this case also there was no direct attack upon the king, and the king had no defensible grounds from which he could move to the protection of Bacon. The charge against him was the acceptance of bribes in cases before his court, and the evidence was so indisputable that he could only plead guilty.[8] Whether the case was a polit-

[8] Prothero, *Documents*, 334–336.

ical impeachment or not, and clearly there was in it no assertion that the minister was responsible for the acts of the king, it had fully established the right of parliament to bring charges of misconduct against a minister of the crown and to punish him severely. This right was confirmed in 1624 by the impeachment of the earl of Middlesex, the lord treasurer, on similar charges.

In the same session another important constitutional point was settled, at least negatively and quite in accord with the principles involved in the historical origin of parliament, which would give the house of commons no share in the judgment-making power of the house of lords derived from the old great council. In finding guilty and sentencing to punishment one Floyd, a Roman catholic lawyer, not for an offence against itself but for disrespectful words spoken against the Elector Palatine, the house of commons went beyond its rights, and could not furnish precedents in support of its action when requested to do so by the king, nor justify itself when the lords explained that their privileges were being infringed.[9] Without a formal confession of guilt it surrendered the case to the lords, before whom it was prosecuted by the attorney general. Earlier also its committee in its revival of impeachments had reported that the case must go to the lords for trial and judgment. These conclusions, undoubtedly historically correct, are important at the date when they were made, because later in the century great emphasis was to be placed upon the assertion that parliament, the high court of parliament, was the highest court of the land, an assertion made often in language easily misunderstood. It must be held in mind that the house of commons never undertook to defend a claim to a share in the highest function of a court of law, the making of the final judgment which concludes a case, nor formed in practice any other part of an actual court than that occupied by the practising attorney. When brought squarely to face the

[9] Prothero, *Documents*, 337–339.

question, it recognized the fact that its power of judgment and punishment extended only to cases affecting its own rights and privileges.

As parliament paid no attention to James's requests for more money, but insisted upon busying itself with the investigation of abuses, the king adjourned it in May to meet again in November. In the interval, James's plans for obtaining peace in Europe and protecting the Palatinate through an alliance with Spain made no progress, and he met parliament with a request for £900,000 for the English army, which was serving in Germany though in form war did not exist. With considerable show of reluctance the house of commons voted one subsidy, less than £80,000. The king certainly had some ground of complaint, but parliament was not disposed to deprive itself of its most certain means of forcing the redress of grievances. Matters were brought to a direct issue by a petition drawn up by the house of commons, calling attention to the alarming spread of popery and expressing the hope of a protestant marriage for the prince of Wales instead of a marriage with a Spanish princess which the king hoped to make in order to cement the alliance he desired.

It must be said that in this petition the house of commons was going a little beyond what had so far been recognized as its sphere of action. Indeed, down almost to the present time, the field of foreign affairs has been considered to belong exclusively to the executive. James came instantly to the defence of his prerogative. Without waiting for the petition to be presented, he sent a letter to the speaker commanding him to make known to the house "that none therein shall presume henceforth to meddle with anything concerning our government or deep matters of state," including the Spanish marriage, and declaring his right and determination to punish misdemeanors and insolent behavior in parliament. The house of commons replied by a second petition, in which they prayed the king to recognize "the ancient liberty of

parliament for freedom of speech, jurisdiction and just censure," which they asserted was their "ancient and undoubted right and an inheritance received from our ancestors." This the king refused, and on his side said that their "privileges were derived from the grace and permission of our ancestors and us, for most of them grow from precedents, which show rather a toleration than inheritance."

Historically the king was right in regard to "most of them," but the commons had now come to understand too clearly what was involved in this issue to allow the king's claim to pass unchallenged. They answered in the "Protestation," adopted December 18, 1621.[10] This was no petition, but an unqualified declaration: "That the liberties, franchises, privileges and jurisdictions of parliament are the ancient and undoubted birthright and inheritance of the subjects of England," that affairs concerning king, state and church are proper subjects for their discussion and that in their discussions they have entire liberty of speech. The next day parliament was prorogued by the king, and a few days after he sent for the journal of the house of commons and in the presence of the council tore out the leaf upon which the protestation had been entered. Three members of the house were sent to the Tower, and John Pym was ordered to confine himself to his house, and on January 6 parliament was dissolved.

The protestation is worthy of special notice not so much for its language, for that is not greatly in advance of that in the "form of apology" of 1604, but because it takes issue sharply with the king without disguise or pretence of form, and because it shows a somewhat clearer perception than had been before indicated of what their disputes with the king might involve. It may be taken thus to mark the end of the first stage in the conflict of the century between the king and parliament, the introductory stage, covering the reign

10 Prothero, *Documents*, 313–314.

of James, though nothing happens to mark the opening of a new stage till a little time after the accession of Charles I.

James's fourth and last parliament met in February, 1624. King and parliament were not in complete accord during its one short session, but they were more nearly so than had been usually the case. James's plan for the Spanish marriage had failed, and he was more in the mood for war, or for an earnest threat of war than he had been before. He asked for six subsidies and twelve fifteenths, and parliament voted three subsidies and three fifteenths. The subsidy was a direct land and property tax put into the fixed form of four shillings upon the pound for lands and two shillings and eight pence on the pound for goods, reckoned upon an assessment also fixed which had been made in the reign of Mary. A single subsidy brought in something more than £70,000. Five subsidies voted at once would be in form confiscation of the whole assessed value of land, but it made in reality not a heavy tax, the assessment being extremely low and the payment distributed over more than a single year. The fifteenth was an income tax — a tenth in the royal domains, which included most of the towns — but the sum to be paid by each local unit had been fixed before the middle of the fourteenth century and not since increased. A single fifteenth amounted to about £30,000. This parliament also impeached the earl of Middlesex, and passed a statute declaring monopolies, except patents for new inventions, to be "altogether contrary to the laws of this realm," "to the ancient and fundamental laws" of the realm the preamble says, and therefore void. James dissolved this parliament at the end of May, and died on the 27th of the next March.

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CHAPTER XII

KING WITHOUT PARLIAMENT

The reign of Charles I, at least to 1640, is a natural continuation of his father's. But Charles was more obstinate and more shortsighted than James, and parliament had now a clearer idea of what was at stake. For these reasons differences between them drifted more rapidly to extremes than in the earlier period. Charles had been brought up to believe implicitly the doctrine of the king's absolute power by divine right and, as this doctrine was strongly held in the church and at the court and had the sanction of judicial decisions, he was likely to be convinced of its errors only by the logic of events. The personality of Charles was an even more decided influence in shaping the history of his reign than his father's had been; it came again, as in the time of Henry III, greatly to the advantage of constitutional growth that a king not intellectually strong had an exalted idea of his position. While Charles was obstinate, he was also vacillating. He could not be convinced by argument, but his conduct could be influenced by currents of feeling to which he was exposed, and changed by the force of circumstances to contradict his professions. He wholly lacked the qualities so preëminent in the Tudors, tact and a keen instinct for the drift of public feeling.

At his accession Charles was eager for a war with Spain. In less than three months he called his first parliament in hope of a large grant of money for the purpose, but the house of commons would grant only two subsidies. The house was less interested in the king's plans than in two other matters: to protect protestantism against what it believed to be new catholic dangers, and the determination which it

expressed in a formal resolution "to discover and reform the abuses and grievances of the realm and State." Impatiently Charles dissolved the parliament on August 12, nothing further having been done; no grant had been made even of tunnage and poundage. But the king could not get on without parliament, and his second met on February 6 next. It at once assumed an even higher tone than the first, and proceeded to prepare an impeachment of the Duke of Buckingham, the king's favorite minister, whom it believed responsible for the worst abuses. But this Charles would not permit. He summoned the commons to his presence and informed them that their first business was the granting of supplies, and that he would not permit his servants in high place near himself to be called in question for they had done nothing except at his command. The house was unmoved. It made no change in its plans but asserted vigorously its right to take action against anyone guilty of abuses in a position of trust. It promised the king a liberal supply but resolved to postpone making the grant actual until grievances were redressed. On May 8 the impeachment of Buckingham was brought up to the house of lords by the managers for the commons. Two of them, Sir John Eliot and Sir Dudley Digges, were immediately thrown into the Tower for things said in their speeches, and the commons at once resolved that they would do no further business until the release of their members.[1] The king yielded with reluctance, but when the commons resolved that tunnage and poundage could not legally be collected unless granted and that no supply would be voted until Buckingham was removed, he dissolved his second parliament on June 15.

It is impossible not to see in the story of these fifteen months since Charles began to reign that parliament had moved boldly on to a higher plane. It had taken in full self-consciousness a new position of power in the state — a position which had long been preparing but which had not

[1] Gardiner, *Documents*, 3–44. Cheyney, *Readings*, 456–457.

before been occupied. Not even the relatively powerful parliaments of the Lancastrian time, certainly no Tudor parliament, nor quite even any one of James's, showed the same spirit. These parliaments of Charles's feel themselves on a par with the king. They believe themselves able to stand over against him as an equal in determining the future. They are fully prepared to enter into conflict with him on even terms, and they know that they have formidable weapons, the privileges of parliament, impeachment, and the king's financial necessities, which they are prepared to use to the extreme in offence as well as defence. Here, as elsewhere in the century, the change is less in institutions than in a new consciousness of what they mean and how they can be used.

This new consciousness of the meaning of old institutions is strikingly to be seen in the speeches before the house of lords of the managers of the impeachment of Buckingham for the house of commons. Sir Dudley Digges used the words already quoted: "The laws of England have taught us that kings cannot command ill or unlawful things. And whatsoever ill events succeed, the executioners of such designs must answer for them." That is, the king can do no wrong in the constitutional sense of that phrase. In the closing speech for the prosecution, Sir John Eliot was still more definite. "My Lords," he said, "I will say that if his Majesty himself were pleased to have consented, or to have commanded, which I cannot believe, yet this could no way satisfy for the Duke, or make any extenuation of the charge, for it was the duty of his place to have opposed it by his prayers, and to have interceded with his Majesty to make known the dangers, the ill consequences that might follow." The modern doctrine of ministerial responsibility can hardly be more fully stated in the same number of words, though of course all that was implied in it was not yet seen. Here is, however, the principle that it was the minister's duty to resist the orders of the king if he knew that they were wrong, and to protest against the attempt of the king to carry out

his will contrary to the law; and because he did not do that the minister is responsible and must be held accountable.

On the king's side there was also a formulation of the opposing doctrine which was as new in its explicit form, though it was logically involved in the king's theory of his own place in the state: his definite assumption of responsibility for the acts of his ministers. In a message to the house of commons in regard to Buckingham, he said: "And for some particulars wherewith he hath been pressed, however he hath made his answer, certain it is that I did command him to do what he hath done therein. I would not have the House to question my servants, much less one that is so near me." The issue thus drawn between the king and parliament was one way of stating, though that was not yet understood, the fundamental constitutional issue which the seventeenth century was to settle. It involved also, at the beginning of Charles's reign, the tragedy of its close, for his insistence upon his own responsibility made compromise impossible.

It was easy for the king to send parliament home because it displeased him, but it was not so easy with no authorized taxation to meet the necessary expenses of the government. It would have been difficult even in time of peace, and in addition to his war with Spain Charles was rapidly drifting into a war with France, which broke out in the next year, 1627. He was forced to adopt the expedients of his father, and new ones also. Tunnage and poundage were continued without a grant; benevolences and forced loans were demanded and privy seals were issued; heavy debts were contracted; exemptions were sold; the maritime counties were ordered to furnish ships for the fleet, a medieval method of forming and equipping a navy which was not yet out of use, and the attempt was made to extend the obligation even to the inland counties. Altogether these expedients raised insufficient sums, and they excited bitter opposition. The forced loan was planned to be a regular tax, based on the assessment for the last subsidy and intended to be equal to five subsidies, but

little was collected.[2] The judges of the king's bench, called upon to sign a statement that the loan was legal, refused to do so, and, though the chief justice was dismissed, the other judges continued their refusal. Payment could not be enforced. Gentlemen who refused were thrown into prison, and common men were pressed into the army forming for the continent. Martial law had to be invoked with some severity to control the ill-trained levies, and, to make up for the lack of money, the troops had to be quartered upon the local communities. It is very likely true that these measures were not adopted to punish the people for their unwillingness to pay the king's taxes, but they showed clearly what an arbitrary government might be led to do and they excited great alarm.

A further constitutional question was raised in the five knights' case, or Darnel's case, growing out of the imprisonment of gentlemen for refusing to pay their assessments towards the forced loan. Five of the knights arrested, of whom Darnel was one, sued out writs of *habeas corpus* in the court of king's bench.[3] Their jailer made return to the writ that they were held by the special command of the king. The prisoners' counsel refused to accept this return as sufficient but, while admitting the right of the king and the council to make arrests, declared that the return to the writ must specify the exact reason for the arrest. They cited in their support Magna Carta and other statutes. The counsel for the crown argued that reasons of state often made it very inexpedient to state exact reasons, and they cited on their side precedents and judicial rulings. The chief justice rendered the decision of the bench, which was generally understood to refuse to admit the prisoners to bail and to sustain the action of the crown.

There can be no doubt but that historically the decision of the judges was correct. Prerogative arrest and imprisonment without stating the specific reasons had always been

[2] Gardiner, *Documents*, 51–57.

[3] Gardiner, *Documents*, 57–64.

recognized as among the rights of the king. Magna Carta had made no change in the practice, and the right never had been before this date seriously called in question, though precedents may be cited on the other side, and there seems to have been at the time some confusion between prerogative right and common law. Here was, in the eyes of the historian, a new constitutional claim, an attempt to limit the royal prerogative in a new particular; but it was a claim entirely in harmony with past progress and logically involved in it. The letter of the precedents sustained the king's position, but their spirit did not. It was now no necessity of state from which he was acting, but the necessity of maintaining his illegal and unconstitutional action. If the nation had been right in cutting off one after another the king's extra-legal means of raising revenue, so they were right in taking away an effective weapon for defeating their will in this particular. The history of the king's opponents may have been wrong, but their logic was right.

Charles found that with all his expedients he could not sustain the burden of a foreign war, and he was obliged to try the experiment of another parliament, which was summoned to meet in March, 1628. In the temper of the nation the elections were not likely to return a house of commons favorable to Charles's wishes, and when it met it determined at once to demand, as it had before, the reform of abuses before granting a tax, in spite of the threatening language of the king. It is a sign of considerable advance, however, that it proceeded now, not against the ministers of the king, but directly against the king's interpretation of the constitution which threatened the establishment of absolute government. Differences between the crown and the people had now shaped themselves into very specific form. In four definite particulars the fear of the nation had been greatly excited, and with these four the commons were determined to deal specifically — illegal taxation, arbitrary imprison-

ment, billeting of soldiers on individuals, and punishment by martial law.

Just how they were to be dealt with in such a way as to accomplish the desired end was a matter of some doubt and the subject of long debate. A simple confirmation of the existing law, to which the king was quite willing to agree but which would leave him still free to interpret the law according to his own ideas, was not satisfactory to the commons. They desired a statement which should make their interpretation of the law binding upon the courts. At first they determined to proceed by bill which, when accepted by the king, would make their view a statute on a par with all other statutes and necessarily binding. But the king gave it to be clearly understood that he would never consent to such a bill. After further debate it was decided to present to the king, from both houses, a "petition of right."

Since the thirteenth century the petition had been a constant feature of the country's judicial system. A petition might be addressed by any person or body of persons, generally to the king himself, or to the king and his council. It was the recognized method of initiating proceedings in chancery, and might be used for other purposes. As the writ of right assumed the justice of the plaintiff's claim, the petition of right assumed the justice of the petitioner's case and went on the supposition that all that was necessary was to bring it to the king's attention and justice would at once be done. The answer to such a petition from a private person generally was: *fiat justitia,* or *soit droit fait a la partie.* The advantage to parliament in this method of procedure was that the petition and the action taken upon it would be a matter of judicial record, like a decided case in any of the courts, and would have the same binding effect upon other courts in the future.

In drawing up the petition the commons softened somewhat the language they had at first proposed to use, but they

did "humbly pray your most excellent Majesty that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge without common consent by act of parliament"; that no one be molested "for refusal thereof"; that no freeman be imprisoned without due process of law, nor detained by the king's command "without being charged with anything to which they might make answer according to law," implying, though not definitely asserting, that this last was secured by existing law; and that billeting of soldiers and punishment by martial law might cease.[4] To this petition the king answered on June 2, 1628: "the king willeth that right be done according to the laws and customs of the realm; that the statutes be put in due execution, that his subjects may have no cause to complain of any wrong or oppressions, contrary to their just rights and liberties, to the preservation whereof he holds himself as well obliged as of his prerogative." To the commons this answer seemed ambiguous, as an attempt to permit the king to substitute his own interpretation of the law for theirs, as no doubt it was. With the lords, they applied for a different answer, and finally the king gave assent in the words: "*Soit droit fait come est desiré*," words suggested by parliament and at that time commonly used in assenting to a private bill.

The Petition of Right was therefore not a statute, though it was a matter of record. It was rather, if its historical antecedents be regarded and some irregularities of form be disregarded, to be classed technically and in binding force with judicial decisions. As a matter of fact, in time to come it was not regarded with any exactness as making law. Its important provisions had to be reënacted before the close of the century. It is as a constitutional document that its significance is greatest, and in this respect it is a sign of what was taking place rather than the record of a definite advance. Undoubtedly, however, it belongs in the series of

[4] A. and S., 339–342; Gardiner, *Documents*, 66–70.

great documents of our constitutional history which begins with Magna Carta. The Petition of Right in spirit, purpose, and method is exactly in line with the Great Charter. It asserts that the things to which it demands the king's agreement were already the law of the land, and it is based upon the supposition that the king has shown himself so unwilling to regard these principles that it must obtain his formal pledge, binding upon his successors as in 1215, to respect them in the future. But it cannot be affirmed that the Petition of Right is of equal importance in English constitutional history with either Magna Carta or the later Bill of Rights. It uses many words after a fashion of the time and is the least concise and clean-cut of all our constitutional documents. Its historical value is to be found chiefly in the precedent which it established in the struggle of that century of the parliamentary coercion of the king in constitutional interpretation, and in the assertion which it made in a most striking manner of the supremacy of the law.

In one respect the Petition of Right is a sign that an advance had taken place. It is the first attempt made since the beginning of the struggle between king and parliament to draw a definite line between prerogative and law, to fix with some exactness the point where the power which is above the law shall end and where the reign of law shall begin. This it attempts to do, not as a general matter but in specific particulars. That in doing this it reduces the king's prerogative powers and sets new limitations to them is quite in harmony with the spirit of past constitutional growth.

An incident in the adoption of the petition probably assisted still further to clarify ideas upon what was fundamentally at issue in the conflict. The lords wished to say in an amendment which they proposed, that they presented the petition to the king "with due regard to leave entire that sovereign power wherewith your Majesty is trusted with the protection, safety and happiness of your people." The introduction of the idea of sovereign power, of sovereignty,

in this way was something new in the discussion. Probably parliament understood only vaguely that these words would be an acknowledgment that sovereignty resided in the king, or what would be implied in such an admission, but the apprehension of the house of commons was at once excited. With many expressions of wonder and doubt about "sovereign power" the house rejected the amendment, and the lords yielded. In this discussion, however, they were skating near to the edge of the most serious issue between king and parliament. The petition was in truth the first step in the transfer of sovereignty from king to parliament. The acts of which it complained were all prerogative acts, acts above the law, acts of sovereignty. These prerogatives had been exercised by the king down to this time with no serious opposition. What parliament insists upon is that now these acts must be transferred out of the sphere of prerogative into the sphere of law, out of the sphere of that law which the king is above into the sphere of that law which is above the king.

One further characteristic of the Petition of Right should not be overlooked,— its entirely practical character. It confines itself strictly to the business in hand. It does not attempt any theoretical justification; it lays down no fundamental principles and borrows nothing from speculative philosophy. It settles specific questions in a specific way. Its narrow range of application, only to the four practical points which had risen in the experience of the time, makes it perhaps the most typical in this respect in the whole series of Anglo-Saxon constitutional documents, of all of which with hardly an exception this practical, unspeculative nature is characteristic. The only significant exception is the preamble of the Declaration of Independence. That gives expression to the political philosophy made popular near the close of the seventeenth century by John Locke, and derived through medieval from classical thought. It is, of course, no expression of the real ideas which carried the

American Revolution through. These are expressed in the body of the Declaration, and that is a perfectly straightforward, clear-cut, terse, and businesslike document. It takes its proper place in the series which opened with Magna Carta, with nothing to apologize for from the practical point of view. The Petition of Right, while less sharply formulated, is as eminently practical.

If the third parliament of Charles saw the first step towards the transfer of sovereignty from king to parliament, it saw also the first step towards revolution. In gratitude for the acceptance of the petition, the house of commons voted to grant the king five subsidies, but prepared to remonstrate against the illegal collection of tunnage and poundage.[5] To prevent this Charles brought the session to an end. When the new session opened six months later, the same question arose and the king attempted to prevent action by brief adjournments of the house. On the second occasion of the king's interference, the commons refused to adjourn, and when the speaker declared that he had the king's orders to leave the chair, he was forcibly held down by two members, while the door was locked to prevent members who wished to go out from leaving, and three resolutions prepared by Sir John Eliot were put to vote by a private member, in spite of the speaker, and declared adopted. Here were acts not warranted by law or practice, and done in the excitement of passion.[6] The resolutions were in themselves legitimate. One declared against changes in religion in the interests of popery or Arminianism, the doctrine of the high church party; one declared against the collection of tunnage and poundage without a grant; and the third denounced anyone who should pay these illegal duties as an enemy of the kingdom. But revolution is an appeal to violence to do what cannot be easily or quickly done by legal methods. That the thing is desirable to do, or that the

[5] A. and S., 343–346; Gardiner, *Documents*, 70–74.

[6] Cheyney, *Readings*, 460–463; A. and S., 346–347.

majority wish it done, does not make it any the less revolution. This was the first step in the road of revolution, but it was long before another was taken, for Charles had had enough of parliaments and resolved to call no more. This resolution was formally announced by proclamation a few days after the dissolution.

Charles did not wait even for the dissolution to punish the leaders of the opposition. Nine members of the house of commons were arrested and imprisoned. The formal accusation against them before the court was carefully drawn to avoid the question of parliamentary privilege, but three of them, Eliot, Strode, and Valentine, refused to answer on the ground of violation of privilege. They were heavily fined and kept in prison, Strode and Valentine until just before the short parliament of 1640, but Sir John Eliot died in the Tower in 1632.

No adequate grant of taxes had been made the king by any of his three parliaments, and the question whether he could dispense with future parliaments was really the question whether a sufficient extra-parlimentary revenue could be provided to meet the pressing expenses of the state. Considerable experience in finding such revenue had now been accumulated since the accession of James I, but the Petition of Right explicitly forbade the most fruitful sources, forced loans and benevolences. Charles and his advisers had no intention of observing faithfully the spirit of the petition, but they did strive with some ingenuity to avoid a violation of its strict letter in their search for methods of virtual taxation. The result of their schemes for revenue, looked at as a whole, may be described as an antiquarian revival of forms of income, which, though virtually obsolete, had not passed absolutely out of use and had not been forbidden by statute, or if forbidden like monopolies could be revived in a form not touched by the strict letter of the statute.

In the reign of Henry III, when the feudal army was beginning to fail the state, compulsory knighthood had been

invented to compel men of the requisite income, £20 per annum from land, to become responsible for having the arms and equipment of the knight required by the assize of arms and so to be ready to defend the country. With the further decline of feudalism, and especially with the change made by the introduction of gunpowder, the measure lost its military value, but it was readily converted into a source of revenue by enforcing the requirement and taking fines for exemption, and it had been so used in the past. The sum brought in was not sufficient of itself, but quite worth while in a time when it was hard to find any revenue. The required income was now fixed at £40 but, because of the great decline in the value of money which had taken place, this was a considerably smaller income than the £20 of the thirteenth century.

The royal forests had been in medieval times very carefully guarded, and infringements upon their territory by settlers or neighboring proprietors had been severely punished. In later times their borders had been a good deal contracted, and portions of them had been granted away or occupation tacitly allowed. It was true, however, that legal evidence of ownership was easily lost, especially in times of civil war, and that no length of possession need be accepted as valid proof against a claim of the king's. Now the old boundaries of the forests were reëstablished and all holders within them were required to prove their title to possession under penalty of very heavy fines, which were in the end, however, largely scaled down. Charles was not the first king who had used this expedient for raising money, but it was now so clearly an act of tyrannical injustice and so plainly used to escape the legal limitations of the constitution that the exasperation excited was greatly out of proportion to the money obtained. Monopolies had been forbidden by the statute of 1624, but that act had expressly excepted "any corporations, companies or fellowships of any art, trade, occupation or mystery." The reference was of course to the well

known trade companies, but the language allowed the revival of monopolies to corporations devoted to a trade with all their opportunities for injustice and corruption. After the adoption of the Petition of Right there had been a brief resistance by the London merchants to the collection of tunnage and poundage, but it had soon ceased and these customs duties, with further impositions fixed by a new book of rates in 1635, and increasing with the increase of commerce, furnished about half the revenue of the state.

The most important discovery of new revenue was in the revival and extension of ship money. In medieval times it had been very easy to turn a commercial vessel into a ship of war, and the government had relieved itself of the necessity of maintaining a large permanent fleet by calling upon the port towns in time of war to furnish a certain number of ships. There had been in those days no objection, legal or constitutional, to this practice as calling for the service of the towns in defence of the country. The use of gunpowder, however, had made no more serious change in military than in naval methods, and it was now a much more difficult matter to transform a mercantile into naval vessel. The practice had not passed out of occasional use; Charles had made use of it in 1626 in the war with Spain; but it had ceased to be a main dependence of the state. It was now proposed to make it such again. That there was real need for a stronger fleet than the king could maintain from his precarious revenues is certain. The foreign relations of England were threatening in more than one direction, and especially had the very rapid growth of Dutch commerce and the strength and policy of the Dutch fleet awakened much anxiety among English merchants. It was not a time of war, but it was not difficult to advance a plausible excuse of necessity. The first writ for ship money, issued in October, 1634, was near enough to the traditional practice not to lead to serious opposition.[7] It called upon

[7] A. and S., 347–349; Gardiner, *Documents*, 105–108.

the port towns to furnish ships of war, but of a size not to be found except in London, or in lieu of these to levy a sum of money sufficient to cover the cost. The demand was a transition from the ancient precedent to a practically undisguised tax. London objected on the ground of special exemptions without success, and otherwise the demand was acceded to with little remonstrance.

The second writ, of August, 1635, completed the transformation. The tax was extended to all the kingdom on the ground that as the support of the navy concerned the safety and defence of all so all should contribute to that end. The writs were sent to the sheriff of every county, directing him to provide a ship of war or to levy and pay in a sum of money in place of it. To this writ so extended there was considerable more resistance than to the first but none that required extreme action by the government. Taken into the court of king's bench in one case, it led to a judicial decision that "many things which might not be done by the rule of law might be done by the rule of government"; that is, that this was a legitimate exercise of the sovereign power, which by inference it was the king's right to exercise.

The third writ, issued in October, 1636, and like the second extending the levy to the whole kingdom, made it plain to every one that the king had discovered a method of annual taxation which could be made sufficient to supply his needs provided the tax was paid. The levy brought in something over £200,000 and was about equivalent to three subsidies. It was becoming clear also that the principle was capable of still wider application. If the king could lay a tax like this upon alleged grounds of national necessity determined by himself alone, what limit was there to an extreme right of arbitrary taxation? More and more clearly the question was emerging into light: where does the right of final decision lie, with the king or with parliament, with the nominal sovereign or with the people speaking through their representatives? It was to the clarifying of this ques-

tion that the great service of John Hampden was rendered, in refusing to pay the levy of 20 shillings which had been made on him. For the judges who pronounced for the king in his case found it impossible to maintain the right to lay the tax on any grounds except those of prerogative. The case was tried before the court of exchequer chamber, that is, by a united bench of all the common law judges, who decided seven to five for the king.[8] Said one opinion: "The king *pro bono publico* may charge his subjects, for the safety and defence of the kingdom, notwithstanding any act of parliament, and a statute derogatory from the prerogative doth not bind the king; and the king may dispense with any law in cases of necessity." Said the chief justice of the common pleas: "No act of parliament can bar a king of his regality . . . therefore acts of parliament to take away his royal power in the defence of his kingdom are void." Such doctrines as these from such a source, with the practical consequences plainly evident, forced thinking men to consider carefully the fundamental principles involved. For the present nothing could be done. A new levy of the same kind was collected in each of the three following years.

Charles was succeeding in his plan of getting on without parliament. Putting together his various means of raising revenue, he was getting enough nearly to cover the ordinary expenses of the state in time of peace. If he could avoid the necessity of paying for an army in addition to a navy, it looked as if he might be ultimately successful in throwing off all constitutional restraints. We have therefore to consider now how he found himself forced to raise an army. In doing this we are obliged to consider also how the religious questions of the day entered into the constitutional struggle.

The king had found two men who were of great assistance in carrying out his purpose of personal government. Sir Thomas Wentworth had been one of the leaders of the opposition in the first parliaments of the reign, but as time

[8] Gardiner, *Documents*, 109–124.

went on it was found that his idea of legal right as between king and parliament did not agree with that of the other opposition leaders. He believed that in strict law the king had a larger body of right than they were willing to allow, and in particular, though he accepted the Petition of Right in principle, he did not believe in the right of parliament to supreme authority. Gradually he passed over to the king's side, no doubt from honest conviction, though he was bitterly hated as a renegade. He was finally to be made earl of Strafford, but in 1632 he was appointed lord deputy of Ireland. Here he had free hand to develop his own ideas of what the royal government should be, which was, in his own words, "thorough," or "founded on a complete disregard of private interests with a view to the establishment, for the good of the whole community, of the royal power as the embodiment of the state." He also firmly believed that, if this ideal was to be realized, it must be supported by a strong military force, and this he made it his business to prepare in Ireland. His great abilities, much above those of most men of his time, as well as the opportunities offered in his government, made him more feared than any other of the king's supporters.

William Laud, whom Charles had made archbishop of Canterbury, was largely responsible for the religious opposition which was excited. He was by natural disposition a leader of the high church party and an opponent of Calvinism, and his duty to religion and his duty to the king coincided in his mind in his effort to bring "comprehension" to an end and to drive the puritans out of the national church. He had the full sympathy and support of the king in this effort, and for years it seemed entirely successful. On their side the puritans were alarmed, not merely by the danger to their own form of protestantism, but they thought they saw in the plans of the high church party preparations for the restoration of catholicism. When they took into account also the military successes of the catholic powers on the con-

tinent and the influence of the catholic queen, Henrietta Maria, they were ready to despair of the future. Religious and political liberty seemed perishing together. The first result of their despair, the hopeless outlook as it seemed to them in both church and state, was the migration of thousands of families to New England, by which they rescued the northern colonies from the gradual encroachments of Dutch and French.

But more important than the geographical expansion which the puritans secured were the constitutional ideas which they brought to America. There was indeed to be for these ideas an immediate future in England which the puritan emigrants did not foresee, a future in which they were to be forced to a premature development in the hothouse process of revolution. But it was to be a development short lived and without permanent influence in the mother country. It was in that other England which they helped to found across the sea that the peculiar constitutional ideas of the puritans in a slower and more normal development were to bear fruit for all the world. Nor must the fact be overlooked that it was not in New England alone that puritan colonists settled, nor through New England influence alone that puritan ideas affected the future of America. At home, between 1630 and 1640, everything seemed to be going as the king and Laud desired. The modern newspaper was not yet in existence. None of the machinery of democratic expression, public meetings, political speaking, party organization, had yet been devised. Parliament still remained the only organ in the state by which the general opinion of the nation could be made conscious of itself, could be created, gathered, and expressed. By the policy of the king the opposition was for a period of eleven years deprived of the opportunity of parliamentary expression, and it was in consequence helpless and dumb. The financial dependence of the king on parliament, which was at that date the only

thing making a meeting of parliament necessary, seemed for the moment at least to be successfully overcome.

Charles I succeeded, as has been said, by his arbitrary measures in establishing a temporary independence of parliament. Governments can hardly hope, however, to go on for many years without special financial strain, and the end came for the government of Charles through yielding to a very natural temptation. So great apparent success had crowned the efforts of Laud to reconstruct the English church according to the aristocratic ideas of the high church party, that the conclusion seemed obvious that with the continued backing of the king the same thing might be done in Scotland. The king's ideal of monarchical power would promise to be solidly established in facts, if presbyterianism in Scotland could be curbed and a subservient church put in its place. The Scots proved to be, however, too thoroughly devoted to their national worship. They formed the famous Scottish Covenant and resisted in arms, and Charles was compelled to raise and maintain an army. That was too great a strain for his makeshift finances.

Various expedients were resorted to; a contribution was asked for from London and then from the whole country, and loans were requested, hardly escaping violations of the Petition of Right. Another obsolete levy upon the counties for the support of a military force, "coat and conduct money," was revived. Every expedient was resisted and failed. A parliament became inevitable, if the Scots were not to be left to triumph. Wentworth, who had returned from Ireland and was soon to be made earl of Strafford, urged the calling of a parliament believing that, whether it granted supplies or refused them in time of war, and thus justified independent action by the government, the king's position would be strengthened. The parliament was called to meet on April 13, 1640. The elections took place in the midst of rumors as to the king's intentions in dealing with

parliament, but with no certain knowledge of his plans and no knowledge of the strength and general prevalence of opposition views. No method had yet been found of ascertaining public opinion in advance of a meeting of parliament.

When the house of commons met, it was found that not merely was there a large opposition majority, but that in spite of all the changes of eleven years its leadership was as able, experienced, and observant as before. Pym and Hampden came at once to the front and others were hardly second to them. Pressure was brought to bear at once by the king and his supporters for an immediate grant of money. The lords voted that supply should come before grievances, which the commons resented as an infringement of their privileges in regard to money bills. The king offered to give up ship money in return for a grant of twelve subsidies. The house was not to be moved, however. They saw clearly the disadvantage at which they would be placed if they gave the king an adequate supply before they had brought his illegal methods to an end. When Charles was convinced that they could not be moved from this course he dissolved the parliament, after a session of only three weeks in which nothing had been done.

But the opposition to the king's government had made great gains. It had learned how strong it was against the king; it had learned the powerful support which it had in the general feeling of the country; and it had revealed to the Scots that it was not a united nation which was making war upon them. The members of the house of commons returned to their homes with a new determination to resist arbitrary government, and with new courage and confidence in their ability to defend their rights. The so-called "short parliament" did none of the work of a parliament, but it destroyed all chance of the king's success and rendered the triumph of the constitution certain.

After the dissolution of the parliament the king and Strafford made the utmost effort to overcome both the financial

and military difficulties of their situation. Some members of the commons were imprisoned on pretexts avoiding the privileges of the house. The sheriffs were urgently pressed to collect the ship money and coat and conduct levies, the lord mayor and aldermen of London to make a loan; convocation, which sympathized with the king's Scottish policy, tried to support a general benevolence; twice an attempt was made to get a loan from Spain in return for help against the Dutch; it was proposed to debase the coinage; it was planned to seize Spanish bullion deposited in the tower for coinage; all to no purpose. From all sources only small sums dribbled into the treasury, while expenses were constantly mounting. Meantime the army which had been raised was a serious problem. It was undisciplined, badly supplied, and scarcely paid at all. To maintain it in the semblance of an army it had to be quartered on the country, and martial law had to be rigorously enforced, both in real violation of the Petition of Right. In August the Scottish army crossed the border with practically no resistance, and occupied the counties of Northumberland and Durham. They announced that they intended no attack on the English nation, which they believed to be in sympathy with their cause, and that they would pay for all supplies taken and refrain from violence. These promises they kept.

At the end of August, twelve peers united in a petition to the king, reciting "the great distempers and dangers now threatening the Church and State and your Royal person," and asking "your most Excellent Majesty that you would be pleased to summon a Parliament within some short and convenient time." To avoid this if possible, or at least to gain time, Charles fell back again upon an old precedent. It was not yet forgotten that the great council had once performed some of the functions of parliament, nor that meetings of it had still been held long after parliament had come into existence. Accordingly writs were issued following the old form, for a meeting of the peers at York on the

24th of September.[9] The great council made a treaty with the Scots, by which they were to hold the two northern counties until a definite peace was made and to receive £25,000 per month for their expenses. Otherwise it could do nothing but pledge the security of the peers to a loan for the king's pressing necessities. Already matters had been growing worse so rapidly that a parliament could no longer be avoided, and it had been called to meet on November 3.

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[9] Gardiner, *Documents,* 64–66.

CHAPTER XIII

THE VICTORY OF PARLIAMENT

After an election which exhibits in the efforts made by the opponents of the king more of the characteristics of a modern election than any held before it, the "long parliament" met in a most determined spirit. The house of commons was almost unanimous. The number of members who were ready to defend the acts of the king against the attacks of the majority was at first very small. The majority on its side was conscious of the character of the crisis in which they were called to act, of what was really at issue between monarchy and parliamentary government, as no similar body of men had ever been before in any crisis of English history. This was the net result of Charles's reign to this date. In their thinking also, in the argumentative defence of their position, if they had not yet reached any ultimate principles which they could state, they were at least on the eve of great advance in that direction. It was an advance new to history if we consider it as involving not merely a theoretical statement of the sovereignty of the people but, as it did before the close of the century, the practical operation of that principle through representatives responsible to the people. In this sense, while the results were to be borrowed by all men, the advance is particularly interesting to the student of the origin of American constitutional ideas, for this is the beginning from which they grew in continuous life on American soil. The commons could hope also to proceed to extremes against the king without interruption, for the Scottish army, known to be in sympathy with them, was retaining its station in the north of England ready to march on London at a moment's notice.

The first step of the house of commons was the impeachment of Strafford. He had reluctantly come to London from the north at the urgent request of the king, who had promised him that he "should not suffer in his person, honor or fortune." Parliament opened on the 3d of November; Strafford was arrested and placed in custody on the 11th, and the king made no attempt to prevent the impeachment. There was no doubt some personal bitterness against a man who seemed to the opponents of the king to be an apostate from their cause; they were also no doubt afraid of his abilities; but it is equally true that in him they intended and conducted an attack upon the king which did much to bring the fundamental contradiction of the two positions into light. The accusation was treason. But as yet in English history there had been no definition of treason except as an offence against the king. If sovereignty in reality resided in the king, treason took necessarily the form of an offence against him. Here was a logical difficulty insuperable to ordinary and traditional ways of thinking. Strafford, as the most devoted supporter of the king in his conflict with parliament, could not have committed treason in any historical meaning of the term. Yet some way must be found of convincing the house of lords, on which rested the responsibility of judging a man upon a capital charge, and which hesitated at such straining of the law, that they might righteously find guilty of treason and condemn to death one who had most faithfully served the king as the king himself believed. If this could not be done, the hope of a successful impeachment must be abandoned.

Forced forward by this dilemma, the leaders of the house of commons advanced in the formulation of their case to a statement which they might logically have rested on Magna Carta had they known as much of the true historical influence of that document during the formative centuries of the past as they believed themselves to know of its special clauses. As a matter of fact, though there had been much thinking

on the parliamentary side since the king's father began to put the issue as he understood it into words, they were not entirely conscious of what they were doing. It is probable that they were thinking only of the specific case and its difficulty, though reasoning concerning the foundations of government had already begun and was soon to go very far in the democratic wing of the party. In reality what they did in constructing and endeavoring to prove their accusation of treason was to combine together the fundamental principle on which Magna Carta rested with that on which impeachment rested. If there existed a body of law which the king was bound to keep, and if the king who refused obedience could be driven from the throne, made non-existent in the state, then surely the lesser man, the minister who aided and abetted the king in his refusal, might justly be made to suffer the penalties of treason. But they did not quite see that this was what they were doing. The argument in this form was still beyond them. They still interpreted the past history of the constitution too narrowly, however rapidly they were advancing in the understanding of its meaning.

What Pym said in opening the case of the commons before the lords was that Strafford had committed treason in attacking and endeavoring to subvert the fundamental laws of the country and the liberties of the subjects; or as it was phrased in the bill of attainder, where the formal accusation was no longer treason against the king, but "high treason," against whom or what not specified, "for endeavoring to subvert the ancient and fundamental laws and government of His Majesty's realms of England and Ireland and to introduce an arbitrary and tyrannical government against law in the said kingdom." The case for impeachment was not clear enough to convince the lords, and a bill of attainder had to be substituted for it.[1] The lords were but little better satisfied with this form, and it could be carried only in a very small house under the influence of rumored plots and vio-

[1] A. and S., 361–362; Gardiner, *Documents*, 156–158.

lence and by the mob pressure of puritan London, and by the same means the king was made to sign the bill. Before this result was reached, Archbishop Laud had been impeached, and Lord Keeper Finch and the six other judges who had decided against Hampden in the ship money case.

In the meantime there had begun a period of legislative activity which, if the importance of the acts passed be considered and the short time occupied in their passing, has hardly been equaled in parliamentary history. It was indeed mostly legislation of a destructive character in which the king was deprived of the institutions of arbitrary government and of the sources of illegitimate revenue which had been found for him, but, as making for the security of the constitution and determining the character of the future, even the destructive legislation was constructive in a high degree. Parliament opened on November 3, 1640, and both houses adjourned early in September 1641, after a session of ten months.

The first act passed was to secure the regular meeting of parliaments. It provided for a meeting at least once in three years. If in the third year parliament had not been summoned before the third day of September, provision was made that writs should be issued or an election held without the act of the king, and that parliament should meet on the second Monday of November.[2] It was also provided that no parliament should be dissolved or prorogued within 50 days of its meeting without its own consent, but the life of a parliament was limited to three years. This was an act changing the constitution as it had come down from the past, and it was in principle permanent though not in the form enacted. A little later parliament went a step farther in the same direction by a still more revolutionary enactment that the existing parliament should not be dissolved or prorogued without its own consent.[3] This was asking

[2] A. and S., 350–359; Gardiner, *Documents*, 144–155.

[3] A. and S., 362–363; Gardiner, 158–159.

the king to surrender more than the previous bill required, and deprived him of all his usual weapons against parliament, but it came to him in the excitement about Strafford's execution, and he seems to have signed it without much consideration. It may have been revolutionary as taking away the King's constitutional powers, but it became statute law upon his signing it. The collection of tunnage and poundage without authority of parliament was made illegal; ship money was abolished; compulsory knighthood and the abuse of the forests were done away with and the royal right of purveyance limited; impressment for the army by prerogative was ended; and by a resolution of the two houses, not a statute, it was declared that the judges ought to hold office for life or good behavior, a reform which did not go into permanent effect.

These were important changes seriously limiting the possibility of arbitrary government, as that had been exercised by the Stuarts, but the action of parliament with reference to the prerogative jurisdiction of the council, and of the special courts which had grown out of it, was the most radical constitutional amendment effected in this session and, in the form in which it was enacted, the most permanent. That extraordinary jurisdiction of the king in his council, above the ordinary and common law because the expression of the prerogative, which had existed since the establishment of the Norman monarchy, and in which had originated in the twelfth century the whole modern common law and equity jurisprudence of England, was brought to an end.[4] It was enacted that "neither his Majesty nor his Privy Council have or ought to have any jurisdiction, power or authority, by English bill, petition, articles, libel, or any other arbitrary way whatsoever, to examine or draw into question, determine or dispose of the lands, tenements, hereditaments, goods or chattels of any of the subjects of this kingdom; but that the same ought to be tried and determined in the

[4] Gardiner, *Documents*, 179–186; A. and S., 363–366.

ordinary courts of justice, and by the ordinary course of law."

The councils of the north and of Wales were abolished and the ordinary jurisdiction of the privy council. The council could still arrest and commit for trial, but the trial must be in the ordinary courts; and the appellate jurisdiction of the council which had grown up for places outside England, like the Channel Islands, was not taken away. The ecclesiastical court of high commission, which had been extensively used by Laud in his persecution of the puritans, was abolished by a separate statute.[5] This legislation was continued in force at the Restoration of 1660 and the surviving appellate jurisdiction of the council, all that was left of its ancient powers as a court, formed the basis of its modern judicial function. Looked at constitutionally these acts against the prerogative courts did more than any other of the period of the Great Rebellion to secure permanently for Englishmen what is called in modern times the rule of law, the supremacy of law over the king, and so to render an absolute monarchy impossible. Indeed they almost brought prerogative itself to an end as that had been understood in the middle ages, and they illustrate the fact that the destructive legislation of the time was also in a high degree constructive.

These measures were all adopted by substantial majorities, but the session was not yet half over when the differences began to appear which were to divide the house of commons and finally the kingdom into two almost equal parties. On December 11 a strong petition was presented from London asking for the abolition of bishops[6] and a few weeks later one signed by a thousand ministers asking that the government of the church by bishops be reformed. These petitions had strong support in the house in the debates which followed, but decided differences of opinion and feeling on

[5] A. and S., 366–369; Gardiner, *Documents*, 186–189.
[6] Gardiner, *Documents*, 137–144.

ecclesiastical questions were revealed which tended to divide the members sharply into two opposing sides. On one side was the puritan, as yet in leading the business of parliament practically presbyterian only, who wished to do away altogether with the episcopal constitution of the church; and on the other was the church party which wished to maintain the church in most matters as it existed, but was not entirely united within itself on how far the reform of acknowledged abuses should go. On the position of the bishops as permanent legislators in parliament there was less difference of opinion, and the commons passed a bill for their exclusion with no great opposition, but it was rejected by the lords. A more extreme measure, called the root and branch bill, which would do away with the episcopal constitution of the church entirely did not pass the commons. While it is true that the beginning of a division into parties was due to differences in regard to church government and worship, and while that party which later supported the king began to form more from loyalty to the church than from loyalty to him, it was evident as the session drew to its close that the number of those who thought that enough had been demanded of the king was increasing. When parliament reassembled on October 20, 1641, those who were ready to oppose any further extreme measures were almost half the house.

A trial of strength came soon after parliament opened. Shortly before the adjournment in September, Charles had gone to Scotland in the hope that he might so arrange matters there that he could gain help against his opponents in England. In this he failed, but the attempt excited renewed fear of what he might be able to do and led the leaders of the opposition to draw up a document known as the Grand Remonstrance, which is at once a defence and a programme.[1] It has been called an appeal to the nation by the party resolved to go on with radical changes both in state and church.

[1] A. and S., 376–380; Gardiner, *Documents*, 202–232.

It is a long document and after the fashion of the time not concise. It recounts the wrongdoings of Charles, states what had been accomplished in reform, and outlines what still remained to do. Its most interesting proposal from the point of view of the present constitution is that the king's ministers should be "such as Parliament may have cause to confide in." It was carried by a majority of 11 only in a vote of more than 300.

Charles arrived in London from Scotland about the same time and not long after returned answer declaring that he could not surrender the undoubted right of the Crown to appoint ministers and, saying that he knew of no wicked party in the council, to which the Remonstrance had attributed the conduct complained of, virtually assumed responsibility himself for all that had been done. A few days later he made a serious mistake of tactics. He directed the attorney general to lay articles of impeachment of treason before the lords against five members of the commons.[8] When the lords did not act at once, he went in person to the commons' chamber to arrest the men. They had escaped, the speaker refused to answer the king, and he was obliged to retire in failure. If Charles had warrant in law for any of the steps of this action, it was law so ancient as to be long obsolete, and loud outcry was raised at the illegality and violation of privilege. The only effect was to inflame passion and hasten the drift to civil war which now became rapid. The king left London and both sides began to prepare for the inevitable, the king's party constantly growing in strength from those who were by natural disposition loyal to the Crown and still more from those who were opposed to a puritan control of the church.

Actual fighting in the civil war began over the question of the control of the militia, the only organized military force in England, and the action of the house of commons in the matter marks another step forward towards the doctrine of the

[8] Gardiner, *Documents*, 236–237.

sovereignty of the people. When the king resolutely refused to accept the bill transferring the appointment and responsibility of militia officers from himself to parliament, the house of commons resolved to carry out its will by what it pleased to call an "ordinance," [9] remembering that there had been in early times law-making by non-parliamentary legislation called by that name, but forgetting that an ordinance in the fourteenth century was not an act of parliament without the king but an act of king and council, or lords, without the commons, but the misuse of the term is rather typical of the antiquarian arguments which were used for justification at the time. In defence of their action, of their right to make law without the king's formal consent, the house of commons declared: "What they do herein hath the stamp of the royal authority, although His Majesty, seduced by evil counsel, do in his own person oppose or interrupt the same; for the King's supreme and royal pleasure is exercised and declared in this High Court of law and council, after a more eminent and obligatory manner than it can be by personal act or resolution of his own."

These words do not contain an explicit declaration of the sovereignty of the people or of parliament but, if they are to be scientifically defended, it can be done only on the ground of the sovereignty of the people expressed through parliament. What these words really say is that sovereignty, the right of supreme and final decision, is exercised by parliament, not by the man who holds the name and title of sovereign. It may be added that they are so entirely assumed to be true in the present English government that the king is not supposed to have any will, or opinion even, on a political question, except that of his ministers.

Before war actually began, parliament presented to the king their final demands for the reconstruction of government in the so-called Nineteen Propositions.[10] This is a

[9] Gardiner, *Documents*, 245–247.

[10] Gardiner, *Documents*, 249–254.

most interesting document as showing in definite and formal statement, no doubt carefully drawn up, to what ideas the conflict with the king had led regarding the kind of constitution which ought to be given the state. It is not a complete constitution but it is clearly the foundation on which one could easily have been built. Its determining principle is an unreserved transfer to parliament, not merely of sovereignty, but of the control of all practical details in daily government, for, where such a transfer is not expressly provided for in the document, it would very quickly have resulted. In a short time the directly acting force in government would have been parliament not the king. So far forth, in practical effect, the result would not have been different from that of the present English constitution, but the method would have been wholly different. Everything was to be done by direct action of parliament and under direct responsibility to it. The Nineteen Propositions have been called a new edition of the Provisions of Oxford, and it is with the medieval attempts to limit the king institutionally that they belong. All privy councillors, great officers and chief judges were to be approved by parliament. No new peer was to sit and vote without parliamentary consent. The fortresses and militia were to be under parliamentary control, and the church was to be reformed by parliamentary advice. It is not likely that the leaders in parliament expected the king to accede to their proposals.

The war went against the king. In a little more than two years he was obliged to surrender himself to his opponents. In a second stage of the war, which followed, those of the presbyterian puritans and their Scottish supporters who were ready to make some agreement with the king in the hope of saving a national church organization, were defeated, and the democratic wing of the puritan party, the independents or congregationalists as they were called from their ecclesiastical teaching, was at the end of 1648 in sole possession of power.

They were in theory democratic both in their ecclesiastical and their political ideas. In the government of their churches they were able to carry these ideas into practice to such an extent as not merely to vest the control of each local church in its own members, but to make the individual church organization as a unit independent of any outside authority. As the logical result of such a practical realization of their ideas, they were split into numerous sects upon various points of difference which appear less important today than in the seventeenth century. This was a carrying of the fundamental protestant denial of the right of authority in matters of belief to its logical extreme. In this regard they represent the extreme protestant wing of their time. But in another respect, because they carried on here also the protestant position to a logical conclusion, they are less typical of seventeenth century protestantism. They believed in religious as fully as in political liberty. They did not believe in a national church for themselves, but they did not object to such an organization, provided all churches could be left free to organize as they thought best. But in the practical carrying out of religious liberty, they could not be, or were not, as logical as in ecclesiastical government. They looked upon episcopacy with suspicion as tending to monarchy or to Roman catholicism, and in most cases they did not extend their toleration beyond protestantism. It is in their political theories, however, as developed in numerous discussions in voluntary councils in the army and in publications of all sorts, that the ideas which had been gradually evolved since the accession of James I were carried most nearly to their logical conclusions and most nearly to the results first permanently reached in America. At the beginning of the second civil war the independents had control of the army under Cromwell and the presbyterians of the parliament.

The victorious army returned from the field very angry with the king and with the presbyterian puritans, whom

together they held responsible for what they believed to be the unnecessary sacrifices of the second war, and they immediately proceeded against both. First the presbyterians were all expelled from parliament. Col. Pride with a company of troops at the door of the house, arrested some and turned back others, on December 6, 1648, leaving of the Long Parliament the independents only, about one-eighth the original number. This really powerless remnant came to be known as the Rump. Then in a second step they constituted a court to try the king for treason [11] — a court in its fundamental character not unlike the star chamber which they had assisted to abolish. The accusation was treason in the sense of Strafford's treason, against the nation and the fundamental laws, not against the sovereign person. In the formal charge before the court they said: "That the said Charles Stuart, being admitted King of England, and therein trusted with a limited power to govern by, and according to the laws of the land, and not otherwise; . . . yet, nevertheless, out of a wicked design to erect and uphold in himself an unlimited and tyrannical power to rule according to his will, and to overthrow the rights and liberties of the people, . . . which by the fundamental constitutions of this kingdom were reserved on the people's behalf in the right and power of frequent and successive Parliaments; . . . he, the said Charles Stuart, for the accomplishment of such his designs . . . hath traitorously and maliciously levied war against the present parliament, and the people therein represented." [12]

The king, who resolutely refused to recognize the court, was sentenced on January 27 and executed on the 30th, 1649.

In trying the king upon a charge of this kind, the independents necessarily broke with the history of the past, with established form and precedent, even more completely than they had done before. The house of lords, even the

[11] A. and S., 389–390; Gardiner, *Documents*, 357–358.
[12] Gardiner, *Documents*, 371–374.

little fraction left in that house, would not go so far. All government, even before the trial of the king, was reduced to one house and its appointees, and again a declaration was adopted in defence of this position, having especially in mind the trial of the king. The house of commons, resolved on January 4 "that the people are, under God, the original of all just power; that the commons of England, in parliament assembled, being chosen by and representing the people, have the supreme power in this nation; that whatsoever is enacted or declared for law by the commons in parliament assembled, hath the force of law, and all the people of this nation are concluded thereby, although the consent of the king or house of Peers be not had thereunto." But already by this time the sovereignty of the people and the delegated character of government had been expressed clearly and fully by so many mouths and pens that there can be no doubt it had become one of the ruling ideas of the party. It had been stated ten years before by Thomas Hooker in a sermon which he preached not long after his arrival in Connecticut in this way: "They who have the power to appoint officers and magistrates, it is in their power also to set the bounds and limitations of the power and place unto which they call them. And this, in the first place, because the principle of authority resides in the free consent of the people." Hardly a more striking example can be had of the transfer of puritan ideas of government to new influence and power in America.

It is hardly possible today to do better than these statements in formulation of the principle of the sovereignty of the people and of the representative character and derived powers of the legislature. We must remember, however, that in England such ideas were revolutionary. The new constitution which was foreshadowed by them was a break with past history and, however logically involved in that past, as an experiment in actual government it had not been prepared for as yet in national experience or in institutions by an adequate political development. In the details of this

advance the independents were influenced by their religious, as well as by their political training. After a long, slow process of growth towards democracy, which was not to be begun for more than a hundred years, England was to come in the nineteenth century in reality to these principles, though not in avowed law and not along a road which led through this age of revolution. It was American, not English, constitutional law which was here making its first beginning, its first essays in imperfect and half conscious formulation, and it was in America that these principles were developed from this beginning in unbroken growth into the government of a great people.

No one is called upon to defend or even to discuss the execution of the king. Such justification as it has is to be drawn from the fact of revolution, of which it was an extreme, perhaps an unnecessary act. But the revolution itself was necessary. The issue had been so sharply drawn, the king was so deeply pledged to his view of the monarchy, and his character was so untrustworthy and within a narrow range so obstinate, that the only chance, not merely for the success of the puritan idea of what the character of the government should be, but for the successful realization in constitutional practice of those checks upon absolute power which the progress of the past had made ready, lay in pushing the struggle to an extreme which, to the men then in power, involved the death of the king. Even upon the scaffold Charles insisted upon his interpretation of the constitution and stated it with admirable clearness. "For the people," he said, "truly I desire their liberty and freedom as much as anybody whatsoever, but I must tell you their liberty and freedom consists in having government, those laws by which their lives and their goods may be most their own. It is not their having a share in the government, that is nothing appertaining to them. A subject and a sovereign are clear different things."

The execution of the king and the disappearance of the

house of lords, left the house of commons the sole survivor of the national authorities of the old constitution. But the house of commons was the Rump merely, the independent members, and the real power in the state was undoubtedly the army and its leading officers. But the chief influences in army circles had been for a long time democratic, and years before it succeeded to power individuals and councils had been busy considering the foundations of government and the forms it should assume. A flood of proposals, theories, and arguments appeared in those years, as characteristic in tone and substance of an age of religious, as of political revolution. For the puritan, especially for the independent, this age was both, and the results he attempted to accomplish in constitution making are a compound of the conclusions to which the tendencies of English history would naturally lead, prematurely conceived, and the ideas which he drew from the Bible and applied in the organization of his churches. Already before this date, even before the beginning of the war, members of the party had begun to return from the American colonies bringing with them, not so much new ideas and principles for these they had carried from Old to New England, as reports of the logical carrying out of their principles in actual governments and encouragement that they had and would work in practice.

Of these suggestions, the most formal and developed as a proposal to be carried out in government, was that which was presented to the house of commons in January, 1649, under the title, "The Agreement of the People." [18] This title conveys to us less clearly than it did to contemporaries what the document was intended to accomplish; but it implies and was intended to imply what the preamble of the American constitution asserts: "We the people of the United States do ordain and establish this Constitution." It implied that the people of England by an agreement formally entered into were to make a written constitution in order

[18] Gardiner, *Documents*, 359–371.

to establish a government and define its powers. As a proposal for actual government, we need not consider the Agreement of the People, for it was never put into operation, but as a landmark in the history of American constitutional law it is of great importance. The foundation upon which it rested, the agreement of the people, is the same as that upon which our constitutions rest, and it was here proposed for the first time in history as the foundation of a national government. The similar compacts which had preceded it in America, though they came from the same ultimate sources and were truly intended to establish "a Civil Body Politick," served for little communities of people in which an actual democracy was entirely feasible, and representative institutions, as an expedient for working a democracy on a great scale, had no need to be considered for a long time. The Agreement of the People was seriously intended as the constitution of a great nation.

It must be regarded, however, as more than merely the first written constitution proposed for a great state. It was a constitution distinctly of the American type. It proceeds throughout explicitly on the principle that the source of all government is the people; that the people by their agreement together create the government; and that they have the right not merely to clothe the government with powers but also to fix limitations upon its action which it must not exceed. It explicitly declares that certain numbered particulars "are, and shall be, understood to be excepted and reserved from our Representatives." It also expressly states that certain portions of the document, considered "fundamental to our common right, liberty, and safety," are beyond the power of their representatives to alter. In this respect, like the United States, the framers carried the principle of the sovereignty of the people a stage farther than England has yet gone, making the formation and reconstruction of the constitution an act which must come in special and separate form directly from the people. If the government conceived

of in the Agreement of the People could have been put into operation with sufficient national force to support it, and developed as it naturally would have been by experience, it would have made real in the seventeenth century a government of the people, by the people, and for the people. It was in its nature and in its freedom from certain limitations more likely to attain this end than the Instrument of Government afterwards founded upon it.

The Agreement of the People was never put into operation. It was the programme, not of the majority of the independent party, but of the more radical extremists, and the time, still full of dangers for a revolutionary government which represented only a minority of the nation, was unpropitious for new political experiments. The great practical problem of the day was to make sure, if possible, that the fragments of the constituted authorities which remained in power should maintain themselves and enforce peace and order throughout the country. This was the task of the army, and the government which followed under the Commonwealth and the Protectorate was really the government of the army. On February 13 the Rump appointed a council of state to govern the country; on March 17 it abolished the office of king; on March 19 it abolished the house of lords; and on May 19 it declared that "the people of England and of all the dominions and territories thereunto belonging, are and shall be, and are hereby constituted . . . to be a Commonwealth and Free State, and shall from henceforth be governed as a Commonwealth and Free State by the supreme authority of this nation, the representatives of the people in Parliament, and by such as they shall appoint and constitute as officers and ministers under them for the good of the people." These changes were really made necessary by the situation. There could no longer be any pretence of government by a king.

But if the government was to be in theory a government of and by the people, it was in reality a military autocracy,

and it is doubtless true that that was the only revolutionary government which could have kept itself in power. Cromwell regarded himself by virtue of his commission from the old undivided parliament as more truly the one regularly constituted authority than the fragment of the parliament. On April 20, 1653, he expelled by military force the Rump, which had lingered to that date though with little power. On July 5 a new parliament met, known as the "Little" or Barebone's parliament, and composed of persons appointed to membership from lists drawn up by the independent churches. It did, however, little except to debate a series of reforms most of them far in advance of the times and was dissolved by its own act on December 12. Almost immediately thereafter a new written constitution which had been prepared by the leaders of the army was brought forward and accepted by Cromwell. This was the Instrument of Government which was put into force by Cromwell and his council without being referred for sanction either to a parliament or to the people.[14]

All discussion of the Instrument of Government must be prefaced by the statement that it had no influence on the constitutional history of England. The experiments in government which followed the outbreak of the civil war are an offshoot from the main line of English history and they lead nowhere in that country. They are, however, an offshoot which grows as naturally and normally from the main trunk as does the continuation of that itself. They are of especial value as showing, in the middle of the seventeenth century, what was even then, and has been since more abundantly, made evident in the colonies. They show what sort of a government the historical constitution of England, even as it then existed, logically would lead to, when it cut itself off from the monarchy and its theories of sovereignty. For the American student the Instrument of Government has a peculiar interest for several reasons. It is the first written

[14] A. and S., 407–416; Gardiner, *Documents*, 405–417.

constitution, creating a government in theory of delegated powers defined and limited, put into actual operation for a great nation. It formed nominally at least the basis of the government of England for something more than three years. Of it it may be said as truly as it has been said of the constitution of the United States: "Thus these men at Philadelphia were in theory completing the historical process that had been working out in English history since the meeting of the barons with John Lackland at Runnymede. The long effort to establish a government of law and not of men was reaching its logical conclusion in an effort to make the government itself dependent on fundamental law." Of equal interest and significance are the anticipations of what we sometimes consider American innovations and discoveries in the practical workings of government, showing almost more clearly than matters more vital from what stock we have grown.

The important points of the Instrument may be briefly stated. Article I provides that the supreme legislative authority of the Commonwealth of England, Scotland and Ireland and the dominions thereto belonging shall be and reside in one person, the lord protector, and "the people assembled in parliament." The source of authority both for the constitution and for parliament is thus stated to be the people, and the united government of England, Scotland and Ireland, which had been already brought about in fact, is recognized in law. The functions and powers of the protector and his council in the executive government are then stated with their limitations. Often he is required to act with the advice or consent of parliament. The modern legislature cannot be dissolved without its own consent; the protector could not dissolve his until after a sitting of five months. The distribution of representation was decidedly changed and roughly fixed according to the distribution of population. Many small boroughs were disfranchised, new growing towns like Leeds and Manchester received represent-

ation, and the county representation was enlarged. The old parliament contained 413 borough members and 92 county, the new 135 borough and 238 county members. The franchise was considerably restricted. A property qualification of £200 was required of all electors. All who had taken part in the war against parliament were disfranchised for four parliamentary elections, and all who had aided the rebellion in Ireland and all Roman Catholics permanently.

All bills passed by parliament were to be sent to the protector for his consent. If he did not give his consent within twenty days, or "give satisfaction to the parliament within the time limited," they should become laws without his consent, "provided such Bills contain nothing in them contrary to the matters contained in these presents." Two clauses in this Article require especial notice. One provides for a limited veto. "Give satisfaction to the parliament" implies the right of the protector to persuade the parliament, as in the veto message of American practice, to abandon the measure, but an ordinary majority merely would override his veto. The other provides that unconstitutional bills shall not become law. As in the American constitution, no provision is made for any authority to decide what bills are unconstitutional, but in time undoubtedly the courts would have assumed the duty. The Instrument provides no way in which it can be amended, and some have taken this clause to forbid all amendment. It is highly probable, however, that courts of law, called upon to interpret it, would have said that it prevents the passage of an unconstitutional act over the protector's veto, and that by inference the Instrument could be amended by parliament with the protector's consent. Parliament shared directly in the appointment of the members of the council and must approve the appointments to the chief offices of state. Religious liberty was granted to all "such as profess faith in God by Jesus Christ," with a proviso that "this liberty be not extended to Popery or Prelacy."

The logical effect of such a constitution, as it would

naturally develop, would be to transfer the sovereignty not merely in fact but in form from parliament to the people. Parliament, as subject to the fundamental law established by the people, could not occupy the place of ultimate supreme authority, could not be the last resort in the decision of doubtful questions or policies. In truth this was the effect of the puritan revolution, though the written constitution disappeared, and though the fact was not and never has been expressed in form nor acknowledged in theory in England. As Professor Dicey has said in his *Law of the Constitution:* "in a legal point of view parliament is neither the agent of the electors nor in any sense a trustee for its constituents. It is legally the sovereign power of the state." Mr. Dicey did, however, consent to a distinction between legal and practical sovereignty, the practical sovereignty residing in the electors. The true test of course is to discover in a final conflict of authority which of the two must yield to the other. Of that there can be no doubt.

Outside the written constitution, in acts passed by one or another parliament, or in measures proposed but not adopted, there were other anticipations of changes which have been in recent times carried through: Free public schools; a public post office; public work for the employment of the poor; female suffrage; voting by ballot; the establishment of a national bank; freedom of the press; freedom of trade, but with the reënactment of the navigation laws; the removal of religious disabilities in principle but incomplete in practice; the improvement of local government; a system of recording land transfers; a simplification of marriage laws; and the local registry of vital statistics. In the sphere of government and law there were equally modern measures or proposals; a great extension of the use of committees in parliamentary business; the enactment of an excise tax, a drastic reform of procedure in the courts to remove causes of delay and cost, and all to be in English; a simplification of appeals; steps towards the union of equity and

common law; a new secular court of probate; the payment of judges by fixed salaries, no longer by fees, and tenure during good behavior; more liberal means of defence to persons accused of crime; better facilities for the collection of debts; and prison reform and the relief of prisoners for debt. Interesting anticipations of ideas sometimes thought to be peculiarly American are the declaration in a parliamentary debate in 1647 that "a man is not bound to a government that he has not had a voice to put himself under," and the lines in Edmund Waller's Panegyric on Cromwell, which anticipate also American language:

> Whether this portion of the world were rent
> By the rude Ocean from the continent;
> Or thus created, it was sure designed
> To be the sacred refuge of mankind.
> Hither the oppressèd shall henceforth resort
> Justice to crave, and succour at your court.

The list is not complete, and comparatively few of these proposals passed into actual statute law, but it is sufficient to show both the activity of mind upon governmental problems in this revolutionary age, and how thoroughly the thinking of the time was in line with the constitutional and legal progress which was to follow, more naturally and normally, in less revolutionary ways, in the coming centuries. It may be said indeed that the greatest obstacle in the way of carrying out the puritan plans of reform was the puritan activity of mind. Their parliamentary assemblies are all characterized by endless debate which led to no practical conclusion. The first parliament under the Instrument of Government insisted so obstinately on debating the constitutional law of that document and its possible amendment, against the expressed desire of the protector, that it was finally sent home with nothing done. The second parliament, in which a house of lords was reëstablished, was not much better. While the executive during the Commonwealth and Protec-

torate accomplished good things in practical government and in foreign affairs, the nation was tired out with the useless wrangles among the sects and parties, and, as no successor to Cromwell rose to continue his vigorous executive policy, the monarchy was easily restored.

There will be occasion in what follows to discuss some details in which there may be seen permanent results which are to be traced to the period between 1640 and 1660. Mr. Taswell-Langmead in his *Constitutional History* states four further general results which he believes to have been permanent. 1. "Although the cause of monarchy was gained, that of absolute monarchy was lost forever." This is quite true, but its truth was not so apparent at the time as it is to us. The struggle with absolute monarchy was by no means over and though the struggle was really without hope of success for the king some of its most desperate phases, as they would seem to contemporaries, were immediately before the nation. 2. "The predominant influence of the house of commons in the government of the nation was permanently established." This also is a fact perceived only by the historian as he looks back from the vantage ground reached by a later progress. It was not understood at the time nor fully, with reference to practical government, for more than a century. These two are the most far-reaching and fundamental results of the conflict between parliament and king in the seventeenth century, and they settled permanently the character of the English constitution. 3. "The complete and definite rejection of Romanism in England was assured; but the position of the National Church after the Restoration was no longer precisely the same as before the Rebellion." The fear of the political designs of Romanism was, however, not yet over, and the national judgment that it is a danger in the state was to be further strengthened in the following period. The last clause will be discussed later. 4. "The development of an intense national antipathy to a standing army and of widespread

distrust of men of extreme views." The antipathy to a standing army and opposition to it were to be greatly increased in the following generation, with seriously inconvenient results both in England and America.

To this statement of permanent results there may be added others: 1. All financial independence of the king was at an end. The struggle over this matter which had lasted from the reign of Edward I was at last over. No later English king, if we make an insignificant exception for James II, has attempted to raise a revenue, independent of parliamentary action. 2. The prerogative courts, and with them all danger from the prerogative, were permanently done away with. A slight exception for the next generation must also be made here, but the effort of the sovereign to make use of the prerogative was without avail. Such possibilities of prerogative action as remained have been, since 1688 at least, under parliamentary control. 3. It was definitely settled that England was not to be a republic. In one sense the logical drift of English constitutional development was towards a republic, but the institutional changes which followed the Restoration and which gave expression in governmental machinery to the Restoration settlement made such a result for long impossible and, even after two more centuries and a half, highly improbable. How this came about is the theme in large part of the history which follows.

The puritan revolution of these twenty years marks the division of the stream of English constitutional development into two branches. For England it was an attempt to arrive at the logical conclusions of that development prematurely, by violence and revolution, under the stimulus of religious as well as political excitement, before an adequate preparation in ideas and institutions had made the ground ready. In the reaction which naturally followed, the work of the revolution was undone. Constitutional development linked itself back to the results of its more natural processes in the stage which it had reached at the end of the first session of the Long

Parliament in 1641. Nearly everything for which the revolution strove is now a part of the English constitution, but not as a result of its endeavor. Rather as a result of the slower and more normal process of growth, out of which in a sense the revolution indeed came but which it for a moment interrupted. In the puritan and quaker colonies of America the ideas of this revolution created the natural political atmosphere. There they were not revolutionary, but became the material from which the normal constitutional life of these little states drew its strength. Their natural political development began with these ideas and led, as their population and needs increased, to more and more extensive realization of them in practice, until at the last they had large share, with other influences, in shaping the institutions of the second great Anglo-Saxon nation.

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CHAPTER XIV

THE VICTORY CONFIRMED

The extent of the reaction against the radical party was shown by the character of the restoration of Charles II in 1660. The king was restored to the throne with no constitutional guarantees whatever. Nothing was said of the sins of his father, nor of the principles which the great majority of the house of commons were determined to defend in 1640. The legislation of the first session of that parliament remained on the statute books, and arbitrary government was to that extent deprived of the means of operation. But the supremacy of parliament was not declared in any formal statement, nor was the king required to acknowledge that his powers were limited or derived from the people. So far as formal pledges are concerned, or formal statements even, with which the new government began, there was nothing to indicate that anything of a constitutional character had happened since the first of November, 1641.

Much had happened, however, which affected the minds of men and which could not be forgotten. Charles's statement that he had no wish to go on his travels again is not of chief interest as the sign of a cynical character. It was his expression of a profound political observation which judged correctly the actual state of things. Charles knew that a great constitutional change had taken place, though perhaps he could not have called it that nor defined very clearly its nature. What he did know very assuredly was that he could not resist the will of parliament beyond a certain point, and by that knowledge he shaped his conduct. It was not that he was any more willing than his father to submit to

the authority of parliament or any the less determined to re-establish an irresponsible royal power. He had a keener political insight and recognized more quickly the limits of the possible and understood the consequences of overstepping them. And so when a parliament, which was usually ready to do what he wished, objected strenuously when he undertook to relieve the nonconformists of their legal disabilities by proclamation, he yielded and withdrew from his attempts.

Such an act on the part of the king was highly typical of the actual situation as it had been left by the Restoration, not in law or formal statement, but in the facts themselves. In form and law the king was supreme and sovereign. In fact parliament was supreme. The sovereignty in the state, the power of final decision on every political question, if an issue arose upon it, had been transferred to it. Never since that date has it been possible for the king, so long as the king remained the real executive, nor for the ministry after the cabinet had absorbed the executive authority, to withstand the convinced will of parliament. No period of later history, not even the most modern, reveals this result more clearly than that which followed first, in which the attempt of Charles I's sons to reëstablish the old royal power met with disastrous failure.

The result in 1660 just described was a compromise; not less truly a compromise because it was expressed in facts rather than in words. The question which had arisen at the beginning of the reign of James I, whether it would be possible to make the strong monarchy of the sixteenth century and the strong parliamentary control of the fifteenth work together in practice — what boundary line could be found between king and constitution — had been answered by the discovery of a compromise. But it was a compromise of a peculiar type. As developed in the next hundred and fifty years, it meant that form and appearance remained with the king, the reality with parliament. The words in which the modern constitutional lawyer states the result are as accurate

as can be found: "Sovereignty resides in the king in his parliament." The king is in theory sovereign, but his sovereignty can be declared and exercised only in parliament. The king gave up the power to determine by his individual will the policy of the state, but the surrender was disguised by an appearance of power and for a long time by the exercise of very substantial powers and by the permanent possession of important rights and influence. It was more than a hundred years before all that the compromise implied was clearly recognized and the balance established at its present level. But it was really made in 1660.

In the history of government in the world no event has ever happened of greater significance or of wider influence than the making of this compromise. Upon it depended the spread of the English constitution throughout the civilized world which is one of the chief characteristics of the nineteenth century, even if it should in the end prove that constitutional monarchy is only a halfway house on the road to ultimate democracy. In this respect it is difficult to overstate the influence of this compromise. Had the course of English history led to a constitution in which in form and law the ministry was directly responsible to parliament instead of to the king, not merely would it have been immensely more difficult to reconcile the sovereign to a loss of the substance of power, but the adoption of the constitution by other and unwilling monarchies would have been made a practical impossibility. The compromise feature of the present constitution by which in theory and in form the ministry, though supreme, seems to be the creature of the king and responsible to him, would have had no existence. The choice which, without this compromise, a successful revolution might offer to a sovereign between a formal direct responsibility of all the organs of actual government to the legislative assembly on one side, and an out-and-out republic on the other, would have been an even choice with no particular attractiveness or significance in one side above the

other. The world influence of the English constitution depended for its existence upon the fact that parliament came to control the actual government in fact rather than in form, indirectly, not directly; that an actual republic was concealed under all the ceremonial and theoretical forms of a continued monarchy.

The Restoration was the work of a combination of cavaliers and presbyterians, somewhat like that which had failed after the first civil war. It now succeeded because the radical party, always in a minority, had lost popular favor and was without leadership. Actively it was the work of the army under General Monk and of what we in America should call a convention but which is called in England a convention parliament, because formed like a parliament. For the upper house it was composed of such lords as could be assembled, and for the commons it was based on the same distribution of seats as the old parliament. Legally it was not a parliament, because the elections had been held without the authority of writs issued by the king. After the return of Charles II an act was passed declaring it to be a parliament, and Charles's second parliament, regularly summoned, passed an act confirming the acts of the convention parliament. Everything possible was done to make the process of restoration conform to constitutional practice. According to the interpretation of the constitution which was now made to prevail, Charles II had become king immediately on his father's execution, and therefore all acts of Commonwealth and Protectorate parliaments, not having received the royal assent, must necessarily be void. This was true also of the acts of the long parliament passed after the outbreak of the civil war, but the Restoration parliaments did not propose to restore the older possibilities of autocratic government, and the earlier acts of the long parliament remained in force with a few exceptions and some modifications.

It has been said that the Restoration was twofold, first of the king and the old constitution, and second of the church,

and the description is convenient. In the convention parliament the presbyterians were too strong to allow active measures to be taken against the non-conformists. It restored the king; it gave to parliament its old organziation and its place in the state with all the new power which it had gained; it reëstablished the gentry in local government and in local influence, and checked the more radical puritan tendency towards democracy; it abolished the old feudal tenures of land, and for the income which the crown had derived from the feudal dues it substituted an excise tax; it reënacted the navigation laws; it voted tunnage and poundage to the king for life, but began the policy followed throughout the reign, whether intentionally or not, of never furnishing the king with revenues sufficient to meet the expenses of government; it allowed the execution of a few of the judges who had condemned Charles I to death and still fewer of their extreme supporters, but passed an act of indemnity for the others. This parliament was dissolved on December 29.

Writs were soon issued for a new parliament, which met on May 8, 1661. General enthusiasm for the monarchy and for the Anglican church had been steadily rising since the return of the king, and the elections reflected this feeling. The presbyterian element which had been so important in the convention parliament almost disappeared, and the house of commons was overwhelmingly cavalier. The parliament is known in history as the "cavalier parliament," and it has been called more royalist than the king and more Anglican than the bishops. Although it developed towards the end of its life a more definite opposition to the king's policy than at first, it was so satisfactory on the whole that it was kept in existence by Charles for eighteen years, which could be legally done after it had itself, in 1664, repealed the triennial act of 1641.

The work of the cavalier parliament may be conveniently considered under two topics, its ecclesiastical and its political activity. The question of the national religion, or at least

of the organization of the national church, was still a living one, not yet finally decided. If the claims of the independent were not likely to be very fully or favorably considered, the presbyterian had good grounds for believing that some form of "comprehension" would be devised by which he and his ministers might remain in the national church without conforming to all the requirements, like ritual and vestments, to which he objected. Of this mistake he was speedily disabused. The Anglican majority in parliament and its leaders intended as thoroughgoing a policy of exclusion, of enforced conformity, as Laud had in mind. This intention was embodied in a series of four statutes, known commonly as the Clarendon code from Lord Chancellor Clarendon, the chief minister of the time.[1]

The first of these was the corporation act of 1661, by which all holders of offices in corporate towns were required to renounce the solemn league and covenant, to declare on oath that resistance to the king was unlawful in any circumstances, to take the oaths of allegiance and supremacy, and in future to receive the sacrament according to Anglican rites within a year after election. The act of uniformity of 1662 required all clergymen to obtain episcopal ordination and to use the prayer book in their services, and all teachers to declare their acceptance of the liturgy and of the principle of non-resistance. The conventicle act of 1664 forbade, under severe penalties, attendance at any worship not of Anglican forms if more than four persons were present, unless they were of the same family. The five-mile act of 1665 demanded that ministers who had refused to comply with the act of uniformity should declare on oath that they regarded resistance as unlawful and pledge themselves not to attempt any changes in church or state. If they would not do this, they were forbidden by threat of heavy punishment to come within five miles of any corporate town or borough or of any parish in which they had previously preached.

[1] A. and S., 425–434.

The effects of this legislation were wide-reaching and long-continued. One immediate result was that the church of England ceased to be a national church in the older sense and became an established church. "Comprehension" was at an end. The non-conformist disappeared. He became a dissenter, and the term non-conformist as used in more modern times ceased to mean, as it had earlier in the century, the member of the national church who did not conform to its ritual, and came to mean the outsider who had a different church relationship, the dissenter. The blow thus struck was more fatal to the presbyterian than to the independent. It was indeed to some extent aimed at him because of his political importance. To the presbyterian a national church organization was a part of his essential creed, and such an organization for him either within or without the Anglican church was now impossible. All chance of a recovery of political power was also destroyed, for the seat of presbyterian political strength had been in the towns, and especially in the corporations which elected borough members of parliament. By degrees the presbyterian families passed over into the church of England and gave to the future whig party much of its strength, while presbyterianism as a non-conformist organization became weak in England. The independent churches, which had never believed in a national organization, suffered less severely and survived in larger numbers to the time of toleration. If the brief interval of limited toleration in the protectorate period interrupted in any sense the complete parliamentary control of the religious and ecclesiastical interests of the nation, the legislation of the restoration period fully restored it. The influence of religious questions upon the constitutional legislation of the period was not, however, exhausted by the enactment of the Clarendon code, as will be seen later.

In interpreting politically the reign of Charles II, the question of the king's intentions is one of considerable importance and one on which scholars are not entirely agreed.

It is certain that in traits of character and personality he was not a typical Stuart. He resembled in these respects more closely his maternal grandfather Henry IV of France. With more than average political ability, and with a degree of insight into the conditions with which he had to deal lacking in his father and brother, he was in some respects the Stuart king most dangerous to the constitution. For the simplest explanation of his policy, the one which creates the fewest difficulties, is to suppose that he set before himself two chief objects to be attained: first, to restore as completely as possible the personal control of the king over the government, to be free of parliamentary restraints; and second, to obtain for catholicism, if not the position of the state church once more, at least a position of equality as a recognized legal religion for all who wished to adopt it. These two objects he pursued with much skill and discernment, under a mask of devotion to pleasure, so long as they did not demand of him too severe an effort or entail the danger of another revolution. It must not be understood that pleasure was entirely a mask with Charles. He undoubtedly pursued it for its own sake and, as he grew older, its hold upon him as a real business in life grew stronger. It is difficult, however, to explain some things in his reign unless we suppose that he consciously made use of his personal inclination to pleasure and the loose moral standards of the time to conceal from his ministers a deliberate intention to return to the constitutional interpretation and position of his father and grandfather, or of the Tudors.

Charles made his first attempt to change existing conditions in favor of the dissenters, including catholics, and incidentally of the royal prerogative as well, in December, 1662. He issued a "declaration," called often his first "declaration of indulgence," in which he announced his intention of persuading parliament in its next session to "enable us to exercise with a more universal satisfaction that power of dispensing which we conceive to be inherent in us." That is,

he declared his belief that the prerogative of dispensing from obedience to existing statutes belonged to him as king, and that he hoped to exercise it to relieve dissenters with the expressed acquiescence of parliament. Parliament, however, refused to acquiesce, and Charles was obliged to drop the plan. Ten years later he did not ask the coöperation of parliament but, relying on the prerogative alone, he issued a new declaration in which he said:[2] "We do declare our will and pleasure to be that the execution of all and all manner of penal laws in matters ecclesiastical, against whatsoever sort of non-conformists or recusants, be immediately suspended, and they are hereby suspended." It has been said that forty acts of parliament were broken through by this declaration, which was of exactly the same nature as Richard II's attack on the authority of parliament. Any hope which the king may have cherished of gaining a national support for his policy by a union of protestant and catholic dissenters was disappointed by the unwillingness of the protestants to accept toleration on these terms, and parliament expressed itself clearly and pointedly at its next session. The house of commons resolved that "penal statutes in matters ecclesiastical cannot be suspended but by act of parliament," and embodied the resolution in an address to the king. After some hesitation he yielded.

Charles appears to have been convinced by these experiments that success was not to be obtained by direct prerogative action, and that, if he was to secure equality of privilege for catholics, it must be through political success in establishing his supremacy in the state. At any rate, from this time on he dropped all open attempts to bring about a religious change. Religion did not disappear, however, as a factor in the constitutional situation. The sharp fear of the danger to liberty from a catholic triumph, which had been so decided an influence in the political history of Elizabeth's time, returned in a new form; not now the fear that the

[2] A. and S., 434–436; Robertson, *Statutes*, 42–45.

catholic portion, perhaps in the earlier time a majority, of the nation might restore the rule of the pope, but that the same dreaded result might be reached by a catholic king or a catholic dynasty. Charles's protestantism was suspected. His brother James, the next in succession to the throne, was more than suspected; he was confidently believed to be a catholic. The national fear of what might possibly result led to the passage of an act of long-continued influence in English history, and to the attempt, almost successful, to pass another of even greater constitutional significance.

The first was the "test act," introduced almost immediately after the withdrawal of the declaration of indulgence, and intended to exclude all catholics from office by a test which could not be evaded, and which would consequently compel all office-holders who were catholics in secret to declare themselves.[3] All civil and military officers were required to take anew the oaths of allegiance and supremacy, including in the oaths a declaration of disbelief in any transubstantiation in the sacrament of the Lord's supper, and to receive the sacrament by the rites of the English church. This was followed in 1678 by the parliamentary test act imposing the same declaration upon the members of both houses. These conditions no catholic could meet, and James was obliged virtually to confess his membership in the Roman church, and catholic peers were obliged to give up their seats in the house of lords, which they had until then retained.

The pretended disclosure by Titus Oates of a great popish plot to overthrow the government in the interest of catholicism, popularly supposed to be favored by James, Duke of York, created such intense excitement for a time that the party of opposition in the cavalier parliament was greatly strengthened. When Charles prorogued and then dissolved this parliament to save his minister, Danby, from impeachment, the new house of commons, elected in the spring of

[3] A. and S., 436–439; Robertson, *Statutes*, 39–42.

1679, had an even larger majority of the opposition party, soon to be called the whigs. The party determined to save the English church from the danger of a catholic sovereign by an exercise of extreme parliamentary power.[4] In three successive parliaments a bill was introduced to exclude the duke of York from succession to the throne. Once the bill was rejected by the house of lords, and twice the king prevented its passage through the house of commons by prorogation or dissolution. He did not, however, formally dispute the constitutional right of parliament to change the order of succession. The religious question led to no further results in the reign of Charles, but in the actual revolution which closed the reign of James the religious influence was as active as the political.

It is from the religious troubles of the reign that the two great political parties of English history date their continuous existence. If the first principle of division between them seems to be support of or opposition to the court, and so their history may seem to go back to the division which formed in the house of commons in 1641, it must be remembered that that earlier division was formed also on religious rather than political grounds, and that as a beginning it must be treated as premature, broken off by a long interval without appearance of parties. It must be admitted also that a strong argument can be made to show that what really determined a man's relation to support of the court, or opposition to it, was his attitude, even in this early time, towards the really fundamental issue which has always separated English parties, the question of conservatism or liberal progress. Through all the changes of modern times, in spite of all the special issues that arise from time to time, this seems to be the final deciding test of party position. This it is in English history which determines that, except in times of political disintegration, or when new issues are not yet clearly defined or have not yet made themselves chief issues, there

[4] A. and S., 439–440.

shall be but two parties. However this may be, the political parties of modern English history emerge from the reign of Charles II full-grown, standing upon the fundamental principles which have ever since determined their attitude towards special questions as they arise, and familiar with the practices which they have employed in their own internal management and in their campaigns against their opponents.

Two things enabled Charles to treat his last parliament, in 1681, with great contempt, dissolving it after a session of a week only, when it showed its determination to go on with the exclusion bill. One was that he had agreed with Louis XIV to withdraw English opposition to French plans on the continent, in return for a pension which would render him independent of further parliamentary grants. The other was the general reaction which had taken place in England against the excesses of the popish plot and the extreme policy of the whigs in the exclusion bill. The opposition party was broken up and driven out of all influence, and was not able to recover itself until some time after the opening of the next reign. The last four years of Charles's life form a period of as absolute government as that of the Tudors, but it was an imperfect and incomplete absolutism. It was conditioned, in the first place, upon the postponement of the king's intentions in regard to catholic dissenters. He had learned that these could not be safely allowed to appear, at least not until his political power was secure. In the second place, it was an absolutism without institutional means of expression, embodied in no forms, and wholly unrecognized. It existed as yet because of the absence of resistance and of all opposing leadership, and because of the spirit put into forms which could be as easily interpreted in the opposite direction, that is, because of the racial habit of allowing laws to be interpreted by conventional practice and conventional practice to pass into law. Charles and his brother would have had a task of enormous difficulty in transforming this nascent absolutism into one as well based in law and constitution as

Louis XIV's, but it would be rash to say that from the beginning Charles had made they could not have done it, if they had been willing to let religion alone and had been able to act with sufficient reserve.

It would be wrong to say that they were entirely without the advantage of a constitutional beginning. One important element of Anglo-Saxon liberty had not been yet secured — the independence of the judiciary. The puritans in their legislation had given to the judges a tenure during good behavior, *quamdiu se bene gesserint*, but the legislation had fallen to the ground, and Charles had gone back to the older practice of appointments during pleasure, *durante bene placito*. He dismissed for political reasons two lord chancellors and a lord keeper, three chief justices and six judges, and James II went even farther. Some preparation was also made against the inevitable time when there must be another parliament. The towns were the strongholds of the opposition party and against them the blow was struck. *Quo warranto* proceedings were brought against them in the courts, alleging acts beyond their legal powers, and their charters in large numbers were declared forfeited.[5] New charters were granted to them, but with the right of election and municipal government confined to a few persons so that a controlling influence of the crown would be easy. Besides this the art of parliamentary corruption had been invented and put into operation somewhat extensively during the reign; precedent had been created for interfering with the right of petition; and the doctrine of non-resistance had been exalted into almost a necessary article of belief. Success was probably hopeless at so late a date as the end of the seventeenth century, but the sudden death of Charles at an age when many years of vigorous life might still be expected in normal cases was a disaster to the cause of absolutism, not uncommon in the history of monarchical successions, for, in place of the political insight and willingness

[5] A. and S., 448–450; Robertson, *Statutes*, 382–384.

to bide his time of Charles, it put the tactless impatience of his brother James.

One further statute of the reign of Charles I is of special constitutional importance, the *habeas corpus* act of 1679.[6] The middle ages had known a number of writs which had for their object to protect the liberty of the subject against arbitrary arrest and imprisonment. At first, in the thirteenth century, the writ of *habeas corpus* could hardly be called one of these, but it was used to bring a person into court for several different purposes — to give evidence, for instance. It is only in the fifteenth century that it begins to be used by the common law courts to protect persons from the growing prerogative jurisdiction of the equity courts, and in the sixteenth that it becomes important as a protection against the increasing powers of the council. The full possibilities of the writ in the way of protection were indeed not realized until after the beginning of the seventeenth century, and we have already seen the first steps taken to develop it in the early part of the reign of Charles I. When the original jurisdiction of the council was ended in 1641, the need of protection was not ended also, for it still retained the power of arrest and imprisonment though not of trial. Experience had shown also that several details in the procedure needed clearer definition. The act of 1679 must not be thought of as having for its object to establish the principle, but, like the legislation on taxation after 1295, to cut off various means of avoiding the principle which had been found dangerous. Not merely were officers holding persons in custody required under heavy penalties to make proper and speedy return, but also judges to whom application for the writ was made were required under still heavier penalties to issue it. The number of courts which could issue the writ was increased, and it was provided that prisoners not bailable should be brought to a speedy trial. The danger of a demand of excessive bail was not thought of and

[6] A. and S., 440–448.

remained to be guarded against in the Bill of Rights ten years later.

It should not be overlooked that the process of impeachment, the medieval method of holding the individual minister directly responsible to parliament, was given its perfected and final form in this reign. It would perhaps be better to say that it was perfected just at the time when it was about to be made obsolete by the modern method of enforcing responsibility — the cabinet system. In the impeachment of the earl of Danby, begun in 1679 but never completed, various points, partly old and partly new, were decided:[7] that the minister could be put on trial on charges known to be unfounded against him but well founded against the king; that the king's written order could not be plead in defence; that a pardon from the king could not avail to stop the trial —embodied in law in the act of settlement of 1701; and that prorogation or even a dissolution of parliament was not to interrupt the proceedings and require them to be begun anew. This last was an application of the principle already adopted in the ordinary judicial business of the house of lords. Though the growth of the cabinet system made impeachment obsolete as a political expedient, it is still usable as a criminal trial in England and may be so used in the United States though with penalties only of a political kind.

A far more effective means of maintaining a parliamentary control over the executive, at least under modern conditions, was developed and improved in the reign of Charles — improved to such an extent as almost to constitute its beginning — the practice of appropriations. We have seen the beginning of the practice in the fifteenth century, but the beginning remained a beginning of possibility only. It was followed by no substantial growth. Instances had occurred earlier in the seventeenth century of assigning supplies when voted to particular objects of expenditure without creating a continuous practice. Now in 1665 a grant was voted to be

[7] Robertson, *Statutes*, 566–569; A. and S., 439.

used for the war with the Dutch, and this was followed up in 1667 by the appointment of a parliamentary committee to audit the accounts of the treasury, and by the expulsion from the house of the treasurer of the navy, because he had paid out money without a warrant. It was the strict auditing of the accounts and insisting that a legal warrant only could authorize the payment of money that constituted the advance of the time, and though there was some interruption of the practice under James, there was no real break. The foundation was securely laid for the changes that followed after his expulsion. Modern Anglo-Saxon legislatures have considered the practice of appropriation, now extended to even minute items of expense, to be one of the most essential sources of their power and have guarded it with the utmost care. It is a check upon government policy, not by calling a minister to account for what he has done, but by rendering action which is not approved of impossible in advance. The full establishment of the right of appropriation should probably be regarded as the last step in the creation of so great a power in parliament over the executive that resistance was hardly possible, and that the cabinet method of responsibility, expressed in no law, existing in unrecognized custom only, could come into existence.

If the increase in the power of the house of commons through its control of government expenditure was a preparation for the setting up of cabinet responsibility, and if in the formation of parties preparation was made for the motive force to operate it, equal preparation was also made in this period of the external or institutional body with which it was to be clothed. The starting-point of this side of cabinet formation was found in the old privy council, and the immediate line of connection with parliament was found in the fact that members of the council had always been members of one house or the other. The council since the close of the middle ages had shown a decided tendency to increase in numbers and at least the beginning of a tend-

ency to differentiate within itself distinct ministries, that is, individual members or small committees, in special charge of particular governmental or administrative interests. Committees of this kind go back into the middle ages, and in Tudor times there were at least six of them. With the increasing membership of the council it became more difficult to do business effectively in a meeting of the whole, and the use of committees continued throughout the seventeenth century. In addition, it should be noticed that the king was not bound to consult the council, nor any particular members of it, on any question of policy, and it was also regarded as proper for him to consult, and he often did, members not forming a recognized committee or persons not belonging to the council at all.

At the accession of Charles II the size of the council was further increased. The surviving members of his father's council were restored to their places with other royalists, and the number of these was balanced by appointments from the opposing party. At times under Charles the council contained as many as fifty men. But there was no attempt to make the council as a whole a real advisory organ, and the small committee for foreign affairs performed that function more nearly than anything else. Still Charles consulted, and increasingly as time went on, with informal or secret advisers, though there was an increasing feeling that there should be a recognized council standing between king and parliament, mediating between the two, and having an influence sufficient to secure that the policy actually followed should have the support of both. This was the idea at the bottom of the plan attributed to Sir William Temple, which was tried after the fall of Clarendon. Mediation was to be obtained by including all parties. The council was to contain friends and opponents of the king and neutrals, members of the old council and parliamentary leaders. The plan could hardly have been successful, even if the king had given it sincere support.

The modern cabinet was not to originate in a coalition measure. But the attempt shows that the problem which the cabinet was to solve, the necessity of making sure that executive and legislature should follow a common policy, was beginning to be understood, and that the privy council was felt to be the institution in which the machinery of reconciliation should be found. To this we shall return in more detail in the next chapter.

Some things worthy of note begin and some end in this reign. Convocation ceases to tax itself and the right is surrendered to parliament. The house of lords as a court of law abandons its original jurisdiction and establishes its right to hear appeals from the chancery courts. Members of juries cease to be personally liable for the verdicts they render if not satisfactory to the presiding judge. The house of commons establishes its exclusive right to determine taxation free from amendments by the lords. The medieval tenths and fifteenths disappear from taxation. The organization of the war office under a secretary at war begins, and an improved council for foreign plantations for colonial concerns.

James II could hardly have begun his reign under more favorable conditions than actually existed. The practical power handed on to him by his brother was very great; it has even been said to have been greater than that possessed by the Tudors. The sympathy and prevailing disposition of the nation was all in his favor, for the reaction against the attempt to exclude him from the throne had been general and deep. The doctrines of divine right and non-resistance seemed almost universally accepted. The opposition was thoroughly disorganized and discouraged and not in a position to exert any effective strength. James's first acts and words and his apparent restraint made a good impression upon all. The parliament elected under these influences in the spring after his accession, and with the advantage given to the crown by the manipulation of the borough charters,

was overwhelmingly royalist. He was granted a large revenue for life, and parliament seemed ready to do anything in reason which he wished. From such a beginning it was no slight political achievement to have destroyed all his advantages in a trifle over three years and have brought himself to the point where he must abandon his throne as a fugitive with scarcely a supporter left. And it was a significant element in this achievement that he had in so short a time transformed most members of the party which from honest conviction had held to the doctrine of non-resistance into advocates of resistance and revolution.

It was as true of James as it was of the nation that the leading interests and motives in the crisis were religious. He wished to give catholicism a better position in England; it was undoubtedly his hope to make it a legal worship. But the means which he employed and the results, probably secondary to his main purpose, which he accomplished were constitutional. The ease with which the insurrections of Argyle and Monmouth were put down soon after he began to reign, and the possession of a fine army which he did not disband when the insurrections had been suppressed, probably tempted him to go faster and farther than he at first intended. He determined not merely to retain the army, in spite of the national prejudice against a standing army, but also to keep in their offices the catholics who had been commissioned during the insurrection contrary to the test act, an even more serious offence. Before these questions were brought to the attention of parliament in November, 1685, sympathy and alarm had been excited in the country by the persecution of protestants in France by Louis XIV, and especially by the revocation of the edict of Nantes in October, as it was supposed under special Jesuit influence. As there was known to be strong Jesuit influence also at the court of James, naturally suspicion was aroused and faith in any representations or promises of the king's weakened.

When parliament declined to provide for the army or to relieve the officers from the test act, but adopted an address to the king of the opposite significance, it was prorogued and after a long interval was dissolved.

James was not to be turned from his course by the opposition of parliament. The next spring, after providing a packed bench of judges, he secured a judgment in a collusive suit affirming that he had the power to grant dispensations from the statute to any of his subjects.[8] With this authorization he went on to appoint catholics to office, not merely in the army but to civil office, to the privy council, in the university of Oxford, and even in the English church itself. At about the same time, because he had found himself unable to punish a clergyman who had preached an anti-catholic sermon, he created what was in reality a revived ecclesiastical court of high commission, though taking some pains to avoid the letter of the statute abolishing the former court of that name. Catholics were encouraged to celebrate their worship more and more openly, and when the London mob forcibly objected James brought up his army and settled 16,000 men in a camp near the city. There was evidence enough of the temper of the nation regarding these innovations, but the king did not see and did not understand.

By the end of 1686 James had gone far, but his work still lacked a solid foundation. It rested merely on action of the royal prerogative of more than doubtful validity, at least if the nation should ever again be in a position to express and give effect to its own determination. The next move was an attempt to gain popular support. Charles had found that he could not gain the help of the protestant dissenters by relieving them of their religious disabilities by declarations of indulgence. James thought he could. In April, 1687, he issued his own first declaration of indulgence, which granted freedom of worship to all dissenters, prot-

[8] Robertson, *Statutes*, 384–388.

estant or catholic, and did away with all religious tests for office.[9] For a moment it seemed as if the protestant dissenters would respond. It was even hoped that a parliament might be elected which would repeal the test act, and manipulation of the constituencies was extended from the boroughs to the counties, but the attempt did not succeed. The counties could not be controlled and the devotion of the king to catholicism became too suspicious for the support of independents and quakers.

At the same time with the declaration of indulgence came the attempt of the king to impose a catholic president upon Magdalen College, Oxford, against the election of the fellows, and his installation by force, which increased greatly the public excitement and fear. James remained, however, blind to all signs and events moved rapidly to their natural conclusion. In April, 1688, the second declaration of indulgence was issued, followed immediately by an order that it should be read in all the national churches.[10] This seemed to the clergy not merely an illegal act of the king's but to require of them also illegal action. The archbishop of Canterbury and six bishops sent a petition to the king requesting that the clergy should not be forced to act against the law. The implication that his action was illegal aroused the intense anger of James, and the bishops were arrested on a charge of criminal libel and lodged in the Tower. Their trial was a travesty of justice, but their acquittal by the jury was not merely received with enthusiastic rejoicing, even in the army, but marks a stage in the development of the right of the jury to render a verdict on the general merits of the case whatever may be the evidence submitted to them.

Before the trial took place the birth of a son to James changed the whole situation at a stroke. Until this event it had been possible for the nation to look forward to a not distant time when James's daughter Mary, married to the

[9] A. and S., 451–454.

[10] Robertson, *Statutes*, 388–391.

Prince of Orange, both strong protestants, should come to the throne. It was possible to wait patiently in the hope that matters could not be carried too far before conditions would change. Now the possibility was opened of an indefinite line of catholic sovereigns, and it became obvious to all that the nation must aid itself. Immediately after the acquittal of the bishops a written invitation was sent to William of Orange to come to England to take the lead against the king, signed by seven prominent whigs and tories. Even after William landed it might have been possible to avert revolution and the loss of the throne, if James had had a clearer insight into the actual situation and been less obstinate in holding to his own course. As it was, he was abandoned by practically everybody and himself abandoned his own cause by his flight to France.

James did his best to make the organization of a new government impossible by burning the writs which he had prepared to issue for another parliament and by carrying off the great seal. But there was no serious embarrassment. An advisory "assembly" was called composed of the lords and of all who had been members of the house of commons during the reign of Charles II, with representatives of the government of London. The assembly advised the calling of a convention parliament, and letters were issued for the ordinary parliamentary elections, though the letters could not be in the usual form of parliamentary writs.[11] The convention parliament met January 22, 1689, and remained in active work until August 20, and later continued its work in a second session. Immediately after the acceptance of the crown by William and Mary, it declared itself to be a parliament and its acts valid law, and this was reaffirmed by the second parliament of the reign. It must be remembered that the process of revolution had been made to seem to this generation less startling and violent, and more nearly a permissible process in extreme need, than would normally be the

[11] Robertson, *Statutes*, 105–108; A. and S., 454–456.

case, partly by the experiences of the century, for many men then living could remember an earlier successful convention parliament, and partly by the extensive study of past precedents which had become habitual. Reference was made in relation to James to the deposition of both Edward II and Richard II.

There were grave differences of opinion as to what should be done with the throne at the opening of the convention parliament. Some wished to restore James with secure conditions; some wished a regent with James as titular king; others held that James had abdicated by his flight but that the crown at once fell to Mary, with no vacancy; and others still, that James had abdicated but that the throne was vacant and the nation had the right to fill it, fixing such conditions as would secure good government. It was this last view which finally prevailed, partly because of the refusal of William to accept any other. James was not formally deposed, but it was resolved "that King James II, having endeavoured to subvert the Constitution of the Kingdom by breaking the original contract between king and people, having, by the advice of Jesuits and other wicked persons, violated the fundamental laws, and withdrawn himself out of the Kingdom, has abdicated the government, and that the throne is thereby vacant," and second, "that it hath been found by experience inconsistent with the safety and welfare of this Protestant Kingdom to be governed by a Popish prince." The crown was offered to William and Mary conjointly, with succession after the descendants of Mary to the princess Anne and her descendants, and in the third place to descendants of William by any other marriage, and was accepted by them.

Conditions of succession were, however, not the only conditions which the new sovereigns were required to accept. There was added by parliament and accepted by them a "declaration of right," enumerating the arbitrary acts of James and declaring each of them specifically to be illegal.

In the second session of the convention parliament this declaration, with some additions, was embodied in a statute and adopted as law, and in this form it is known in history as the Bill of Rights.

The Bill of Rights, whether regarded historically as the end of a constitutional epoch, or for what it is in itself merely, is the most interesting document of English history next to the Great Charter.[12] It marks the end and sums up the results of a struggle which had filled almost a hundred years, in which the very nature of government, the sources of its authority, and the method and channel of its expression, were at stake. These questions as involving the fundamental character of the government were now settled never to be raised again in English history. Yet of all of these questions as fundamental issues the Bill of Rights says nothing. There is in it no statement of what the issues had been, much less any attempt at theoretical justification, or political philosophy or generalization. This omission was not because there was no current political philosophy in defence of the revolution. There was a great deal of it in print, and John Locke's *Two Treatises of Government*, which was published a few months after the Bill of Rights was adopted, was in manuscript and had been for nearly twenty years. Other countries outside of England which have adopted similar documents have not followed this example strictly. The numerous "Declarations of the Rights of Man" adopted on the continent in the revolutionary period a century later are full of speculative philosophy about natural and inalienable rights which was derived directly from the ideas of Locke. In the documents of our own national and state history we have stood between the two, but nearer rather to the English than to the French position. We have put forth many statements of natural rights, like that in the preamble to the Declaration of Independence, which was derived directly from Locke and not from France. We have called these generally

[12] A. and S., 462–469; Robertson, *Statutes*, 129–137.

bills of rights, but we have combined them with sharply practical statements of specific rights and remedies of the English type, like the body of the Declaration of Independence and the first amendments to the Constitution, some of which use the language of the Bill of Rights. Upon these latter we have really depended to secure liberty, and not upon declarations of natural right. It is not too much to say that Anglo-Saxon liberty has been created and made secure because the Anglo-Saxon mind has instinctively felt that the affirmation of abstract rights, however emphatic and solemn, protects nothing, but that the end was to be reached as a practical reality by "providing remedies for the enforcement of particular rights or for averting definite wrongs."

This is what the Bill of Rights does. It does not state the fundamental issues of the seventeenth century, but, by enumerating and declaring illegal the specific acts by which James has tried to set up an autocratic royal power, it condemned and made impossible for the future everything that any one of the Stuarts had attempted. In doing so it did what had been omitted in 1660; it gathered the results of the revolution into constitutional form, embodied in a formal document, and made them binding upon future kings. Considering that most of the law stated in Magna Carta has become obsolete, not applicable to modern conditions, while the provisions of the Bill of Rights would be of instant application to an attempt of the executive to recover power, the Bill of Rights is most nearly of the nature of a written constitution of anything in English history. It is not a written constitution. It does not constitute a government and define its powers. It could be repealed or abrogated by an ordinary act of parliament. And yet it does put into written form a series of constitutional laws which are fundamental to the Anglo-Saxon system of government. They are probably regarded in the popular mind as so fundamental that, if parliament should ever be tempted to exercise its power to repeal them,

there would be many who would be inclined to say that it had no right to do so.

It should be remembered also that the Bill of Rights, considered as a constitutional enactment, affirmed in more specific language than any earlier document the underlying fact of English constitutional development, that the king has no right to violate the fundamental laws of the kingdom. To be sure the bill does not say this in set terms, but by unavoidable inference. In the preamble, after enumerating the arbitrary acts of James, it continues: "All which are utterly and directly contrary to the knowne lawes and statutes, and the freedome of this realme." And in the body of the bill the same acts are declared to be "illegal." The bill is also as clearly a contract between the king and the nation as the charters of Henry I and John were between the king and the barons, though there was in the seventeenth century no reminiscence of a feudal contract. It is made evident in the bill, though again not expressly affirmed, that it is in consequence of their recogntion of the illegality of James's acts that William and Mary are accepted as reigning sovereigns. In these respects the revolution of 1688 and the Bill of Rights mark the culmination of English constitutional development. The foundations upon which the constitution rests, the supremacy of the law, the sovereignty of the nation, are never again called in question. All the later progress consists in more and more complete application of these principles in actual government, the more complete carrying of them out in practice.

If the Bill of Rights was severely practical, so was the revolution of which it was the result. It was emphatically a revolution by public opinion, without bloodshed, even without conflict or public convulsion. Not merely was it carried through quietly, but great pains were taken that every step in it should be legal, or as nearly so as possible. And yet it was a revolution. It was not, and it could not be

made, legal to declare that a king had abdicated who had not done so and who vigorously maintained that he had not. That was deposition, in reality, if not in form, and the constitutional law of a monarchy could hardly provide for the deposition of the sovereign. Other things had to be done which were not legal. According to precedent the convention parliament was not legally a parliament, and it could not make itself so by its own act, nor indeed could the next parliament do so, itself called by a revolutionary king. But it was a revolution fully justified, as a revolution must be if at all, by the higher right of the common decision of the nation which spoke through it. Also in no other revolution is another characteristic common to Anglo-Saxon revolutions seen so clearly as in this. Its object was not to throw the nation out of the road which it had been following in the past and set it over into a new track. Its purpose was only to remove obstacles from the way, that the political progress of the people might go on naturally in the same path which for centuries it had been following. And this was what it did effect.

It must be added that the effect of this revolution was as great in America as in England. It came as a strong reinforcement through new channels to the ideas of government which the puritan settlers of the middle of the century had brought with them. The colonists had suffered as much in their charters and in their free governments from the plans of Charles and James as the English at home. Through all the northern colonies they had sympathized deeply with the opposition, and they rejoiced in the success of the revolution. It was, however, through the writings of Locke that the new influence was most directly exerted and longest felt. American political thinking of the eighteenth century was as profoundly and directly affected by Locke as was French, and the thought of these two countries runs so closely parallel, not because they borrowed from each other, but because both learned from the same teacher.

But the fundamental ideas of Locke — the sovereignty of the people, government resting on the consent of the governed, the legislature the supreme power but its power delegated by the people who may withdraw it, the executive not the director but the agent of the legislative — were those expressed and acted upon by the puritans between 1642 and 1660 and built into the foundations of the American colonies.

The course of events in James's reign has been followed in rather full detail because it makes clearer than mere description in words can do the character of the crisis and what was at stake in it, the stage in which the constitution stood at the time, the serious danger to which it was exposed, and the necessity and character of the revolution which resulted.

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CHAPTER XV

THE MAKING OF THE CABINET

The reign of William and Mary opened a new epoch in English constitutional history and one quite different from any in the past. The old struggle in the old form was ended. The old issue between the limited and the absolute monarchy, which had dominated more or less openly every epoch of English history since the beginning of the thirteenth century, was finally settled. The old absolutist theory, the Stuart interpretation of the constitution, was never again insisted upon by any English king. We shall come later to a time when a vigorous and for some years a successful effort was made by a king, George III, to recover power, but it will not be difficult to see that what he was trying to regain was not what was lost in the seventeenth century, but what was lost after 1688. It can even be said still further that questions involving the fundamental meaning of the constitution hardly arise again. It is two hundred years before a question of the kind that can with any semblance of truth be called fundamental becomes a leading one for the nation to decide. It is doubtful if even that question, the real position of the house of lords in the state, should be considered a case in point, for all that is fundamental in that question was virtually decided in 1688. The new epoch starts with the old issue settled, and its chief endeavor constitutionally is to learn how to apply that settlement more and more completely to all the details of government operation, and to devise effective machinery for carrying it out in practice. Its most striking characteristic is institution-making, and the chief institution made is beyond all question one of the most im-

portant of history, we may perhaps in the end be justified in saying the most important, for its history is not yet finished. The new institution was the English cabinet, not meaning by that the cabinet as a mere institution, but the cabinet system of government: the cabinet as controlled by the modern doctrine and practice of ministerial responsibility.

To understand the beginning of the cabinet system we must go back to the restoration of 1660. The restoration was, as we have seen, a compromise by which the form of sovereignty remained with the king while the reality was transferred to parliament. If fully carried out in practice, this compromise would mean the direct supervision and control of all lines of government policy and executive action by the legislative assembly. Such an arrangement was new to all human experience and naturally there existed no machinery by which it could be carried out in practice, no institutional forms through which a legislature could exercise an executive authority which in theory it did not have. Constitutional machinery for the practical operation of the compromise must be devised and the origin and growth of this machinery is the origin and growth of the cabinet with the principle of ministerial responsibility to parliament. Or we may state the fact in another way: the English system of vesting the executive authority in a cabinet virtually chosen by the legislature and held under a close control by it, was the method finally devised to carry out in the practical operation of the government of the country the sovereignty of parliament which had resulted from the constitutional advance of the seventeenth century.

It would be absurd to suppose that the men of Charles II's reign, or any later reign, were conscious that here was a practical problem for them to solve. What they were conscious of at first was some little difficulty in harmonizing the king's policy and parliament's policy upon a common line of action, and such conscious efforts as were made, as in Sir

William Temple's plan for a reorganization of the privy council, were directed to creating a mediating, harmonizing body between these two great powers. These conscious efforts led to no result. So far as any progress was made under Charles II, it resulted from the efforts of a small body of ministers who were in the confidence of the king and at the same time able to influence the action of parliament. The earl of Clarendon, who was for a time one of these ministers, has described their methods in words which are especially interesting to us because they might be used almost without change to describe methods employed in Washington during the past thirty years in efforts to bring the influence of the president to bear on legislation. He says: "These ministers [Clarendon and Southampton] had every day conference with some select persons of the house of commons, who had always served the king, and upon that account had great interest in that assembly, and in regard of the experience they had and their good parts were hearkened to with reverence. And with those they consulted in what method to proceed in disposing the house, sometimes to propose, sometimes to consent to what should be most necessary to the public; and by them to assign parts to other men, whom they found disposed and willing to concur in what was to be desired: and all this without any noise, or bringing many together to design, which ever was and ever will be ingrateful to parliaments, and, however it may succeed for a little time, will in the end be attended with prejudice."

As a matter of fact, the king was still, and for a long time after, the real executive. He chose his own ministers and controlled their policy and did not concern himself with parliament's approval of them nor consistently with parliament's approval of his policy. On its side parliament naturally regarded the new methods with some suspicion, as evidence of intrigue in the king's interest, but it knew no way of exercising its power of final decision except by making a square issue with the king, nor of holding the king's servant

responsible except by asserting a direct responsibility enforced by the old practice of impeachment.

The situation in this respect was not changed by the revolution of 1688. That revolution was not a decision as to particular forms or machinery. What was at stake once more were the principles which underlay all forms, and the whole nation showed that it was determined to maintain the settlement of 1660 so far as that was a settlement of the fundamental question of the supremacy of parliament. But we may be sure that if satisfactory constitutional machinery had been devised during the reign of Charles II for exercising that supremacy in practice, it would have been included in the settlement of 1689. But it had not been, and indeed in 1689 it was only the fundamental principle of parliamentary supremacy that was in any sense apprehended. Neither the range of its application to the operation of actual government, nor the method of its application, was yet understood, nor was the latter, which is the principle of ministerial responsibility applied to the cabinet, clearly understood for another century.

With the accession of William III this fundamental question at issue between king and parliament was settled, as has been said, never to be raised again. The characteristic feature of the new age was not a question of that kind, nor of the interpretation of the constitution, but it was progress upon the new task of devising machinery for carrying out in actual government the compromise settlement already reached. In workable machinery for this purpose, the age of William III made no great advance over that of Charles II. The mediating body still consisted of a small and informal group of ministers who enjoyed the confidence of the king and who were influential in parliament. The king still retained a very decided control over the conduct of government, especially in foreign affairs, and he never dreamed of allowing parliament any voice, direct or indirect, in the choice of his ministers.

This change may be described in other terms. In the reign of Charles II impeachment, representing the old form of ministerial responsibility, was a survival, in the scientific sense of the word, destined speedily to disappear, and the new and modern form was foreshadowed on its institutional side in the experiments to find a mediating, harmonizing body between king and parliament. Of these Sir William Temple's proposed reorganization of the privy council is the most famous, but it is not the one from which the modern form developed. That came more directly from the disliked and suspected ministerial clique which the king himself formed, though rather from that as it was reëstablished under William III than from Charles II's. The birth of the idea of ministerial responsibility on the other hand can hardly be traced back so far and is to be found coming into existence very slowly after the beginning of the eighteenth century, though the idea was in a sense involved in such an experiment as Sir William Temple's.

William III began his reign with a clear recognition on his part that the royal office had been shorn of extensive powers. As it has been expressed by a distinguished historian of the constitution: "The king was to be distinctly below statute; he was to have no power to suspend statutes or to dispense with statutes; he could not by his proclamations create any new offence; he could not keep a standing army in the realm in time of peace without the consent of parliament; parliament had begun to appropriate supplies; the military tenures were gone; he had no powers of purveyance and preëmption; he could not try men by martial law; the judges were no longer to hold office during his good pleasure; the courts of politicians whereby the Tudors and two first Stuarts had enforced their will were gone, there was no Star Chamber, no High Commission." We may add: he could make no laws without the consent of the nation's representatives; he could lay no taxes; he could claim no kingship by divine right, for the divine line had been set aside by act of parliament,

and upon that act alone his title rested; he could hold no man in confinement without a speedy trial; his ministers and officers were personally liable in damages to any individual if they exceeded their powers, and it was clearly recognized that they were responsible with their lives to parliament for the policy which they carried out, even if it was known to be the king's and not theirs. All these limitations William III knew and accepted.

Still the king was by no means a figurehead, and his practical powers were much greater than those of the king today. The whole realm of government policy, the determination of the conduct of the government, of what it should strive for and how it should do it, was in his hands alone. The progress of the constitution had deprived the king of a number of specific ways by which his policy might be carried out or enforced; in extreme cases of opposition his advisers might be held responsible for that policy; in appropriations and in the auditing of accounts a far more effective method of controlling policy was beginning; if new law were necessary, as would almost certainly be the case if he adopted a new financial policy, recourse must be had to parliament; but as yet the heart of the matter had not been reached. It was still the executive and not parliament which determined the direction of government policy, and the executive was not yet under immediate parliamentary control. He was not obliged to consult parliament in any way, directly or indirectly, in advance of a decision. This was even more true in foreign affairs than in domestic, as it is today for that matter, and in the time of William III foreign policy determined domestic more completely than has been commonly the case in later periods of history.

Parliament was in the end to secure a direct control of government policy by obtaining an indirect control over the appointment and dismissal of ministers. As yet not even a beginning had been made in this direction. The modern kind of control did not grow out of impeachment. It

arose from a discovery in the practical operation of government, in attempting, as has been said, to bring together in a common policy the king and the majority in the house of commons. William III made the first approaches to the discovery, though it is highly improbable that he had any conception of its meaning, nor did he ever recognize any compulsion, not even the compulsion of the existing situation, in his selection of ministers. To the end of his reign he was entirely free in his choice of the members of his privy council. In selecting also those members of it who were to hold the offices of state and so to form the ministry, that is the cabinet not so much in the later English as in the American sense, his special advisers, he felt no binding obligation to consider their relation to the distribution of party strength in parliament. When he did consider it, it was a matter of convenience not of obligation. In other ways too his freedom in this matter was greater than that of a present-day king. He was not limited to the advice of his ministry. He might and did ask, and be influenced by, the advice of men who held no official relation to the government. He might and did disregard the advice of his ministers. He might and did act in exceedingly important matters, binding the future action of the nation, without seeking their advice at all. The final decision of all questions of policy was his. William III was a limited monarch. He was not, and could not possibly be, an absolute king of the type of his perennial opponent, Louis XIV, but the English constitution had much growth to make before it should reach the kingship of the twentieth century.

At the accession of William and Mary the two political parties, whig and tory, had as definite existence and were as clearly distinguished from one another as at any later time, and party spirit was as bitter. William's first parliament, the convention parliament, was strongly whig, but he believed not merely that he could form a successful government by uniting both parties in the ministry, but that he ought to

do so, that his government would then be stronger and that he would be free from any danger of being the king of a party or a faction. If the idea which was half consciously held in Charles II's time, that the ministry should be a mediating body between a powerful king and a powerful parliament was to prevail, it was very likely a necessity of human nature to move towards its realization first of all by working out the experiment of a coalition ministry. At any rate it would seem, in the absence of much experience, a reasonable method of getting a mediating body. We must remember also that there was at the beginning no such definite combination of officers into a distinct group as we have in the cabinet. There was a privy council which was a definite body. There were various recognized committees of the privy council, and had been for many generations, which had charge of distinct government interests, but the incipient cabinet was something different from these, something less formal and authorized. There was a group of executive and administrative offices of more or less high rank and power whose holders belonged to the privy council, and who sometimes had cohesion enough to stand together against opposition attacks in parliament. But there was no definite notion as yet that these officers formed an organized body within, but distinct from, the council, having as a group a special, or even a semi-official, relation to the formation and direction of policy. A given man was put into office because he was an influential leader in parliament and the nation, and the king asked his advice for the same reason, but he grouped together as he pleased those men whom he wished to consult in a body, leaving out some the great office-holders and including on occasion some who were not among them. The whole conception was still rather individual than corporate. When men did get any glimpse of a definite body seeming to stand apart from the council and together enjoying influence upon government, it was to condemn it as improper and dangerous. As a matter of historical fact the change in both these par-

ticulars, the recognition of a corporate cabinet and of its usefulness instead of danger to the constitution, was wrought out by experience with coalition ministries.

William's experimenting began with his first ministry. The convention parliament was strongly whig, but the offices were filled with tory as well as whig leaders. If the belief was that the coalition would tend to harmonize the two parties the result must have been a disappointment, for factional quarrels were common both in the ministry and in parliament. The first election of the reign, in 1690, gave the tories a majority, and ministerial changes followed by which the number of whig officers was reduced and of tory increased; but if the result was "greater harmony between the parliament and the court," the effect was not striking enough either to teach the lesson to be learned or to change the practice of coalition ministries. On leaving England for Ireland in the same year, William appointed, to assist the queen during his absence, a special council of nine, made up almost equally from the two parties.

Some modifications of the ministry in 1692 are not of particular importance, but with 1693 began a series of changes the significance of which has sometimes been exaggerated. The earl of Sunderland, who seems to have been for some time a believer in that policy, is said to have urged upon the king the wisdom of making up his ministry entirely from one party, in this case from the whigs. By degrees that was done, and by 1696 the cabinet was formed which was known as the "junto," a name which implied not merely that the combination was noticed but that it was not approved. The election of 1695 returned a whig house of commons, but the junto cannot be regarded as opening the continuous history of the modern cabinet, for when the election of 1698 went the other way the ministry felt no obligation to resign, and the necessary connection between cabinet and parliamentary majority was not recognized for many years.

The election of 1698, however, demonstrated the suprem-

acy of parliament over king, when it thought the matter important, for the policy of retrenchment and reduction of the army which it adopted, with unhappy results, was opposed to the strong desires of William, though he felt obliged to yield. In the remaining changes of William's reign no new principle or practice was introduced. The ministry became more tory, but the insolent acts of Louis XIV united the nation, including the tory party, in support of William's foreign policy, which led to the war which he did not himself live to conduct. The total result of William's reign, which he passed on to his successor, Queen Anne, can hardly be described as more than tendency, but in one respect it was a tendency which had long prevailed and could no longer be successfully opposed. This feature of the result was the tendency to commit the control of national affairs to a small group within the council composed of the holders of the great offices, a group distinct enough to be often recognized and given a name, but not authorized nor even permitted by any law. The great step remaining to be taken after this, in the formation of the cabinet system of government, was to discover and to carry into effect in practice the relation between the directing group of ministers and the parliamentary majority.

Naturally, as they were as yet unconscious of the relationship, this was not the difficulty which troubled contemporaries. What seemed to them the great danger, in the change which they were vaguely conscious of, was the secrecy of the cabinet action and the difficulty of holding the members responsible for their advice to the king. Impeachment, which was the medieval method of holding ministers to a direct responsibility to parliament, had only just been put into its perfected form. But since the supremacy of parliament, which had been established in 1660 and confirmed in 1688, was not direct but indirect, and was not legally recognized, impeachment was a less suitable method of control than it had been. What was needed to make the new posi-

tion of parliament effective was not a means of punishing ministers for what they had done, but a means of making the authority of parliament effective throughout the process of deciding what to do. Only in such a way could there be exercised a real supremacy which was nevertheless indirect. Naturally also the men of the time did not realize this need. The whole process of this most important constitutional change was unconscious, and this fact must never be overlooked.

What contemporaries did think they perceived was that they were losing the means of holding ministers responsible. Impeachment seemed to be slipping out of their hands and nothing taking its place. Early in the reign, in rather stormy debates on the mismanagement of the war by the government, in the autumn of 1692, members of parliament bitterly attacked the cabinet as not belonging among English institutions: "not to be found in our Law-books," said one member; "that has not been the method of England," said another; and as avoiding responsibility by the secrecy of their advice; "you cannot punish them because you have no light on their actions." That ministers should be required to sign the advice they gave was urged by several members. In the next year's session, when the commons were made angry by William's veto of the bill excluding office-holders from the house, it was suggested that the king himself could be coerced by refusing to grant money. Impeachments were several times threatened, but none attempted until near the end of the reign in 1701.

Impeachment had been devised in the struggle between king and parliament over the old issue, the seat of sovereignty in the state. Its purpose was, exactly like that of chapter 61 of Magna Carta and every other expedient of the old type, to hold the king to a real responsibility without the danger of civil war and revolution which would result in those centuries, and perhaps at any time, from holding him to a formal responsibility. For this purpose it was the most

effective of all the older expedients, though all of them were in a way successful, when the king did not obstinately insist upon his own responsibility. But that issue was now settled. It never reappeared after the revolution of 1688. The real issues were no longer those of a fundamental interpretation of the constitution between king and parliament, but those of purpose and policy in the daily operation of government between the leaders of groups of opinion in the nation whose equal loyalty to the constitution was unconsciously accepted early in the period. In such a situation it was instinctively felt that it was an unworthy use of a party advantage to subject the leaders of the opposite side to a criminal prosecution and, though it was not yet seen what could be used in its place to enforce responsibility, impeachment was tacitly dropped.

The same fate overtakes the royal right of absolute veto during the period of this chapter and for the same reason. William III made use of this right four times, always exciting thereby some indignation on the part of parliament; and Queen Anne used it once. But it was as out of harmony with the new phase of constitutional growth upon which England had entered as impeachment. The one was a weapon of parliament against the king, and the other of king against parliament in a conflict of the old sort between executive and legislature. But conflicts of the old sort were no longer possible. Conflicts of the new age were not to be between legislature and executive for supremacy in the state, but between different groupings of public opinion represented by parties in the legislature; and both the nominal executive, the king, and the real executive, the cabinet, were to be wholly dependent on the legislative result. The veto has never been used since Queen Anne's time, but there was much discussion a few years since of the king's right to use it in order to compel the submission of questions of special importance to a popular vote or referendum.

In the last year of William's reign a constitutional act of

almost equal significance to the Bill of Rights was adopted by parliament — the Act of Settlement.[1] It had become necessary to resettle the succession to the crown because of the successive deaths of Queen Mary and the duke of Gloucester, Anne's last surviving child. In this necessity parliament passed over all the intervening heirs to the throne, upon the principle of strict hereditary succession, who were catholics, and declared the next heir to Anne to be the electress Sophia of Hanover, a granddaughter of James I and the nearest protestant among the descendants of the ancient kings. In principle this was an assertion of the right of parliament to determine who should be king no more extreme than that made in the Bill of Rights, but it was more striking because the number of possible heirs passed over was greater, and the heir selected was in a more remote degree related to the reigning sovereign. Greater violence seemed to be done to the right of the direct line. It was an emphatic repetition of the principle that the throne of England was not held by divine right. The princes of the house of Hanover, who came to the crown by virtue of this act, have several times publicly recognized these facts and have declared that their only title to reign is the consent of the nation.

Advantage was taken of the fact that the succession must be settled to include in the act some constitutional enactments of the nature of those in the Bill of Rights. The tenure of judges was at last made by law to be during good behavior, and further they were to be removable only on an address from both houses of parliament. It was also made law that a pardon could not be plead to bar an impeachment. Two other provisions were of more doubtful wisdom. In them parliament attempted to destroy the beginnings of the cabinet system in order to protect what it believed to be its means of enforcing responsibility and, if these provisions had been put into force, would have succeeded in doing so. One of them required that all business of the council should

[1] A. and S., 475–479; Robertson, *Statutes*, 151–156.

be transacted in the privy council and not elsewhere, that is, not by the suspected junto or cabal alone, and that the members of the council should furnish the evidence of their responsibility by attaching their signatures to the resolutions to which they consented, and the other forbad the election to the house of commons of any officers or pensioners of the crown, including of course the ministers. That is to say, parliament had so little conception of how best to realize its own supremacy that it deliberately tried, in the interest of an obsolete method, to end the line of progress which was bringing in the most effective means ever devised, or apparently devisable, for operating a republic under the forms of a monarchy.

Neither of these provisions went into force. It was felt that the first unduly restricted the independence of ministers in giving advice to the king, and it was repealed soon after the accession of Anne.[2] The purpose directly intended by the second was not merely to protect the house of commons from the influence of the king's ministers, but to cut off one of the most effective means by which the king had sought to control the action of the house, through office-holders and the use of offices and pensions as bribes. William III himself had made free use of this means. It was soon felt, however, that the act had gone too far in excluding the members of the ministry from parliament; that the practical inconveniences would more than outweigh the gains. The provision was repealed at the same time as the first, but two years later a new act on the subject was passed which with some modifications is still in force. It provided that no person holding any office created after October 25, 1705, or certain other offices named, could sit in the house of commons, and that any member accepting any other office than these should vacate his seat, but might be reëlected. Since that date new ministerial offices have been placed in the second class by the statute creating them. Had the two requirements of the

[2] A. and S., 483–485; Robertson, *Statutes*, 185–186.

Act of Settlement remained in force, the future development of the cabinet, under the most favorable conditions remaining, if it had continued to develop at all, could have led only to such a result as was later arrived at in the American cabinet, an administrative and advisory cabinet merely. It could not have arrived at cabinet government and ministerial responsibility of the modern kind. As we shall see, the king was not by this act entirely deprived of the means of influencing the house of commons illegitimately, but the principle was established and good progress made in applying it.

While the chief constitutional significance of William's reign is to be found in the progress made towards cabinet government, there are other steps of advance which should not be overlooked. Religious toleration was brought a little nearer. Efforts made before 1688 to relieve protestant dissenters from some of their worst disabilities all failed, but in the first session of the convention parliament a toleration act was passed.[8] The Clarendon code was not repealed, but protestants, except unitarians, who would take the oaths of allegiance and supremacy and make the declaration against transsubstantiation were relieved from the penalties against conventicles and absence from church. On the same conditions and after signing the thirty-nine articles, except three and part of another, dissenting ministers might preach and administer the sacraments, and their meeting-houses were protected if registered. There was a relapse towards intolerance under Anne, in the act forbidding the "occasional conformity" of dissenting office-holders and the schism act against dissenting schools, but these were both repealed in 1718, and soon dissenters were in practice allowed to hold office, annual indemnity acts being passed to relieve them of penalties. The toleration act was not extended to Ireland, and the result was the great Scotch-Irish immigration into the American colonies in the thirty years following the revolution of 1688.

[8] A. and S., 459–462; Robertson, *Statutes*, 123–128.

The annual meeting of parliament was secured after the revolution, by limiting the force of the mutiny act for the organization and discipline of the army to one year only, and by a similar limitation of the validity of appropriations.[4] In 1694 a triennial act was passed, after being once vetoed by the king, requiring a parliament to be held at least once in three years, and also limiting the life of any parliament to three years.[5] In 1695 the house of commons refused to renew the licensing act, which had created a censorship of the press and which had recently expired. Since that date the press in England has been in law and form free, and has actually been without censorship, but a stamp act was passed under Anne which bore heavily on weaker publications and acted as a restraint on new ones. The development of the newspaper press after the revolution was, however, rapid, and its use for political propaganda and to give voice to political opinion after the modern manner was greatly increased. Harley, in the reign of Anne, is said to have been the first minister to use the press for political purposes. An important act was passed in 1696 regulating trials for treason, giving to the accused greater securities, and clearly requiring two witnesses, not necessarily to the same overt act, as the American constitutional provision requires, but, it might be, to two acts of the same treason.[6] The financial legislation of the reign, fixing the "civil list"[7] and more especially organizing a permanent national debt and establishing the Bank of England, while not strictly constitutional in character, had important constitutional consequences in rendering the results of the revolution secure and strengthening the hands of its supporters.

The reign of Anne constitutionally is a natural continuation of William's along the same lines and with the same

[4] A. and S., 457–459; Robertson, *Statutes*, 108–115.
[5] A. and S., 471; Robertson, *Statutes*, 138–139.
[6] A. and S., 472–475; Robertson, *Statutes*, 140–144.
[7] A. and S., 456.

characteristics. Rather more than in William's reign the growth of cabinet government is the chief interest, but it is a growth not marked by any sudden or decisive advance but by slowly increasing understanding of how cabinet government is to be worked and what it implies. At the accession of Anne the whigs had a majority in parliament and the cabinet was one of William's type, made up from both parties. Anne herself was in inclination rather strongly tory, and so were her especial friends, Marlborough and his wife. Under this influence of personal preference the queen began almost immediately to make the ministry over, until it became with slight exception wholly tory. The first election returned a strong tory majority, but the election followed the cabinet change, which was made with an existing whig majority, and could have no influence upon it.

The cabinet thus formed remained nominally in power until the great change in 1710; that is, it remained under the control of the two men who were most influential in its formation, Godolphin and Marlborough; but it underwent many internal changes which in their general character are important. First the more extreme tories were removed and more moderate ones put in their places. Then Marlborough found the whigs more inclined to support the war, and tories were removed and the ministry became more whig. Finally, in 1708, an intrigue of Harley's a leader of the moderate tories, to make himself more powerful, failed and resulted in the removal of the moderate tories, and the ministry became entirely whig and remained so until its fall in 1710.

The sudden and complete fall of the ministry in 1710 is one of the most dramatic events in early party history. It was brought about, the opportunity was given to the queen to dismiss it, by the impeachment of Dr. Sacheverell,[8] a tory preacher, who on Guy Fawkes's day in 1709 glorified, in a sermon in St. Paul's, the old extreme tory doctrines of non-

[8] Robertson, *Statutes*, 421–437.

resistance and passive obedience, and violently attacked the principles on which the revolution of 1688 had been carried through. The ministry did not anticipate the violent reaction of public sentiment which they were about to produce, and they determined to impeach him as a vindication of the whig principles of the revolution. Burke believed the cabinet justified in what it did. The impeachment of Dr. Sacheverell, he said, "was carried on for the express purpose of stating the true grounds and principles of the Revolution." Most students of the period have agreed with Burke. The ministry could not neglect its own defence against so deadly an attack. The trial was pressed upon the fundamental issue, the right of the nation and of parliament to resist the king as a principle and as acted upon throughout English history, and the tory answer in defence was obliged virtually to admit the main point and to avoid the conclusion by asserting that the supreme power which must not be resisted was the legislature, not the executive. The ministry succeeded in its chief purpose, but its success was fatal to itself. The feeling in the country in general was so violent against the cabinet that the queen was encouraged to turn out the whigs, whom she disliked, and bring in a strong tory ministry. "A change so complete and a ministry politically so homogeneous had not been constituted since the revolution." This cabinet, with minor changes, remained in office to the end of the reign.

In each of the three chief cabinet changes of Anne's time the general election which soon followed returned a strong majority for the new ministry, but the change was made with the existing majority against it, by a direct exercise of the prerogative of appointment and dismissal, sometimes as an expression of the queen's own personal like and dislikes, and intrigues of the queen's bed-chamber still had influence on the making and unmaking of ministries. More frequently and in a more marked degree than William III had done, Anne accepted ministers and ministries that she did not per-

sonally like or even to which she was strongly opposed. She did it, however, not because a parliamentary majority would have insisted upon the change as a condition of doing business with the ministry, but because she and her ministers found it easier in this way to secure the support they desired for the war. It may be said that this is practically the same thing, but we can say so because the later history has taught us the identification. The people of Queen Anne's time did not yet see the connection beween the three elements of the problem, the parliamentary majority, the cabinet, and the successful carrying out of government policy. The events of her reign and the experience gained, however, were rapidly making clear both the dependence of cabinet and policy upon parliament and the greater strength and stability of a party ministry over a coalition. It must be added that Anne's lack of interest in political affairs and lack of knowledge of international questions left business of great importance to be settled by the cabinet, as had not before been the case, certainly not under William.

The act of union with Scotland [9] adopted early in 1707, may be considered an extreme instance of the exercise of constitutional powers by parliament since it brought the legislative independence of Scotland to an end without direct authorization by the people or expressed acceptance of the measure. The British theory of the sovereignty of parliament, however, makes the act entirely within its competence, and there was no doubt but that the people of both nations were in favor of the step. It served as a precedent for no extension of the powers of parliament. Scotland received representation in both houses of what thus became the British parliament, and retained complete control of ecclesiastical matters and of the judicial administration of the law in the courts. The queen made an unusual but still unquestionable use of her prerogative in the creation of twelve peers at once, in 1711, in order to secure a tory majority in the house of

[9] A. and S., 479–483; Robertson, *Statutes*, 162–179.

lords, and she exercised her veto power once, the last time in history that it was used. In the case of Ashby vs. White and of the Aylesbury men against the returning officers for rejecting their votes, the house of commons failed in what was really an attempt to fix the qualifications for suffrage in parliamentary elections by their action alone rather than by statute.[10] In 1711 an act was passed requiring a property qualification of members of the house of commons, £600 per year derived from land for county representatives, and £300 also from land for borough members. This act remained in force for more than a century.

Great progress has been made in these two reigns in the transition to cabinet government, but greater still remained to be made. At the death of Anne the cabinet, as a definite body of office holders acting together and influencing on one side the policy of the government and on the other the action of parliament, had in practice taken the place of the privy council as the organ of advice and of the direction of policy in all the ordinary and almost all the extraordinary business of the state. It was no longer generally looked upon as an illicit, secret cabal or junto, dangerous to the power of parliament and to be kept under and if possible legislated out of existence. It was not yet seen how responsibility could be enforced upon its members except by impeachment, nor was the idea or consciousness of party government any more developed than that of ministerial responsibility, but it may be said that the existence of the cabinet as a recognized piece of government machinery had now been at least tacitly accepted. The sovereign was still regularly present at the deliberative meetings of the cabinet, and his will must have been on many occasions a compelling influence in the decision reached. On the other side, in the relation of cabinet to parliament, there was much still to be learned. There was as yet no prime minister of the modern sort, as recognized head of the cabinet

[10] Robertson, *Statutes*, 408–420.

to whom the other members must be subordinate, and who especially stood for the whole before parliament and the nation; it was not yet understood that the members of the cabinet must be a unit on questions of policy; the coalition cabinet was as normal as any other and in practice more frequent, and even when the members were all from the same party it was not considered necessary that they should all stand together; a measure introduced by a member of the cabinet, and having the support of the ministry, was not yet a government measure involving the fate of the cabinet by its success or failure. As a consequence, the corporate responsibility of the cabinet to parliament was not yet understood, that when defeated in the house of commons the ministry as a whole and the party should lose its control of government, and a new ministry and a new party come into power. The country had to work through to this principle by the further experience of a whole generation, and this experience and not the earlier is really that by which the way to an understanding of cabinet government and ministerial responsibility was opened, though it was another generation still, and more, before the advantages of the new method of government were fully appreciated.

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CHAPTER XVI

THE GROWTH OF THE CABINET

The accession of George I marks the beginning of an epoch as formative in the development of cabinet government as the epoch which begins with the accession of James I in the history of the general constitution. The cabinet in form and method of operation was ready for a great advance. The necessary conditions had been thoroughly prepared. The mechanical form was virtually fixed. Experience enough had been gained to serve as a guide and to insure that few opportunities offered in the new circumstances of the time would be missed. But it is exceedingly important to keep in mind the fact that still, and for a long time to come, the progress made had to be progress with no definite aim, with no conception, even by the most far-sighted statesmen who were leading the advance, of the result towards which they were reaching. This period of creative progress with no perception of the end may be said to close with the dismissal by George III, in 1783, of the ministry of Fox and North, and the appointment of the younger William Pitt as prime minister, in the teeth of a hostile majority in the house of commons. This date is too early, as we shall see, for a full understanding of the cabinet system, but it marks well enough the time at which the creative process is at an end. The result then reached only needs to be understood in all its bearings for the completion of the system.

The circumstance which introduced an epoch of peculiar progress, and made certain that it would go on uninterruptedly for fifty years, was the coming to the English throne of a foreign dynasty, the house of Hanover. George I was

not merely a German. He was well past fifty years of age when he became king of England. His habits and interests, his likes and dislikes, were firmly fixed. He would have found it very difficult to adapt himself to the strange conditions of his new kingdom even if he had earnestly tried to do so, and he had no wish to try. The great things in life to him, apart from certain personal pleasures, were the ha'penny intrigues among the petty states into which Germany was then divided. He desired the crown of England for the increased prestige, military strength, and money which it might bring him, but he really cared more to gain a little territory for his electorate, or a better military position in north Germany, than to defend the king's prerogative in England or to check a constitutional development which was destroying the royal initiative. There is another matter which seems an insignificant accident but which was really a prime factor in the result. The king knew no English. Scarcely one of the great ministers with whom he must do business during his reign knew German. Conversation even with Walpole had to be carried on in a Latin which was not very fluent on either side. Difficulties which George had in understanding English ways and methods, his lack of interest in learning the ins and outs of the constitution, needed only the added difficulty of talking things over freely with his ministers to make him quite willing to turn over to them the ordinary running of government without interference, and even the determination of policy in many cases where German politics were not directly concerned. It was the usual opportunity offered by a *fainéant* king, who in this case was a *fainéant* king less by nature than by circumstances.

George II, who came to the throne in 1727, had more interest in England and a better knowledge of English affairs than his father, though still strongly attached to Hanover, but he was a man of very moderate abilities. The process of transferring the whole control of government policy to

the cabinet had gone on very rapidly in his father's time, and had been carried far. It would have required a decided effort to turn the current back, and George did not see how to do it. Sir Robert Walpole was firmly fixed in power, and continued so for a dozen years after he came to the throne. Besides this, George II was rather easily managed by his queen, though he did not suspect the fact. She was a devoted friend of Walpole's, and she also saw clearly that through his control of the house of commons the easiest way was opened of getting things done — the root really from which the cabinet system grew. It must be added also that George II showed a rather surprising sense of obligation to respect the constitution, when he was convinced that a constitutional principle was involved. Altogether, then, his long reign of thirty-three years was a period indistinguishable from his father's, of hardly less rapid and of as uninterrupted growth of cabinet government both in methods of operation and in the understanding of the system.

But if the period was very favorable to the creation of cabinet government from the character of the kings who reigned, they did no more than furnish opportunity. Impulse and direction came from the great minister of the age, Sir Robert Walpole. The first in a long series of great English ministers who have found their field of action in the performance of a double function, the leadership or management of the house of commons and the exercise or direction of the national executive, Walpole was typical of his successors in the position which he created. He cannot be called a brilliant man as his rivals Bolingbroke and Carteret can be. Few of his successors have been brilliant men. His qualities were rather solid; his thinking was clear and thorough; his speeches won votes less by their eloquence than by their lucid and convincing argument. He was remarkable, at a time when political science and political economy had hardly begun to be and when careful observation of past experience was not common, for the number

of different problems confronting the practical statesman of which he saw the essential solution as later times have seen it. But he had no guiding theory of government. Apparently he did not see the particular problem to be solved as one of a series constituting a scientific whole, but merely as an immediate difficulty to be overcome; he did not attack his problems as a philosopher but as a practical worker; but his solutions fit into the scientific whole. Walpole was ambitious of power, but not for personal gain so much as for the opportunity to perform the service which he believed he could best perform. His determination to maintain himself in power, and his clear perception of the time when his power was at an end, both had decided influence in cabinet development.

Walpole has been called, and he was, the first prime minister. His establishment of this position was one of his chief contributions to the progress then going on, but we must remember again the unconscious character of the progress, and also that for nearly two hundred years there was no such office formally recognized. Contemporaries did perceive that something of the kind was taking place, without the ability to reason very much about it, and it was regarded with dislike and suspicion as the early stages of the cabinet had been. The term of prime or premier minister carried something of the same condemnation as junto or cabal. Walpole himself vigorously denied that the term could be applied to him or that he occupied such a position. The important thing is that the stage of growth in which the cabinet stood at the time demanded a prime minister to control its policy, to insure unity of action, and to enforce a common responsibility, and that the dominating personality of Walpole could hardly help furnishing the leadership which was necessary. No office of prime minister was created; it was some time before it was understood that some one member of the cabinet determined who the other members should be and what offices should be regarded as belong-

ing to it, and was entitled to the obedience of his colleagues or to their resignations. It was not much more than a headship from force of circumstances that Walpole established, but it was a headship so clearly implied in the logic of the situation that once brought into existence it was seen to be necessary, and it became a permanent feature of the cabinet.

It is naturally the progress in the evolution of the cabinet during the first half of the eighteenth century that we are inclined to emphasize, but there was necessarily involved with this another change which should not be overlooked. The process of advance, at least from 1715 on, was a double process. It comprised not merely the transfer of the supreme authority in the immediate formation and execution of policy to the cabinet, but also the transfer of the final determinative authority in the state to the house of commons. As soon as the cabinet found itself able to fix the policy of the government independently of the king, it found that its policy must have the approval of the house of commons or it could not carry it out. In other words, the cabinet wins its position in the modern constitution, not as an independent institution, but as the instrument of parliamentary supremacy. These two changes were clearly intertwined in process and result. Each was dependent on the other. Neither could go beyond a certain point unless the other advanced with equal step. What happened when this double result was fully reached was that the compromise of 1660 was now embodied in the working constitution of the state. The sovereignty of parliament had found the institutional means through which it could make itself actually effective in the government of the state, and as a consequence, because in truth the sovereignty of parliament rested upon the ultimate sovereignty of the people, there was a decline in the practical power of the house of lords as well as of the royal prerogative. King and lords in form lost nothing; it was of the nature of the compromise that they should not; but

the real power of decision in every important matter had passed to the house of commons. The fact showed itself during the period in more ways than one, but it is interesting that Walpole was instinctively aware of it and, the first English minister of high rank to do so, steadily refused promotion to the upper house until after his fall from power.

With the settling of the executive power in the cabinet and of the sovereign authority in the house of commons, another feature of modern democracies also became a more definitely effective and controlling force in public affairs, what we call party government; that is, the vital connection between organized political party and the new executive and the new sovereign power. The determination of the policy which the nation should follow by a group of the chief political leaders of the time, who would act together as a unit, implied of necessity two things. For one thing it implied that they all of them held to certain common fundamental principles of government which made it easy for them to unite upon a special line of policy; and second it implied that a majority of the house of commons, and perhaps of the nation, could be for the same reason easily inclined in the same direction. Often, of course, in history the direction of impulse has been the reverse, and the declared opinion of the nation, or of the majority of the house of commons, has imposed itself upon the cabinet, but the principle is the same. Leaders of the chosen way of thinking are always found who are able to form a cabinet and carry the policy into execution. The party holding to other principles and advocating another policy must wait until it can obtain a majority before it can take its turn as executive. This is party government, at least as we have known it in the past, and this is the period of our history when it begins its continuous operation, as forming the effective government.

If the three elements of this situation, the cabinet as the executive, the house of commons as the ultimate sovereign,

and party control, have been taken up in this order, the fact must not imply that it is the order of time. No one is first in time; no one is last. The three come in together and grow together, as the necessarily correlative elements of a single situation. Also it must be understood that, as will be explained later, this was not the age of the creation of democracy. It was, however, the age in which the machinery, which so far in its history democracy has used, was brought into existence as we still have it.

At the moment when Queen Anne died, the tory party was in possession of the government, but the suddenness of the queen's death and the energetic action of certain of the whig leaders prevented any attempt to restore the Stuart family. The known inclination of the party, however, to such a step made it impossible for the new king to trust them with the conduct of affairs. The whigs came into power and continued to hold the reins of government for fifty years. But the tories were not ousted from power alone; they were ousted from public estimation as well. Some of their ablest leaders fled the country for fear of punishment, and for many years the party hardly had an existence as an organized party. It was also some years before a strong opposition to the whig cabinet could be formed in the house of commons, and when formed it was made up and led in large part by malcontent whigs. When the party recovered itself as a definite tory party, it was found to have advanced materially beyond the standpoint of 1714. It no longer questioned the results of 1688, or attempted to undo them, but it regarded itself in the eighteenth century as the peculiar supporter of the king and what remained of his power, from which it passed easily into its nineteenth century attitude as a brake upon too rapid advance.

In the whig governments of this long period there were many changes of ministers, but only a few of them are of interest for our purpose. In George I's first cabinet, the leading minister was Lord Townshend, and Walpole held

at first only a minor office. He speedily, however, revealed his qualities and in hardly more than a year came to be regarded as the strongest member of the cabinet and was made chancellor of the exchequer. In 1717 a split in the party occurred, and Townshend and Walpole retired from the cabinet. Walpole returned to office in 1720, but it was only in 1721 that his great ministry began, which continued for twenty-one years and formed the period of the especially rapid development of the cabinet system.

Not long after the accession of George I a change took place in the method of doing cabinet business, which in this stage of its growth gave it a decided impetus. Heretofore the king had always attended the meetings of the cabinet as a permanent member, taking part in its discussions and having a voice in its decisions. So long as this continued to be the case the transfer of the complete responsibility for government policy to the cabinet could not be made, because the king's opinion must always be, or be felt to be, of prevailing weight. The practice ceased soon after George I came to the throne, not from any theory nor because it was felt to be desirable, but merely because the king was uninterested and bored by discussions which he could not understand from his lack of English. By what seems a mere accident a change was brought about, essential to the independence of the cabinet and to its full control of government, but one which it would have been exceedingly difficult to carry through if it had been deliberately attempted with the conscious knowledge of the sovereign.

Of course this is saying no more than is true of almost every step of cabinet history. Scarcely anything was intended in advance or deliberately attempted. It is true of Walpole's first contribution to the building up of the cabinet system, the creation of the position of prime minister. What he did in this direction began even before the beginning of his long ministry, before he became prime minister, not by his own choice nor by the choice of his colleagues,

but by the force of his personality, which made him naturally the leader. That is all that the premiership was in the first stages of its history, though its history developed rather rapidly. It was nothing more than the position naturally created in such circumstances by superior qualities of leadership, in the cabinet deliberations on one side and in the management of the house of commons on the other. It had no connection in its early stages with any particular office. When the position was once created, however, it was instinctively felt to be necessary, and it was in consequence easily kept in existence by men in whom these qualities were less conspicuous, or who possessed them only in part, though its necessity was not formally accepted for a long time.

The next step to be noticed was more deliberately taken, but it is one that could not be seen to be needed until the cabinet had secured control of government policy and the premiership was well in existence. Only then could it be felt that the ministry as a unit must support the policy determined upon, and that in consequence it owed a corporate responsibility to its head. Walpole's most famous measure, the one which shows us most clearly the capacity which he had beyond other men of his time of thinking through a tangled problem, was his excise bill, a proposal for tax reform made in 1733. The merits of the plan do not concern us, but the fact that an intense public opposition was excited against it which was actively supported by members of the ministry and important office-holders in the upper house. To this Walpole would not submit, and he immediately removed from office several who, he believed, should have supported him; and the same thing was done again a little later in the year, on the defeat of the government in the house of lords. But Walpole felt no obligation to resign on that defeat. He did make it clear that the ministry should act together, and that if any member of it could not support the majority decision he should resign. Walpole has been accused of vindictiveness in his action, and one may

hesitate to free him entirely of the charge, but the principle on which he acted was correct, and it became a rule of cabinet business, though not immediately.

Walpole dropped his excise bill and did not attempt to force it through parliament although he had a majority in the house of commons. The incident is the first one since the beginning of party government in which a parliamentary majority abandoned a measure under pressure of public opposition outside parliament. Outside opinion had not acquired as yet regular means of expressing itself, and its methods in this case were rough and noisy but effective. It can hardly be said that either principle or method was then established of the control of parliament by public opinion expressed otherwise than through a general election, but the incident is to be reckoned with others of the kind, not infrequent from this date on, and with other cases in which action, that would not otherwise have been taken, was forced upon king, or parliament, or cabinet, by public pressure. Pitt's great ministry during the Seven Years' war was the creation not of king nor of parliament but of public opinion, and there certainly was some justification for George II's reply to Pitt concerning the execution of Admiral Byng: "You have taught me to look elsewhere than to the commons for the sense of my subjects," as well as for Dr. Johnson's judgment that Walpole was a minister whom the king gave to the people, while Pitt was a minister whom the people gave to the king. These incidents at the beginning of popular control may be more significant as signs of what the future has yet in store than as facts of the eighteenth century.

Walpole's fall from power in 1742 helped to establish a principle of cabinet government of greater influence in the past at least than the facts of popular control. In 1739 when a violent and increasing opposition in parliament, supported by a general demand outside was striving to bring on a war with Spain, Walpole yielded to the king's unwilling-

ness to accept his twice tendered resignation and entered upon the war against his better judgment. He still had a majority in the house of commons and he still had the support of the king, but he had been obliged to adopt a policy of which he did not approve, and a modern prime minister would have insisted upon retiring. He remained in office three years longer; he still had a small though insecure majority after the election of 1741, but he was defeated on January 28, 1742, by a majority of one, and on February 2 by a majority of sixteen. He then resigned and as earl of Orford retired to the upper house, whose comparative insignificance he recognized. If any minister could in that period have carried on the business of government without the house of commons, Walpole could have done it. But he had demonstrated by his successes as well as by his failure that it was impossible. The house of commons learned as well that it had in its hands absolute power of control over any ministry by the simple method of allowing no business to be done until an obnoxious minister retired, a wholly indirect method of control which the middle ages had never imagined and which was not possible until the real control of national business was in the hands of the house. It was not yet, however, entirely conscious that this was the best way of enforcing ministerial responsibility, for it strove to impeach Walpole after his defeat.

These are the most striking incidents in Walpole's career by which the cabinet system of government was advanced, but they do not measure all the progress made or prepared for immediate accomplishment during his time. For one thing the power of appointing and of maintaining ministers in place was slipping out of the king's hands. He could not keep Walpole permanently in office though he would have been glad to do so. He could not determine the membership of the new cabinet as he would have liked. In 1744 he was obliged to allow Carteret to be dismissed against his will.

He did by his bitter personal dislike keep William Pitt out of office for some time, but he was forced to accept him in 1746, though in a subordinate place.

The case of 1746 is an interesting one because it is evidence not merely of the real powerlessness of the king but also of the complete dependence of the cabinet on the support of the house of commons. George greatly disliked the existing ministry, and when a proposal was submitted to him to remodel it, involving the appointment of Pitt, he refused. Thereupon the ministry generally resigned, and the king asked Lords Bath and Granville (Carteret) to form a new one. They made a serious attempt to do so, but speedily found that those who could command a following in the house of commons would not take office under them, and that those who would accept office would not be accepted by the commons. They were obliged to give up the attempt, and the king was obliged to take back the old ministry, though he succeeded in keeping Pitt out of the cabinet. This is the first failure to form a cabinet because parliamentary support could not be gained for it.

In 1757 George II made another attempt of the same kind against Pitt's ministry. He could and did dismiss Pitt from office, but he could get no one to take his place, and the experiment resulted only in a combination between Pitt and the duke of Newcastle, who commanded great strength in the house of commons. No one would have said at that time that the king had lost his power of appointment and dismissal. Nominally it was all still in his hands, and practically he still retained great power which could be exercised upon favorable occasions, and continued to be exercised for a long time to come. Earl Granville could still say honestly in a cabinet debate in 1761, as reported to us, in opposition to Pitt: "He forgets that at this board he is only responsible to the king." A modern minister, however, might say the same thing truthfully, referring to the form rather than to the reality of responsibility, but he would be felt to have

departed more widely from the actual facts than did Earl Granville.

At the same time the practice was being fixed, though more by unnoticed precedents than by conspicuous cases, that the king must not act without advice from responsible ministers, and that he must take his policy from the cabinet; that is, that he was bound to follow the advice given him. This was an almost inevitable result from ministerial responsibility to parliament. Ministers would necessarily hesitate to be held responsible for policy which was not their own, and, if the king succeeded in forcing his policy upon the cabinet, some minister or the whole of them must become responsible for it. At the same time the policy of the cabinet, which had the support of parliament and therefore, theoretically at least, was the policy of the nation, must be carried out.

Two other matters belonging to the general movement must be noticed. One is the formation of a recognized and regular parliamentary "opposition." By this is not meant an organized faction opposing the ministry in power. A parliamentary opposition is as permanent a feature of party government as the organization which is in responsible power. It is the party out of office, with as definite a programme of national policy as that of the party in, a programme which it is trying to persuade the public to adopt, and which, if it succeeds, it must assume the responsibility of carrying out. Its function as opposition is as definite. Its business is to see that the party in power takes no step which has not been thoroughly criticised, to see that it has been compelled to defend its policy from every side, and to prove its advisability under penalty of loss of power. In other words, its function is to prevent the cabinet from becoming too much at ease and careless, and to keep it awake to the danger of any move which has not been well considered.

The other point to be noticed is the similarity between the history of the cabinet and that of the privy council. The

privy council had now ceased to be the advisory organ of the state. That function had been entirely taken over by the cabinet, but like the privy council after the close of the middle ages the cabinet had tended to increase rapidly in numbers. By tradition certain great offices must belong to it; by the increase of business and of the importance of various departments others had a valid claim to be admitted. The natural result happened, as it had happened in the older institution, the whole body was too large for real discussion, and the determination of policy settled in a small group of especially able men or indispensable officers, whose decisions were accepted by the larger body. The fact was noticed and commented on in the eighteenth century of the existence of an "outer" cabinet and of an "inner" or "*conciliabulum.*" The inner in the end becomes the real cabinet, only to undergo again in the nineteenth century more slowly the same process of enlargement, and under stress of the great war the same formation of an inner cabinet which becomes the real determining body.

The house of commons became during the first two Hanoverian reigns the power having ultimate decision in English affairs, but the house of commons was not at any time during the eighteenth century representative of the English nation, as we now understand the term representative. The whig party, which was supreme from the death of Anne until after the accession of George III in 1760, was the ancestor of the liberal party of Gladstone and Lloyd George and was the liberal party of the earlier time, but it was distinctly an aristocratic party. The leaders were all from great families, or they made their families great. It was something of a handicap to William Pitt at the beginning of his career, as it was later to Sir Robert Peel in the tory party, that he was not born into a great territorial family. But such leadership did no more than to determine atmosphere. It was possible then, as always in English history, for unusual abili-

ties to make their way to the highest ranks. A much more important fact was the aristocratic control of the house of commons. No changes had been made in the electoral laws since before the middle of the fifteenth century and, even by the time of Walpole's administration, the shifting of population had created many anomalies. The pocket borough, where the few remaining electors were controlled by some territorial magnate, and the rotten borough, where the electors were so few and so corrupt that money openly decided the result, were determining factors of parliamentary history in the eighteenth century. Besides this, there were numerous office-holders and crown pensioners still in the house of commons — in 1742 there were said to be 200 placemen in the house, and usually at the service of the government. In 1780 it was estimated that a majority of the house was elected by only 6,000 voters, and that 487 out of 658 members were virtually nominated.

These facts made the eighteenth century the great age of parliamentary corruption. They also were an aid to the establishment of cabinet government, for they made it an easy and simple matter for members of the house to shift their allegiance from one ministry to another. The English cabinet system rests on the fact that the members who have at one time supported the ministry can and will at another time turn against it. Since early in the nineteenth century it has been considered that the change takes place because some ministerial policy fails to win support, or because there has been a change in public opinion outside parliament. In the eighteenth century the reasons for a change were not always supposed to be so honorable. Walpole has been accused, it would seem on insufficient grounds, of being the first minister to employ systematic corruption. The duke of Newcastle certainly was deeply interested in the manipulation of votes in the house and reduced it to an art, and the experience gained in the first half of the century in the

control both of elections and of votes in the house came to the advantage of George III in his efforts to restore the royal authority.

In this age, apart from the development of the cabinet system, there is little of importance to record. In 1716 the triennial act of 1694 was repealed, from fear of what might result from a tory or Jacobite victory in a general election, and the life of a parliament was fixed at seven years. The septennial act continued in force until the passage of the parliament act of 1911.[1] An attempt of a somewhat similar kind in 1719, to close the house of lords and perpetuate the whig majority in it by limiting the king's power to create new peers, did not succeed.[2] This is the age of the rise of the chancellor of the exchequer as the chief financial minister of the state. The office of lord high treasurer was not filled after the death of Anne. The treasury was put into commission with the first lord of the treasury at the head. By degrees, however, this office came to be considered to be the one naturally held by the prime minister and its duties to be political rather than administrative, that is, its treasury duties became nominal. By the same degrees the chancellor of the exchequer, in the middle ages a subordinate officer, came to be considered the working officer of the treasury, to whom it fell to defend the ministry's financial policy and so to have a peculiar responsibility for its formation and carrying out. For this reason it naturally came to be felt that he must always be a member of the house of commons, though no legal rule was made to that effect.

The progress which had been made during the first two Hanoverian reigns, in establishing the cabinet system of government in place of the king's initiative, and in beginning to recognize in experience the incidental results of the system, like the premiership and cabinet solidarity, was very rapid, if we consider the stage of development in which the institution

[1] A. and S., 487–488; Robertson, *Statutes*, 117–119.

[2] A. and S., 488–489; Robertson, *Statutes*, 208–209.

then stood. Forgetting for the moment that neither the institution as a whole, nor the bearing upon it of its incidental features, was then understood, one is tempted to anticipate the complete appearance of the modern system in the next decade. As a matter of fact the progress had been too rapid. It was not merely not understood; it had not made itself habitual; it had not become expected, or conventional, or in anyone's thought a part of the constitution. Bolingbroke saw clearly enough the ultimate foundation in the will of the people upon which any government must rest after the revolution of 1688. Burke was startled by George III's success into a course of reasoning, about what government should be, which comprehended more of the fundamental principles of the new system, but no one saw them clearly as yet, as having their necessary result in the various features we here noted of the new institution which was forming. It was the fact also that the new system had never been subjected to the test of the determined and intelligent opposition of the royal power. It had found its opportunity to grow so rapidly in the practical abeyance of the monarchy. A reaction was not unnatural under all the conditions, and a reaction is what characterizes the next twenty-five years.

George III, who came to the throne in 1760, had none of the talents of the statesman; in fact his abilities were mediocre, and he had been gifted to the full with the allowance of obstinacy which usually goes with a narrow intellect. But he had been carefully educated for one thing: to "be a king," as his mother expressed it, to recover the royal power. He was industrious and painstaking, sincerely desirous of advancing the interests and power of his country, and very much in earnest to perform well the business of a king as he understood it. His text books in political science had been Bolingbroke's high tory argument, *The Idea of a Patriot King*, and Blackstone's account, in his *Commentaries on the Laws of England*, then still in manuscript, of the place of the king in the constitution. His was the account of a

lawyer who naturally stated the law as it stood and disregarded the interpretation now conventional. However ill-fitted George's mind may have been to guide the policy of a great state in perilous times, he saw clearly enough what the function of the king was in the government which he was to strive to recover, and in the practical situation which faced him he was able to take the steps upon which first successes depended.

It is necessary at the beginning to make clear just how far the plans of the king went, as we know them historically, and what they did not include. He never attacked the sovereignty and supremacy of parliament. That is, his plans, so far at least as he had time to develop them, never contemplated the sort of royal power which was aimed at by Charles I and James II, an absolute and arbitrary royal power, limited only by the responsibility of the king to God. The primary results of the revolution of 1688, he did not attempt to change. Rather what he strove to reëstablish was the royal control of government policy which William III had enjoyed. The usurpation, as he could not fail to regard it, of initiative and direction in deciding what the state should do, the transfer of the responsibility of the officers of government from the sovereign to the prime minister, together with the management of the house of commons, these secondary results of the revolution he was resolved to undo. What might have been the ultimate outcome of his attempt, if it had been successful, it does not belong to the historian to say. It is not easy, however, to see just how constitutional liberty could have survived, for apparently the immediate result would have been to do away with ministerial responsibility and to make the king responsible, or at best to set up once more the clumsy medieval system of direct responsibility through impeachment.

We must remember also in forming our judgment upon George III's plan, that no one at that time could think of it as an unconstitutional attempt. It would be unconstitu-

tional in a king of today. It has been called unconstitutional in George by a modern scholar, but that is carrying a judgment from present day conditions back into a time when they did not exist. No one of that day could deny that the king had a perfectly legal and constitutional right to do all that he did in regard to his ministers between 1760 and 1782. We can see clearly that the attack which he made upon the cabinet system of government was deadly, and that it would have destroyed it, if it had succeeded. But the cabinet system was certainly not legally recognized at that time, nor was it so firmly established, so habitual in practice, or so understood in common thought, as to be fixed in the conventional constitution. George III was undoubtedly struggling against the whole current of English history, which had steadily led on to ministerial responsibility of the modern form; his final success would have meant long delay in arriving at the best machinery of national self-government; but he cannot be accused of violating the constitution as it then existed.

The situation at the moment of his accession was not favorable to the king's plan. England was in the midst of the great Seven Years' war, the most desperate phase down to that time of its conflict with France, the war which established the British empire and British supremacy on the sea. The tide was flowing strongly in England's favor, but not yet so decisively that the natural gains from her victories could be securely gathered. The great war minister, William Pitt, whose genius and inspiration had turned defeat into victory, was in control of England's military and foreign policy, and so great was his popularity among the people that it would not have been easy to recover control from him. This the king did not attempt to do, and he does not seem to have had any wish to get rid of Pitt until peace should have been made. There were two things, however, which he could and did set about immediately. One was to take into his own hand the determination of who should be

his ministers, with no recognition of the prime minister's right, and the other was to recover the distribution of government patronage and rewards from ministerial control.

On the day on which George II died, his successor offered to make his favorite attendant, the earl of Bute a secretary of state in the cabinet. Bute possessed no higher political abilities than the king, but he sympathized with his master's designs and that quality was of more value just then than genius. Bute declined to take high office so suddenly, but he was immediately sworn a member of the privy council and given a seat in the cabinet, without considering either Pitt or Newcastle, who was the nominal head of the ministry. George also composed without advice his first address to the council, and Pitt had some difficulty in getting changed certain words which the king had used describing the war as "bloody and expensive." These facts were an unmistakable declaration of policy. They could mean only that henceforth the king proposed to say himself who should be his ministerial advisers, and that he intended to take an active part in the determination of policy. In both these matters he was within his legal rights, and in both he was successful, for twenty years limited only by adventitious circumstances not by law or convention, and for the remainder of his reign to a greater extent than any other sovereign from the accession of his great-grandfather to the present day.

In the second of the matters mentioned, the determination of policy, George did not insist upon attending cabinet meetings. He made known his opinions through special friends who in a way represented him in the cabinet, or through others upon whom he impressed his views, and sometimes by abrupt and even discourteous statements directly to those cabinet leaders who were not favorable to his wishes. He never was at a loss to make his desires known. In the matter of choosing his own ministers he had greater difficulties, but not because the house of commons insisted upon the ministers of its choice and refused to do business with

any other. Till the end of the first period he had no trouble of that kind. His difficulties were all due to the refusal of the men selected to accept office, and these refusals were not due, in the great majority of cases, to constitutional reasons but to personal likes and dislikes, or sometimes to the demands of factional politics. Four times he failed to induce Pitt to take office between his resignation in 1761 and Pitt's consent at last to form a ministry in 1766, and several times he found himself compelled to retain ministers in power, and even cabinets, when he would have been glad to dismiss them, because others would not serve.

The first ten years of the reign saw a rather rapid succession of cabinets, unstable and disunited, largely because of royal interference; cabinet solidarity was at an end. There are reckoned seven ministries in this time, including Newcastle's in power at the accession and Lord North's formed in January, 1770. As one move in his attempt to recover power, George was determined to break up the long whig domination, which had lasted since the death of Anne. The move was made easy partly because the whig party, as usually happens in such cases, had split into factions which could with little trouble be played one against the other, and partly because the loyalty and patriotism of the tory party, after so long a time and so many changes, was no longer popularly suspected. Tories began to appear in numbers at the court and to be put by the king into office. In the existing cabinet Pitt and Newcastle were not in close accord, and, though it seems certain that the king had no intention to force Pitt out till after peace had been made, he did desire a speedy peace and a different cabinet. At the end of five months Bute was a secretary of state; in seven more Pitt resigned because the cabinet refused to adopt his policy of war with Spain; and a year and a half after the accession Bute was prime minister. The ministries which followed at short intervals to the appointment of Lord North present no points of interest which it is important for us to notice.

They are remembered in general history chiefly for their share in bringing on the American revolution.

If George III could succeed without constitutional difficulties in obtaining ministers who would be subservient to his policy or whom he could circumvent, he could not get rid of the supremacy of parliament. Yet if the king was to decide the policy of the state, parliament must take its policy from the king and not from the nation. The king must be sure that parliament would support the view upon which he had fixed. The method of securing the necessary control of parliament was ready at hand when George came to the throne, organized in systematic form largely by Newcastle in the last reign, and the king began immediately to put it into operation at the expense of the minister. It consisted in the distribution of the royal patronage, offices, employments, and contracts, of various rewards, titles, and pensions which the king had to bestow, sometimes perhaps in the direct use of secret service money, all to influence elections or more directly to influence members of parliament themselves. Not infrequently punishments were used as well as rewards and men dismissed from office, in some instances even obscure and old men who had nothing to do with opposition but were dependents or appointees of those who had. Newcastle, who had charge of these matters in the cabinet, which was in office at the death of George II, and who delighted in the business though himself honest, was astonished at the suddenness with which the new king resumed this function, but he had no ground on which to object. The king was again clearly within his rights. The period which followed, the first twenty years of the reign, is the climax of parliamentary and official corruption in English history. The system, as a system, falls with the failure of the king's general attempt. Corruption in parliamentary elections, engineered by private persons in their own interest, continued for a long time, but there was no further attempt to secure

parliamentary majorities by the systematic use of official corruption on a large scale.

George III's system of government reached its highest success and brought on its own failure in the ministry of twelve years of Lord North, which began in January, 1770.[8] Lord North was but little if any superior in political abilities to the king or to Bute, but the royal regime was one in which men of first ability could find little opportunity and in which ability was not demanded. The king was now indisputably his own prime minister, and what he desired was a "chief responsible agent of 'the king's business' in parliament." That North was willing to be, not from ambition to hold office but from honest conviction that this was the king's constitutional right. He was a good debater and leader of the house of commons, but George's hold upon a majority was so secure that it could not easily be challenged. There were 192 members holding office under the government. Besides this during more than half the period the opposition was so divided and out of hand that it was not formidable. The important matter is that during this period George obtained what he had striven for. Cabinet, parliament, and government policy were under his control. Lord North recognized the fact fully and acted upon it loyally. Fairly early he became convinced that the policy followed in America was likely to fail, and he repeatedly urged his resignation upon the king, but yielded always to the king's will. He wrote to George in 1779 that he "held in his heart and had held for three years past" the conviction that to carry on the war in America "must end in ruin to his Majesty and the country." Yet he remained in office until 1782.

It does not belong to us to follow the events of the American war. It is to be noticed rather that what was at stake in it for England, beyond colonies and empire, was the con-

[8] Cheyney, *Readings*, 633–637.

tinuance of this personal royal dictation, under the forms of the constitution established in 1688, or a return to the system of cabinet government taking its direction from the house of commons and responsible to it and to public opinion — the system which had developed so steadily during the first half of the century. It was no doubt the perception by the king that this question was involved that made him so reluctant to bring the war to an end. The fact was recognized clearly enough at the time by the opposition party, and is the explanation of their vigorous support of the American cause. The colonies were fighting the battle of Englishmen at home. The fact has also been abundantly recognized in later times, and there can be no doubt but that this interpretation was correct.

As disasters fell upon the British cause, and as all her old colonial rivals, France, Spain, and Holland, appeared in the field against her, the opposition gathered strength, became more frank in pushing the constitutional point, and began to be supported by increasing public opinion. In 1780 John Dunning obtained a majority in the house of commons for a resolution affirming "that the influence of the crown has increased, is increasing, and ought to be diminished."[4] It required, however, two years more of struggle, with many motions equivalent to a vote of want of confidence carried against the ministry, before the king would yield, and at the moment only because Lord North peremptorily resigned on March 20, 1782.

George was obliged to accept, under the whig Marquis of Rockingham, a ministry which he detested, as well as the cabinet of Shelburne later in the year, and the coalition ministry of Fox and North in 1783; and he was obliged to accept them now not because, as in the early part of his reign, personal and factional conditions rendered any other course impossible, but because public opinion and the house of commons was in control. A long step had been

[4] A. and S., 494.

taken back towards cabinet government. The king, however, had no intention of abandoning his ideals without a further struggle, and it was really due to the tact and political skill of the younger William Pitt that ministerial responsibility was reëstablished.

Pitt early began to display the unusual gifts which won him his place in English history and was carefully trained by his father for public life. From the moment of his entry into the house of commons, then barely twenty-one years of age, he attracted attention to himself as likely to be equal to the highest demands. The king himself soon concluded that he was the man who could rescue him from his embarrassments. In the cabinet of Shelburne he was given the difficult and responsible place of chancellor of the exchequer, but he would not enter the coalition ministry of Fox and North. Before long the king in his anxiety to be rid of this ministry began to urge him to form a cabinet of his own, but Pitt, with that rare instinct for public opinion which distinguished him, refused to accept until the time had come, as he believed, when he could win the support of a secure majority. He had no mind to become another Lord North, sustained by the king whatever might be the feeling of the nation.

He judged the moment favorable in December, 1783. Fox's bill for the regulation of the East India Company had been carried by a large majority in the commons, in spite of the known dislike of the king for the measure. To defeat it in the lords George took an extraordinary step, unconstitutional even at that time. He gave to Earl Temple a card on which he had written these words: "His Majesty allows Earl Temple to say that whoever voted for the India Bill was not only not his friend, but would be considered by him as an enemy; and if these words were not strong enough, Earl Temple might use whatever words he might deem stronger and more to the purpose." Earlier kings had certainly done as much, even William III, though in a less formal way, but the house of commons immediately resolved, by a

vote of almost two to one, "that it is now necessary to declare, that to report any opinion, or pretended opinion, of his Majesty, upon any bill, or other proceeding, depending in either House of Parliament, with a view to influence the votes of the members, is a high crime and misdemeanor, derogatory to the honor of the crown, a breach of the fundamental privileges of parliament, and subversive of the constitution." A day or two later it was resolved, in view of the necessity of reforms in the East Indies, "that this House will consider as an enemy to his country, any person who shall presume to advise his Majesty to prevent, or in any manner interrupt, the discharge of this important duty." In spite of the attitude of the house of commons, the king succeeded. The lords rejected the bill, and the next day he dismissed the ministry of Fox and North.

Pitt now accepted the duty of forming a cabinet. By doing so he made himself responsible, according to modern ideas, for all the king had done, but it must be remembered that the clarity of our ideas about cabinet government is due in considerable part to the events of this crisis. Pitt won his victory, but he made another like it impossible, for the dramatic struggle fixed firmly in public consciousness the due relation of prime ministers to king and commons. Pitt was then some months short of his twenty-fifth birthday, and his effort to form a cabinet was at first greeted with ridicule. It was "a kingdom trusted to a school-boy's care"; it was "a boyish prank"; the cabinet was "a set of children playing at ministers and must be sent back to school"; it was "a mince pie administration" over with Christmas. But it lasted seventeen years. Pitt had judged the situation correctly. He was the only cabinet minister in the commons. He had the support of only one good debater. Majorities against him were large and constant. But the house of commons did not fairly represent outside opinion even at the start. Pitt, knowing in which direction the drift was setting, steadily held his ground and let the

adverse votes dwindle, until on March 8 the majority against him was only one. Then he dissolved parliament, and in the general election following obtained a strong majority. Even under the unreformed parliamentary system of pocket and rotten boroughs, of corrupt elections and unrepresentative distribution of seats, the nation had declared its will with overwhelming force in favor of the new ministry.

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CHAPTER XVII

THE RISE OF DEMOCRACY

Pitt took office as a tory, but he was not a tory of the type of Bolingbroke or even of the tories of 1760. That party now entered upon a long period of opportunity to guide the state, almost as long as that enjoyed by the whig party in the eighteenth century, but its record of achievement, apart from carrying the country successfully through the great struggle with Napoleon, is hardly equal to its rival's in the earlier period. The generation following 1783 was not favorable to constitutional growth. For a third of a century there is no sustained forward movement to be studied, like the formation of the cabinet system, but only unconnected improvements and the preparation for something better.

Pitt was a tory, but he was a tory of the future rather than of the past. As the tories of 1760 had without qualification accepted the results of the revolution of 1688, so now Pitt, and the party which he may be said to have recreated, accepted as final the whig work of cabinet making and the position into which it had brought the king. We shall see in several important occurrences that George III never recognized the fact that he had been reduced to a merely nominal power in the government, and that he could occasionally still make his power something more than nominal, but these are all isolated cases in which peculiar circumstances aroused the intense prejudices of the king, and the minister preferred not to insist. In the steady every-day working of the government from now on, the prime minister and his cabinet were the real executive. They had succeeded fully to the posi-

tion which the medieval king had held in shaping and carrying out the policy of the state, only they did everything under their responsibility to parliament. In other words, we may date from the formation of Pitt's ministry, at the end of 1783, the full establishment of the compromise of 1660: a king in the nominal possession of almost all power, a cabinet in the real exercise of the king's powers, and a parliament with the power of final decision in every question, because it was the voice of the people in whom the ultimate sovereignty resided. The cabinet as the instrument by means of which parliament was to make real in practical government the sovereignty of the people was at last in existence.

But it must not be supposed that there was as yet any general understanding of cabinet government including the principle of ministerial responsibility. Pitt's struggle to maintain himself against a hostile House of Commons had great influence in bringing about such an understanding, but it was still far from complete and was only slowly perfected through another twenty-five years. Two incidents between 1784 and the close of the century show how incomplete the understanding still was. Three years after Pitt's triumph the Constitution of the United States was framed by an assembly of the most experienced public men and students of politics in America, who considered with care the question of setting up a government to operate in the best way. One great problem before them, set by the situation of the time, was to secure a really efficient executive while leaving ultimate authority in the legislature as representing the people, exactly the problem which ministerial responsibility solves. In their constitution, however, not merely did they entirely separate the executive and legislative departments, then becoming closely united in England, but they gave little attention to the cabinet, and they seem to have had no idea whatever of ministerial responsibility.

If we may judge by the powers conferred upon the president in the Constitution and the fact that the cabinet is not

mentioned, merely referred to in passing in the phrase "the principal officer in each of the executive departments," their idea of the head of the state and his relation to his cabinet seems to have been that which George III had made familiar to them during the ministry of Lord North; I do not mean that they consciously thought about it in that way, but that this is the idea which they would instinctively have. It is altogether probable that they thought that in this respect they were following the English model, as beyond question they did when they adopted impeachment, and certainly, had there existed in England any such definite idea of ministerial responsibility as fifty years later, there would have been some discussion of it in the convention. The other incident is even more indicative of English understanding. In 1791 parliament under the leadership of Pitt's ministry framed a new government for Canada. The debate on the bill shows conclusively that the desire was to give to Canada the same kind of government which England had, and there can be no question but that this was honestly intended. And yet no responsible ministry was granted, nor even proposed, and the foundation was laid for the later Canadian rebellion which opened a new era in British colonial government. Neither Blackstone in his *Commentaries* nor De Lolme in his account of the English government for French readers, both writing after the middle of the century, takes any notice of the cabinet system.

It is from the opening years of the nineteenth century only that we can date a full understanding of the cabinet and of the way in which ministerial responsibility is enforced through it, though even then the understanding was rather that of practical action than of theoretical description. It was not until about the middle of the century that descriptions of the system were written that seem satisfactory to us, and well past the middle before any treatise was published upon the new constitution as a whole.

We must continue also to notice that parliament was not,

in our sense of the term, fully a representative assembly of the people. The perfection of the cabinet system did not change this fact. So long as aristocratic influence could control so large a proportion of the membership of the house of commons through the pocket and rotten boroughs, and so long as so many government appointees had seats in the house and kindred abuses existed, a really representative assembly was not possible. It is significant that the period from which we may date the full formation of the cabinet system saw also both these problems taken up in earnest. Pitt's success in bringing the king's personal government to an end was in part due to the results, even the limited results, obtained. In 1782 the horde of revenue officers which formed one-eighth or more of all voters, and who could easily be voted as government desired, were deprived of the parliamentary franchise [1]; a considerable number of offices usually filled by members of parliament were abolished; contractors were forbidden to sit in parliament, and secret pensions brought to an end. Much in this direction remained to be done; the work was not finished until the next century, but a real gain had been made. Still more important perhaps in its general effect in bringing about a thorough change is the fact that there began to come in, from a little time before Pitt became prime minister, a decidedly higher tone in public life, due doubtless to the improved standard of conduct in private life which characterizes the time. This gradual reformation more than laws and prohibitions made the eighteenth century methods of corruption no longer possible. Disguised bribery and secret influence die very slowly, but since 1782 there never has been a return to the methods of Newcastle and George III.

The reform of parliamentary representation, a more equitable distribution of seats and a reduction in the number of nomination members, was agitated at the same time. The elder Pitt first urged the necessity, and made it the subject

1 Robertson, *Statutes*, 247–249.

of parliamentary debate in 1770. In 1776 a bill to make rather extensive changes was introduced, but it was thrown out without a division. In 1780 the duke of Richmond introduced another reform bill, which met the same fate. At the very beginning of his parliamentary history, the younger Pitt seemed inclined to make the subject his own. He brought it forward in 1782 in a very effective speech, moving for a committee of inquiry, and was beaten by only twenty votes. The next year, still as a member of the opposition, he proposed resolutions embodying the chief points, without effect. Meantime numerous petitions had begun to come in from the country supporting reform, and when he, Pitt, became premier, with a majority behind him, he returned to his plan in 1785 with a proposal of rather extensive changes, but was beaten by a majority of seventy-four. The house of commons had yet no mind to reform itself. Before the subject could be taken up again in earnest, the French revolution came on and speedily set up among the ruling classes in England a not unnatural reaction against changes. The plan still retained much popular support, and was brought forward unsuccessfully in parliament in 1790, and again with somewhat better backing by Mr. Grey, afterwards Earl Grey, in 1792, 1793, and 1797. On the first of these occasions Mr. Pitt declared that his opinions on the subject had not changed, but he thought the time unfavorable: "This is not a time to make hazardous experiments." It must be entered upon the debit side of the French revolution account that it postponed the cause of parliamentary reform in England for a generation.

But the denial of parliamentary reform was not the worst reaction in England for which the French revolution was responsible When it began, it was rather generally greeted as a hopeful movement towards liberty and better government, but, when its destructive tendencies, or what seemed to be destructive tendencies, became more evident, strong opposition developed and was powerfully aided by the almost

unparalleled popular effect of Burke's *Reflections on the French Revolution*, which appeared in 1790 and went through thirty editions almost at once. All the conservatively inclined and all who thought they had anything to lose by change took alarm, and the only organs through which a national will could be expressed in action were then in their hands. As the successful revolution began to show itself disposed to carry its doctrines into other countries by force, and especially when France declared war on England at the beginning of 1793, the alarm greatly increased. It must be confessed that it had some ground for existence in the not very wise efforts at propaganda and public agitation by the supporters of more liberal ideas, and at that time at least in the popularity of Thomas Paine's *Rights of Man*, almost equalling that of Burke's *Reflections*.

There followed the result which must still be called natural and with which later times have not been unfamiliar, severe repression by law and even worse by public hysteria. An alien act placed restrictions on foreigners; the *habeas corpus* was suspended [2]; a new treasons act was passed, making it easier to secure convictions; laws were made against seditious meetings, with authority to the local magistrate to determine the question whether there was sedition, and against societies and associations, and some of these were suppressed by force; various restrictions were placed upon the press, and writers and publishers severely punished; royal proclamations were issued against seditious writings and calling out the militia to repress threatened disorders, and warnings to parliament of impending revolution. Worse than these abuses, which were still under the forms of law, were the numerous cases in which the courts, yielding to the public panic, in the trial of accused persons disregarded the safeguards which the law had provided for persons wrongfully accused, allowed convictions on the flimsiest evidence, and inflicted sentences out of all proportion to the offence. Fox

[2] A. and S., 496–497.

was fully justified in exclaiming, on hearing of certain cases in Scotland: "God help the people who have such judges." We find it difficult, however, to learn the lesson of history which was long ago formulated in the words: the best defence against revolution is not repression but reform. The general and severe condemnation by all parties of these unreasoning lapses into fear, which followed after peace had come, does not prevent the same public hysteria in a new time of war, and the same forgetfulness of the real safeguards of liberty. That the demand to which the official guardians of the law give way is practically universal at the time only makes the matter worse, for as everyone admits, the only ultimate safety of democracy is in the willingness of the people to be faithful in all honesty to the restraints which they have placed upon themselves.

In one other particular that age of warfare exhibits a result of which there have been later examples in the Anglo-Saxon world — the practical suspension of parties, the centralization of government, and the willingness to allow almost dictatorial powers to the executive. From the date of his first dissolution of parliament, Pitt had had a secure working majority on almost every question he brought forward, but the effect of the war was to disable and divide the opposition. From the beginning of 1793 the more conservative of the whigs supported the government against the more radical of their own party, and in the next year their leaders were taken into the ministry. The remaining opposition was naturally led to a more careful, if somewhat more extreme, defence of their own position and, if Pitt may be said to have given shape to a new tory party, Fox also had his share in forming a new whig party, leading on to the liberalism of the next century. The immediate result was an overwhelming majority for the cabinet during the remainder of Pitt's ministry. Fox could muster barely fifty votes in the commons, and the check on government of a strong opposition ready to take its place was removed. These facts

explain to a great extent the steady support which the king gave to Pitt for so long. He was not exactly a minister after the king's heart, but there was no opportunity to turn him out of office. Besides George very well knew that the only alternative was Fox, whom he detested more heartily.

Outside parliament the same thing was true. All sorts and shades of opinion, except the liberal, all classes and professions, joined in support of the government, whatever their previous party connections had been, and the supporters of the opposition had to put up even with social ostracism. The sympathy of later writers has been very generally with Fox and his small band of supporters, and it is certainly true that the long dominance of the tory party during the war meant an equally long cessation of the political progress which had been going on since the revolution of 1688. It must not be overlooked, however, that such a universal rallying to the support of government during a dangerous struggle, and a ready acquiescence in a practical dictatorship, is to be expected and hoped for. It has its roots in patriotism and is a source of national safety. All that is to be striven against is the tendency of centralization to support the excesses of emotion and the violations of personal liberty natural under excitement. Pitt's government did not use its absolute power to endanger public liberty, and the constitution emerged from the time of trial uninjured.

It must be noticed also that during the time Pitt was in power public opinion outside parliament acquired better means of bringing itself to bear upon actual government and made more frequent use of them, although there was no improvement in parliamentary representation. The opinions of masses of the nation, of large bodies who think and act in one way, came to be a more active influence than before in shaping the national policy. A striking illustration of this fact is to be seen before the beginning of the war. In April, 1791, Pitt suddenly dropped his Russian policy, after he had dispatched an ultimatum to that govern-

ment and while he had a parliamentary majority for the plan, because of national opposition. More important is it to notice the constant efforts which were made during the war to express public feeling on both sides of many questions, and the variety of ways in which the attempt was made: public meetings, processions, deputations, petitions, addresses to the crown, one may almost include riots in the list under the conditions of the eighteenth century, certainly the organization of societies, associations, and clubs with names proclaiming their doctrines and with propaganda in tracts, handbills, and broadsides. The pamphlet was relatively less frequently employed as a means of influencing opinion than a century earlier, though it has never disappeared to this day. The newspaper press had so greatly improved in three generations that it was now universally recognized as one of the chief means both of forming and expressing public opinion. Men were beginning also vaguely to feel that organization, — that the banding together of men of common opinion, intensified their influence.

All this has a modern appearance when we consider the practices which are so common at the present day; and modern is what it was. More correctly, it was the foreshadowing of a change which would require a century for its completion. All unconsciously the medieval way of looking at parliament, indeed the medieval function itself of parliament, was beginning to be modified. A gathering of wise men from all parts of the country in order to find out what the nation thinks was becoming no longer necessary. There were other ways of finding out; at least the nation was learning other methods of expressing its common opinion, or the opinion of large fractions of the nation. It was beginning slowly to perceive that the chief function of parliament is to put into legal form, into form to govern executive officers and courts of justice, the decisions which it has itself reached elsewhere. It had not yet come to look upon an

election as giving a mandate to parliament; but it was beginning half consciously to see that it must take pains to convince parliament that there was a genuine public demand for this or that action or decision.

The age of the war with France is the first great age in the general use of these methods, but it is not the age of their invention. From early in the reign of George III they had been increasingly employed with effect. In the case of Wilkes, a newspaper publisher and member of parliament, arrested in 1763 for an attack upon the king's speech declared to be libellous, public opinion, expressed in these ways, assisted greatly in establishing the illegality of general warrants, — that is, warrants not specifically describing the place to be searched or the persons or things to be seized.[1] The case also involved the right, finally maintained, of juries to decide on the libellous character of a publication on general grounds. The increasing eagerness of the public to know what was said in parliamentary debates is another sign of the same tendency. Parliament had always debated with closed doors. In the early days of its history it had been a measure of self-defence, as almost the only way of protecting itself against the interference of the king with the freedom of debate. Now the seat of final authority and the feeling of responsibility to it were beginning to change. The public began to be interested in the debates in parliament, not merely as discussions of national questions, but as expressions more or less faithful of its own opinions. Unauthorized and largely imaginative reporting of debates from memory or hearsay had begun before the middle of the century. During the time when the troubles with the American colonies were beginning, reporting improved in accuracy and the attention of the house of commons was attracted. The attempt to enforce the rules of the house against publication broke down before the determined opposition of the city of

[1] Robertson, *Statutes*, 440–455; A. and S., 492–493.

London. Parliament would not modify its rules until many years later, but from 1771 on tacitly allowed them to be violated with impunity.

All these signs of the increasing interest of the public in national questions, of increasing desire to have a voice in their decision, are unmistakable evidences of a tendency towards democracy. But in a far different way, in a field so remote from public affairs as never to be suspected, the powerful forces were being prepared which in another age were to transform England into a real democracy. This preparation of democracy is what must be considered the one great forward movement in constitutional growth of the whole period from the accession of Pitt to power to the fall of Napoleon in 1815. If in its origin this movement seems to carry us out of the sphere of constitutional history, it does so only to emphasize the law of history that all lines of progress are dependent one upon another.

It is into the field of economic advance that we are carried. The economic changes which began about the middle of the eighteenth century brought about a complete revolution in industry and commerce.[4] Their results were of enormous value in enabling England to sustain the crushing burden of the twenty years' struggle against the plans of French conquest. But vast as were these consequences, their permanent effect upon the history of the world was not greater than another which followed from the same changes and whose influence is still unexhausted, the rise of democracy. They opened through this result a new epoch in England's constitutional history wider in import than did the accession of the house of Lancaster or of the house of Stuart.

Fundamental to all else, though not first in time, was the application of steam to machinery, because it removed all limits to expansion. Before it was perfected startling inventions of new machinery had been made to which steam could be applied, especially in the manufacture of cloth. But

[4] Cheyney, *Readings*, 610–615.

steam and new machinery created an insistent demand for fuel and iron. It was at the same time supplied by the opening up of vast quantities of coal and ore near at hand, and by improved methods of smelting iron and making steel. No less insistent was the rapidly increasing production for better means of transportation and wider markets. Both demands were instantly met. A network of canals connected the new manufacturing cities with one another and with the sea, while the results of the victories over France, secured in the peace of 1763, opened rapidly expanding markets and sources of raw materials. Commerce grew as rapidly as industry, and improvements in agriculture during the same years at least helped to meet by home produce the demands for food of the population concentrated in the centers of industry.

The concentration of population was the line of transition to the political result. Machinery operated by steam meant factories, and factories meant concentrated population. Cottage and village industries by degrees disappeared. Large towns were formed where none had been before, and old ones grew larger. Two results followed. The old classes were in a single generation heavily reinforced from below. The profits of industry endowed a new wealthy class which arose from among the manufacturers, or from families not prominent before, to take a place in popular influence beside the old aristocracy. At the same time the middle class received a large accession of numbers, and we may almost say that a wholly new laboring class was created, so greatly did it differ from the more stolid, slow, and unreasoning laborers of a mainly rural England. With these changes in the content of classes went a change of atmosphere, especially of political atmosphere, in large portions of the country. The new elements which began to make themselves felt in public life were not inclined to conservatism. They were restless under many of the conditions in which they found themselves; they were little bound by old ideas, were ready to change, inclined even to be radical and deeply interested in certain

reform demands which affected their position in the state or their local situation.

The impression must not be given that a violent revolution in public life was wrought all at once. The first effect was tendency rather than actual achievement. But a beginning was made at once from which there was no going back. The changes which resulted from and attended the economic revolution somewhat slowly developed into a great movement towards a democratic control of government and of all public interests. This movement has gone on constantly widening and deepening from that day to this and constantly accomplishing more and more of its aims in the management of national and local affairs. In one very true sense the changes brought about were not revolutionary. They were no break with England's past, but the logical outgrowth, the consummation in practical government, of that slow drift towards the sovereignty of the people which began long centuries ago in English history. The puritan attempt, in a revolutionary atmosphere and under the stimulus of radical religious thought, to accomplish these ends prematurely led to failure in England, but in America to an earlier and more complete fulfillment of the natural tendencies of the past. Now early in the nineteenth century, England began an approach to these same democratic results, slower than would have satisfied the independents, but rapid as compared with the intervening generations. We are apt to think of the change as revolutionary, partly because of the striking character of the changes made, and partly because there now enter plainly into the political arena forces which had been heretofore more disguised in their action, economic forces, and new classes.

Apart from the war with France and the management of national finances, the great measure of Pitt's administration which may be called one of constructive statesmanship was the union with Ireland. The union with Scotland in 1707 was a union made between independent nations by equal nego-

tiation and with mutual concessions. Ireland, however, was a subject nation, and a subject nation with peculiar disabilties. Concessions had been made to Irish independence since the accession of the king — Poyning's acts had been repealed and the act of George I which gave the English parliament the right to make laws for Ireland [5] — but the situation had not been materially affected in matters that were concerned in the making of the union. Negotiations had to be carried on not with Ireland but with the owners of pocket boroughs, and the concessions had to be made to individuals who commanded political influence. Out of 118 boroughs sending members to the Irish house of commons 110 were privately owned.

Ireland was in a position which might be one of considerable danger to Great Britain. Full legislative independence had been granted to the Irish parliament by the repeal of the acts named above in 1782,[6] but the Irish parliament had no real check upon the executive, which was appointed by and responsible to the English ministry of the day, and which, through the corrupt system of representation prevailing, could control the legislature. In 1793 the parliamentary franchise was granted to catholics, but they were still disqualified from being themselves elected, though they obtained freedom of worship, of education and land-holding, and of appointment to commissions in the army and navy. The English church was the established church of the island, and all nonconformists, protestant as well as catholic, had to pay tithes for its support. In 1798 discontent led to rebellion. The plan to combine protestant and catholic dissenters in the effort had failed and the attempt was made by the catholics. It was foredoomed to failure unless strong French forces could be landed, and the several expeditions sent from France were all failures. The insurrection accomplished nothing except to add new memories of excesses of

[5] Robertson, *Statutes*, 204–205.

[6] Robertson, *Statutes*, 258–260.

violence and atrocity on both sides to make the future still more difficult.

Ireland remained, however, a threat of danger which should if possible be removed. After the rebellion had been put down, Pitt resolved to bring Irish legislative independence to an end, and he believed that it was necessary at the same time to end the protestant supremacy. If Pitt's whole plan could have been adopted, the future of Anglo-Irish relations might have been different. He carried the political part of his proposal and failed with the ecclesiastical.[7] The Irish parliament was brought to an end. The private owners of boroughs were compensated at heavy expense. A hundred Irish members were added to the British house of commons, and twenty-eight Irish lay peers, elected for life, with four ecclesiastical peers, were added to the house of lords. An Irish peer, not serving in the British house of lords, might be elected to the house of commons by an English but not by an Irish constituency — an arrangement afterwards taken advantage of by Lords Castlereagh and Palmerston.

Pitt, however, had no idea that an absorption of Ireland into a United Kingdom alone would solve the difficulties in that country. The political union was only the first step in a series of reforms which he hoped to carry, and a preliminary step only. Those that were to follow were expected to bring in the really constructive results, and of these catholic emancipation, the establishment of complete political equality for catholics, was the essential introductory measure. It was with this understanding that the union had been adopted in Ireland. Pitt made no definite pledge, but the cabinet did allow it to be understood that catholic relief was to follow. In this matter, however, the policy of the ministry came into collision with the obstinacy of the king. George III was violently opposed on religious grounds. He believed also that, as he had sworn in his coronation oath "to maintain to the bishops and clergy of

[7] A. and S., 497–506; Robertson, *Statutes*, 283–292.

the realm and the churches committed to their charge all such rights and privileges as by law do and shall appertain to them or any of them," he should be guilty of perjury if he yielded. Pitt did not handle the crisis with his earlier skill, and found himself obliged to resign. The stand of George III on this question is the last serious case which has occurred of the interference of the royal prerogative with a policy deliberately formed by the responsible ministry of the crown. Other instances of interference are to be noted but they are of minor importance. By this interference much needed catholic emancipation was postponed for nearly thirty years.

The ministries which follow one another at comparatively short intervals until 1812 present in their policies no points of especial constitutional interest. When Pitt became prime minister again in 1804, he was anxious to include Fox in his cabinet, but the king positively refused, and the ministry was formed without him. On the death of Pitt, however, in 1806, his ministry crumbled to pieces and the king found no alternative possible but to accept the ministry of "all the talents" with Fox as foreign secretary. When Pitt resigned in 1801, he had promised out of sympathy for the king, who had been threatened with serious illness by his anxiety over the catholic question, that he would never bring forward the measure again so long as George should live. In 1807 the king required a similar pledge of Lord Grenville's ministry, in view of a measure they proposed. They refused to give the pledge and resigned. For a short time in this interval of shifting ministries the whigs were in office, but in 1812 Lord Liverpool's tory administration of fifteen years began.

Before this date, however, the reign of George III had really closed. He had been subject to occasional attacks of mental disease, during which he was incapacitated for any share in public business. From the earlier ones he had shortly recovered, but the attack of 1810 was permanent,

and the regency to 1820 is one of the longest in English history. At the time of the king's illness in 1788 a debate of considerable constitutional interest concerning regencies had taken place. In earlier times the great council had had some share, though not definitely defined, in the appointment and regulation of regencies. Its successor, the parliament, particularly during the age of special parliamentary activity, the fifteenth century, had assumed a wider function. From the precedents of that time it might be fairly argued that the sole power to appoint the regent, as well as to define the limitations under which he should exercise the royal prerogatives, resided in parliament, and that no person, not even the direct heir to the crown, could claim the place of right. By statute in the reign of Henry VIII the king was given the power, as if he did not otherwise possess it, to appoint a council of regency for his successor, if one should be needed, and he did appoint such a council for his son Edward VI, but the arrangement which he made was somewhat changed after Henry's death.

This was the question at issue in 1788. It had been the Hanoverian fashion for the prince of Wales to be opposed, sometimes bitterly opposed, to his father, and to head the parliamentary opposition to the cabinet in office. In 1788, the future George IV was in close alliance with the whig party leaders, who were out of office and eager to take the place of Pitt's ministry yet only five years old. It was commonly believed that if the prince of Wales became regent the whigs would come in by as sudden an act of prerogative as that by which Pitt had been appointed by the king. They therefore argued that the place of regent was his of right and with the full powers of the king, and that parliament's function was limited to deciding when the regency should begin. This claim, though strongly argued, received little support from history or in the public opinion of the time. Pitt, who evidently believed that still, as in his own case, a political party with the support of the king could retain

power against the will of parliament, argued with general agreement that the right of parliament was complete to do whatever it should think best in the case. Even the prince of Wales was moved by the weight of opposition to declare through his brother, the duke of York, in a formal statement in the house of lords, that "he understood too well the sacred principles which seated the House of Brunswick on the throne, ever to assume or exercise any power, be his claim what it might, not derived from the will of the people, expressed by their representatives and their lordships in parliament assembled."

The principles for which Pitt had argued were applied in the regency bill which was passed in February, 1811, in spite of considerable opposition and the formal protest of the sons of George III.[8] The prince of Wales was made regent, but under some limitation upon his exercise of royal prerogatives. It was expected again that the tories would be at once turned out of office and a whig ministry formed. Such an arbitrary exercise of the king's power would have been acquiesced in without serious opposition, even at that date, notwithstanding the great progress which had been made since 1788 in the understanding of cabinet government. The prince at once, however, began to look at things from the standpoint of the king, instead of the heir, and no change of ministry was made. During the rest of his life he proved himself as thoroughgoing a tory as his father had been. One change in the arrangements made for regencies should be noticed. In early times it had been customary to appoint distinct councils of regency with a special responsibility to parliament. When the responsible relation of the cabinet to the government of the country began to be perceived, it was seen that this special council was no longer necessary and it ceased to be a feature of the later regency acts.

Not merely was the function of the cabinet by this date better understood, but the necessity, against which almost

[8] Robertson, *Statutes*, 171–182.

the whole eighteenth century had protested, of the office of prime minister as well. This understanding is well stated in a letter of Lord Melville's in 1803, explaining Pitt's views about entering the Addington cabinet. Lord Melville said that Pitt had "stated not less pointedly and decidedly his sentiments with regard to the absolute necessity there is in the conduct of the affairs of this country, that there should be an avowed and real minister, possessing the chief weight in the council, and the principal place in the confidence of the king. In that respect there can be no rivalry or division of power. That power must rest in the person generally called the First Minister, and that minister ought, he thinks, to be the person at the head of the finances. He knows, to his own comfortable experience, that notwithstanding the abstract truth of that general proposition, it is noways incompatible with the most cordial concert and mutual exchange of advice and intercourse amongst the different branches of executive departments; but still, if it should come unfortunately to such a radical difference of opinion that no spirit of conciliation or concession can reconcile, the sentiments of the minister must be allowed and understood to prevail, leaving the other members of administration to act as they may conceive themselves conscientiously called upon to act under the circumstances."

Pitt's experience very likely led him to an earlier perception of the true place of the prime minister than was general, but in the first decade of the nineteenth century we may consider the cabinet system in full operation, though it is some time later still before any intelligent account of it as a whole was put into print. It was Pitt's long ministry, the clearness with which he recognized his position, the absence from his cabinet of any rival in intellectual ability, the tact with which he determined relations with the king, and, it must be added, the national centralization which came with a time of war, all these together which brought the modern office of prime minister finally into existence. With it came

also more clearly than before cabinet solidarity and the exclusion of the king from practical government. When the cabinet must follow the prime minister as a unit, and when the king can no longer interfere with the policy of the prime minister through members of his cabinet who hold a position independent of him, the modern system is in operation.

The close of the struggle with Napoleon in 1815 marks the beginning of a new age in English history. As we study the details of that transition, it seems to us almost as if we passed at a single step from conditions as strange to us as the eighteenth century is into conditions and atmosphere much more familiar and modern. Partly this feeling is due to the appearance in public life of a group of young men whose activities and those of their slightly younger contemporaries form a part of the familiar tradition and even the personal knowledge of men still in middle life. It is also due in part to the fact that the results of the economic revolution now begin to make themselves distinctly visible in the political sphere, and these are results which have gone on with increasing influence until they really dominate public life at the present day. It is certainly in some of its determining qualities more truly a contemporary than a Georgian atmosphere into which we pass in 1815.

Especially interesting is the group of new men who had then just taken their places upon the political stage or were soon to do so. Brougham, Palmerston, Sir Robert Peel, and Lord John Russell were already in parliament, and Palmerston and Peel had begun their official careers; the former was thirty-one and the latter twenty-seven. William Cobbett, like Robert Owen, was considerably older, but his career of reform without reserve, in which he particularly represents certain of the results of the economic revolution, does not begin until 1816. Younger, all born after the opening of the nineteenth century, but shaped by the new influences and soon to begin their great careers, were Richard Cobden, John Bright, Gladstone, and Disraeli. Upon most of these, upon

Peel, Cobden, Bright, and Gladstone at least, the forces created by the new social and political movement had as profound effect in some ways as upon Cobbett and Owen. It is through their work indeed that these forces first come to political expression. It is interesting to note that in the history of the United States the age is in the same respects a new one, and characterized also by the appearance in public life of the group of new men who dominate the middle generation of the century, Calhoun, Webster, Clay, John Quincy Adams, and Andrew Jackson, whose career and place in public life is not unlike the duke of Wellington's in England.

Far greater, however, was the effect of the economic changes in the general life of the time than any which shows itself in the activities even of the leaders of political affairs in the new period. The war had been a time of apparent prosperity. Rapid sales with high prices had prevailed; commerce and manufactures had expanded and wealth had been rapidly accumulated. But the prosperity had been somewhat artificial and, with the removal of the peculiar conditions created by the war, it declined, and economic distress became general among the less well-to-do classes. The years which immediately followed the close of the war were filled with unrest and agitation, partly economic owing to real destitution among the working classes, and partly due to a desire for parliamentary reform or more revolutionary changes in the direction of socialism. Parliament was still in the hands of the aristocratic portion of the nation, chiefly the land-owning class, and the policy which was adopted towards agitation was one of harsh repression. There was some extravagance of word and action on the part of the radical elements, and these were held to justify the use even of force, amounting in one case to what became known as the Peterloo massacre. New acts were passed against sedition, limiting the right of public meeting and of the using of arms, and increasing the severity of existing laws, and the writ of

habeas corpus was suspended.[9] But it soon became evident that the social changes of the last decades had created a new type of workingman not so easily held down. The agitation continued notwithstanding all efforts at repression, and soon began to find spokesmen in the house of commons. It has been said that the first great radical victory won in parliament was the repeal in 1824 of the combination laws, the laws under which combinations of workingmen to better their condition were held illegal.

But by 1824 the indications were already clear that the first great reform age of the nineteenth century was opening. The ministry of Lord Liverpool as reconstructed in 1822–23, though tory, was a reform ministry, if reforms did not cut too deeply into the constitution. Changes in the criminal law had long been urged. About two hundred capital crimes were contained in the criminal code of the early nineteenth century, most of them inherited from the middle ages. Thirty-five kinds of forgery were punishable with death, as well as many slight offences like petty larceny. While in actual practice so severe penalties were not exacted, the whole code needed reconstruction. This was given it between 1822 and 1830, and the death penalty left on the statute books only for serious crime. The procedure of criminal trials was at the same time simplified.

Financial reforms important in themselves, and even more important as opening a long series of similar reforms, were adopted. The navigation laws, many centuries old, might be abandoned under reciprocity treaties with any nation which would grant a like concession — the practical end of the system. The corn laws, also of long standing and strengthened at the end of the war as a protection to national agriculture, which did at that time need assistance, were modified and their wisdom sharply challenged. More important still, the general protective system was attacked. No attempt was made to bring in free trade, but progress

[9] Cheyney, *Readings*, 663–669; Robertson, *Statutes*, 512–517.

was made towards that result. Tariff duties were lowered, in some cases very decidedly lowered, on a long list of articles, and absolute prohibitions removed, of manufactured goods and especially of raw materials. Bounties on exports and prohibitions on the emigration of workmen were abolished. A large beginning was made but the way was still long to free trade, and yet enough had been done to allow the evidence of facts and experience to accumulate.

More striking in the popular judgment and equally essential to future progress were the steps taken towards religious toleration. During the reign of George III, from 1760 to 1820, both protestant and catholic dissenters had been relieved of many disabilities. These had concerned, however, matters of religious belief and practice rather than political status. The test and corporation acts of the seventeenth century still remained enforceable in law, though they were in practice generally disregarded and annual acts of indemnity passed to relieve from penalties those who had violated them. They were at last repealed in 1828. In the next year the even more important "catholic emancipation act" was passed.[10] The union with Ireland had increased greatly the proportion of catholics in the population for which it was the duty of parliament to legislate, and forced into attention the injustice of the existing laws. The increasing agitation in Ireland, led by Daniel O'Connell, brought the country to the verge of civil war. The change was carried by the tory ministry of the duke of Wellington in 1829. At first George IV declared as violently as his father had done that he would not consent, but he was compelled by the force of circumstances to yield — the last occasion on which a British king threatened to thwart a measure to which the cabinet had agreed. The act of emancipation admitted catholics to both houses of parliament and to all public offices, local and national, except a very few. Comparatively little yet remained to be done in this direction,

[10] Robertson, *Statutes*, 312–327; A. and S., 508–513.

but Jews were not admitted to parliament until 1858, nor nonconformists on equal terms to the universities until 1871.

Meantime a general popular demand had sprung up for a reform, more important from a strictly constitutional point of view and more difficult to carry, the reform of parliamentary representation. Generally recognized as necessary for two generations, and many times brought forward in parliament by one advocate or another, it now became an object of increasing agitation among the people, but its serious consideration by the parliament which had granted catholic relief was prevented by the necessity of a general election on the death of the king. George III had died in 1820, though his reign had really ceased in 1810 upon his permanent disability. In the severe struggles through which the nation had been called to pass after 1790, the king had shown himself so thoroughly at one with his people in sentiment and purpose and so devoted to the national cause that he had won a degree of affectionate regard hardly before obtained by any English king. His son, George IV, inherited none of this regard, either personal or political, but on the contrary his moral character and his ignorance and lack of interest in matters of government made him the least respected of kings. He was succeeded by his brother, William IV, who was equally ignorant of public affairs but who retained his whig principles, and was more conscientious about the duties which should fall to a king and more scrupulous to regard the limitations of his constitutional position.

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CHAPTER XVIII

THE AGE OF REFORM

The necessity of the reform of parliamentary representation had been almost forced upon the attention of thinking men by the corrupt practices of the eighteenth century. Lord Chatham denounced the existing system severely in 1766, and again in 1770. In 1776 Wilkes introduced a bill making extensive changes, but he could not get a division upon it. In 1780 the duke of Richmond fared no better with a bill which went farther in the way of change than parliament could be persuaded to go for more than a century following. The younger Pitt made motions in the house looking to reform in 1782 and 1783 without success and, as prime minister, in 1785 failed to obtain leave to introduce a bill making very considerable reforms. He proposed to purchase at the expense of the state, as it was then thought justice demanded, the rights of private owners and borough corporations in nearly fifty boroughs and to transfer their representation to London and the counties. This was Pitt's last attempt, but others took up the rather hopeless effort: Flood in 1790, and in 1792 Grey, afterwards earl Grey, so long identified with the reform, and again in 1793 and 1797. It was nothing more than natural that the French revolution, with what seemed to many the excesses necessarily brought on by its democratic tendency, should lead to a reaction against any plan which appeared to have similar tendencies, and it required many years to remove the fear of the results of reform from the minds of statesmen who had had their training in the period of struggle. The subject was brought forward in vain in 1809, in 1810, in 1818, and in 1819. Lord John Russell, who had so much to do with the passage

of the reform bill of 1832, made his first motion for the purpose in 1820 and repeated it in 1822, 1823, 1826, 1828 and 1830. Meantime attempts had been made by others, and it was clear that a great weight of public opinion was collecting behind the effort.

The result of the industrial revolution in creating a more democratic spirit had greatly increased the public support which could be relied on for a measure of reform, but the argument against the old system had long been complete. No change had been made in the election laws since the fifteenth century, and members were still elected from the counties by the votes of the holders of freehold land of the annual value of forty shillings, and from an arbitrary list of boroughs, long regarded as fixed, in which the right of suffrage was defined in widely varying ways as each borough had originally determined for itself. Glaring inequalities had always existed in the relation of representation to population, to some extent in the counties and to a great extent in the boroughs. The puritan reformers had dealt with this matter in the modern sense, but their measures were not continued, and the inequalities, especially in the case of the boroughs, were greatly increased by the changes in population which followed the industrial revolution. Large new towns arose which had no representation. Old boroughs lost population heavily. Old Sarum with no electors, Galton with seven, and Tavistock with ten, returned each two members, while Manchester and Birmingham had none. Ninety members were sent by forty-six places with less than fifty electors each. Worse even than this, the decline in population, combined with limited rights of suffrage, had put many boroughs sending members to the house of commons completely into the hands of neighboring great landowners who either controlled the election through their ownership, the so-called pocket boroughs, or found it easy to buy the required number of voters, the rotten boroughs.[1] The duke of New-

[1] Cheyney, *Readings*, 643–646.

castle nominated eleven members of the house of commons, Lord Lonsdale nine, Lord Fitzwilliam eight. Six peers together sent forty-five members. Nearly half the membership of the house represented in this way private interests rather than a public constituency.

Early in November, 1830, after the parliamentary election of that year, the same Earl Grey, who had been a leader in the eighteenth-century attempts, expressed in debate in the house of lords the hope that this reform might not be long delayed. The prime minister, the duke of Wellington, answered in absurdly extravagant praise of conditions as they were, saying among other things that if he had been called upon to form legislative institutions for any country he could not hope to do as well as the existing institutions of England, "for the nature of man was incapable of reaching such excellence at once." These words proved the spark which fired the train and revealed how broadly preparation had been made in the public mind for a decided change. On the fifteenth of November, Wellington's ministry was defeated in the house of commons on a question of finance and resigned. The king sent for Earl Grey who formed a whig ministry and went on with the session without asking for a new election. The house of commons had nominally a tory majority, but public opinion had declared itself so clearly for reform that there seemed a chance of securing a majority for it without an appeal to the country.

The bill was introduced on the first of March by Lord John Russell, who for twenty years had advocated a measure of the kind in speeches and motions in the house of commons. It passed its first and second readings, but on the second reading the majority in its favor was only one in a vote of over six hundred. In parliamentary practice a small majority on the second reading is considered a defeat. The passing of the second reading means that the house adopts the principle of the bill, but the details have still to be settled in committee of the whole, and experience shows that more

members are ready to accept the general principle of any measure than will agree together on all the details. This proved to be the case at this time, and on the nineteenth of April the cabinet was defeated by a majority of eight on an amendment to the bill. Then the ministry appealed to the country. Parliament was dissolved and a new election ordered, which was held with electoral reform as the chief issue of the campaign. The election was one of unusual excitement and of clear determination on the part of the reformers. Some pocket boroughs even were carried against their owners, and a great majority for those days was secured for the government. So quickly was all this done that on June 24 Lord John Russell introduced practically the same bill again, and its second reading was carried on July 8 by a majority of one hundred and thirty-six, and on September 21 it was finally passed by a majority of one hundred and nine. The house of lords was naturally opposed to a measure which seemed about to destroy the political influence of the aristocracy, but the reformers made a brilliant defence, and it was only after one of the ablest debates in the history of the house that the bill was rejected by forty-one majority in a vote of three hundred and fifty-seven. The defeat of a government measure in the house of lords does not call for the resignation of the ministry and, sustained by a vote of confidence immediately passed in the house of commons, the cabinet decided to prorogue parliament in order that a new session might allow the reintroduction of the bill.

In the interval between the two sessions the public excitement reached the highest point that had ever attended any question before parliament or perhaps that has ever been known since that time. All measures familiar in English and American politics to impress public opinion upon the legislature were employed, monster meetings, impassioned speeches, processions and petitions, newspaper articles and pamphlets; in places there was even rioting by the more

radical supporters of the bill who expected larger results from it than it really produced. The house of lords met in the new session under no misunderstanding as to the temper of the majority of the nation.

On December 12 a new bill was introduced considerably improved by the experience of previous debates, and after another thorough discussion was passed by the commons on March 23 and sent to the house of lords. Everybody knew that now the real battle was to come, and the pressure on the lords was tremendous. It was generally understood that King William IV had agreed, though with reluctance, to create a number of whig peers large enough to carry the bill through the house, if this should prove to be the only way in which it could be saved. On the other hand, it must not be forgotten that the country had hardly yet recovered a reform disposition from the reaction which the extravagant policies of the French revolutionists had caused, that their excesses were still fresh in mind, that only two years before there had been another outbreak of revolutions on the continent, and that this measure seemed to strike at the very foundations of government as they had existed for centuries, a belief which the radical supporters of the reform bill did nothing to remove. The mind of a conservative aristocracy, naturally timid of experimenting with the unknown, had some defence for itself on this occasion.

Public pressure and the known plans of the government were, however, too strong for many minds in the house, which were wavering either in opinion or as to the best policy for the lords to follow. When the vote on the second reading was taken, it proved that seventeen peers had changed to the affirmative, that some, including Wellington, had stayed away, and that a net gain had been made from among the absentees of 1831. The second reading was passed by a majority of nine. The fate of the measure was, however, undecided because it had yet to undergo the dangers of amendment and of adverse votes in committee of the whole,

and in reality such a vote was carried against the ministry on May 7.

It was now evident that the number of whigs in the house of lords must be increased to a working majority or the bill be abandoned, and the cabinet asked of the king the fulfillment of his promise to create peers, offering him the alternative of their resignation. It seems clear now that the king had never agreed to increase the membership of the house of lords by so large a number as the ministers thought necessary. He was himself conservatively minded and somewhat afraid of the reform, though on the whole loyal to the ministry, as his constitutional position demanded. When brought face to face with the necessity of swamping the majority in the house of lords in order to carry the bill, he could not bring himself to act and instead accepted the resignation of the cabinet.

It then became the practical question whether the tory party in support of the action of the king could form a cabinet which would be able to carry on the business of the country, including some measure of electoral reform which it was now clear to everybody must be adopted. The duke of Wellington made the attempt to construct the ministry, but Sir Robert Peel, who was indispensable, and others refused to serve; the house of commons passed a vote of confidence in Lord Grey's cabinet by a large majority; and renewed public excitement gave warning of trouble. After a few days of hard effort, Wellington was obliged to inform the king that he could do nothing and advised him to recall Earl Grey. William was forced to yield, though yielding meant agreeing to the cabinet's demands. He attempted in vain to persuade them to consent to important modifications of the bill, but he gave them his promise in writing to create as many peers as might be necessary. Then of his own motion he took a further step of more doubtful propriety constitutionally which, though not objected to at that time, certainly would be today, by directing his private secretary

to suggest to Wellington and certain others that all difficulties would be removed by their absenting themselves from the house when the vote took place. This course had been already resolved upon by many and the bill was finally allowed to pass by a large majority.[2]

It has seemed worth while to relate the history of this episode in such fulness because there is no case in which are illustrated in so many points of detail the practical workings of the cabinet system of government by a responsible ministry, which is the especially characteristic result in the constitution whose historical development we have been following. From 1832 to the period of stress occasioned by the world war, the operation of this system remained the same with only slight modifications, which will be noticed later. The relation to one another of three of the great factors in the government is clearly brought out in the history of the passage of the reform bill and that of the fourth is implied. The king, the lords, and the cabinet are shown as they operate together, not of course in the ordinary business details of administration, but in the higher determination of government policy and the foundation of all in the house of commons is indicated.

The king has ceremonial and social functions to perform which are of great importance in an old society which, however democratic politically, is still aristocratic in social spirit, but in the determination of government policy upon any measure his position is fairly shown in the relation of William IV to the passage of the reform bill. He strongly disliked some details of the measure and repeatedly tried to persuade the cabinet to change them without success. The king cannot insist that the ministry change the details of a measure to make it accord more nearly with his own views. He may present his views to the cabinet, either orally through some member or in writing, and urge their acceptance, and they will always be considered respectfully and fully. In matters

[2] A. and S., 514–526; Robertson, *Statutes*, 327–346.

of form, which may indirectly involve matters of substance, as in the famous case of the note of Lord Palmerston's government to Washington on the Trent affair in our Civil War, which was modified at the suggestion of Queen Victoria, or in unessential details, the advice of the sovereign may often be accepted, but if the cabinet decides against his views he must yield.

In William IV's time when the ministry asked of the king an act to which he was strongly opposed, in order to change the majority in the house of lords, it was thought his right to accept their resignations and to try the experiment of forming a government which would not require such an act of him. But when the leaders of the king's way of thinking, from whom the new cabinet must be made, came to the conclusion that no government could be formed which could carry on the business of the country, then the king had to abandon the attempt. It is hardly likely that any student of the British constitution would deny the king the same right at the present day, but the elimination of the king from the practical government of the country in thought and habit has gone so far since 1832, that it is exceedingly doubtful if any sovereign will ever try the experiment again. The attempt would be from the start so hopeless and public excitement so great, for it would only be made on a question of great importance, in which the nation would be intensely interested, that the king would probably always yield rather than take an appeal against the cabinet.

It may be said without qualification that William's conduct in allowing his view about the reform bill to become known would be thought improper in a sovereign of today. It must be noticed, however, that his act in sending a letter to opposition members of the house of lords differed very decidedly from the similar act of George III against Fox's India bill in 1783, in that it was in support of the policy of his government while George's was an attempt to defeat the cabinet. Theoretically the king is supposed to have no political

opinion but that of his ministers, and it would be a serious breach of etiquette for an English political speaker to quote the king in support of his argument. This principle is very correctly stated in a letter of Edward VII's which has been published. When he was asked in writing as to the truth of a rumor that he was opposed to any change in the policy of free trade, he replied: "The king never expresses any opinion on political matters except on the advice of his responsible ministers, and therefore the statement must be inaccurate."

The only political function which the king can perform is to support his cabinet loyally and completely in such ways as are possible to him, which are not many. The three rights which, fifty years ago, Bagehot attributed to the crown, "the right to be consulted, the right to encourage, the right to warn," amount to no more than this, though they seem to allow some room to influence actual government. Much was said during the reign of Edward VII of the activity of the king in the field of foreign relations, and it is quite possible that he may often serve as a particularly useful ambassador because of the peculiar access he may have to the inner circles of a foreign government. As Mr. Gladstone has said: "personal and domestic relations with the ruling families abroad give openings, in delicate cases, for saying more, and saying it at once more gently and more efficaciously than could be ventured in the more formal correspondence and ruder contacts of governments." It is certain, however, that in such a mission the king could take no position which had not been previously agreed upon or which was not in harmony with the policy of his government.

The last work which was necessary in bringing the nominal sovereign into so complete harmony with the real sovereign in the practical carrying on of government was done by Queen Victoria in the course of her long reign. Her letters, which have been published, reveal in how many ways and with what sympathetic understanding this work was carried on,

and Queen Victoria's personal place in the future history of England may very likely be determined more by her assistance in this development than by anything else she did. So entirely is the British sovereign at present in harmony with the constitution that it is very possible that the question of the government's remaining in name a monarchy or being changed in form into a republic will be determined by other than political considerations.

More decided and dramatic changes have taken place in the relation of the house of lords to the other factors in government than in the case of the kingship, and yet all the changes which have occurred were virtually involved in the position of the house as it was revealed in the struggle over the reform bill. That struggle clearly showed that the lords might safely oppose the popular will, as expressed by the house of commons, to a certain point but not beyond it. A first rejection of any bill was clearly their constitutional right, an appeal to the people with the question: Is this your deliberate and mature desire? A second rejection, after a general election upon the specific question had declared the popular will unmistakably, or after it had been clearly declared in any way, would be of more doubtful propriety; and a third rejection after continued evidence of a national determination would certainly have endangered their historical position. What followed, the determination to coerce the house by the creation of peers, the failure of the king's attempt to avoid the necessity, and the final acceptance of the bill, as the only way of escape, revealed for the first time the fact that the long progress towards the realization of the sovereignty of the people in government had overcome the aristocracy as well as the king.

A general understanding of this fact was however only slowly reached. A few years later, on the repeal of the corn laws, the protectionist legislation in the interest of the landlord class, the house of lords was strongly tempted to resist the reform. Only the great influence of the duke of

Wellington, who explained to the house clearly and for the first time the powerlessness to which it had been reduced in the constitution, prevented a repetition of the experiences of the reform bill. From that time on to near the end of the century, it was the custom to say that the house of lords served the purpose of a brake on the wheel of too rapid advance, served to make sure that a reform was really demanded by the mature judgment of the country. Before the close of Victoria's reign, however, the complaint became very frequent that the brake was applied only to the measures of a liberal ministry, never to those sent up by a conservative cabinet. Although the liberals during these years had raised more men to the peerage than the conservatives had done, it had yet been found exceedingly difficult to keep a family liberal in the atmosphere of the lords. The earl of Rosebery a few years ago declared in a speech that in his experience as liberal leader of the house, since the disruption of the party caused by the home rule bill, he had never been able to count with certain confidence on more than thirty votes in a membership of over six hundred.

It was a growing sense of the unfairness of this situation and of the danger of a permanent rejection of some important measure with its probable effects in public excitement, enforced and deepened by recent experiences in the adoption of tax reform measures, that led to the passage of the parliament bill of 1911. If we regard the English constitution with special reference to the character of its long historical development, there is nothing revolutionary about this measure. It takes away the power of the house of lords to postpone for more than two years the enactment of a bill passed by the house of commons which it has been made clearly manifest during that time that the public opinion of the nation demands. This is doing no more than to describe in statute form, with the time of delay definitely measured out, the position which the passage of the reform bill of 1832 had shown was really that of the lords in the constitution,

and this position was clearly the logical result of the previous development. The power of the lords was as much involved in the seventeenth-century struggle with Charles I and James II as was that of the king. The final triumph of the sovereignty of the people demanded as complete and cordial a recognition of the results from the house of lords as from the crown.

The position of the cabinet during the nineteenth century both in ordinary action and in times of crisis is illustrated with equal fulness in the passage of the reform bill. This date, 1832, is the earliest to which we can assign with certainty the completion of the cabinet system in all its working details, though it is very likely true that a somewhat earlier test, had it been applied, would have found its practical operation as fully understood. The reform bill was a government measure. That is, it was framed by the ministry, introduced by one of its members, and remained in his charge during its passage. If it should be defeated in the house of commons, or if an amendment upon a vital point should be carried against the ministry, then the cabinet must either resign or appeal to the country for its support upon the issue by dissolving parliament and bringing on a general election. A new election can be the cabinet's choice only under a heavy responsibility. An appeal to the country upon insufficient grounds, without some evidence of general support, or merely to save the ministry time, would be sure to be followed in the election by severe condemnation, but in this case the government had every reason to believe that the country was behind it, and the event proved the opinion correct. A greatly increased majority for the cabinet was returned by the electors, and the vote was considered a mandate from the country to go on with the measure.

On the defeat of the second bill in the house of lords, the case was different. An election had lately been held and the government had still a large majority in the commons. An appeal to the country was unnecessary and would

have been improper. Instead the cabinet prorogued parliament to permit a reintroduction of the bill in a new session. When the government was again defeated on an amendment in the lords, matters came to a crisis which illustrates the action of the cabinet at such a time. In asking the king to take a step, the creation of peers, which it was known that he was very reluctant to take, the prime minister offered him at the same time the alternative of the cabinet's resignation. At that time, whatever might be done today, the king chose that alternative, but while the attempt to form a cabinet of the opposite party was made, the old cabinet remained in office and carried on the routine business of the government. When the king was obliged to admit that his attempt had failed, it resumed its position as cabinet with reference to parliament, but now with the certainty that its advice would be accepted by the king. The crisis reveals also what it is in the British system which keeps a cabinet in power or turns it out of office. It is its ability or inability at any given time to determine and direct the policy of the government. If the house of commons will do business with the cabinet, then it goes on; if the house of commons will not do business with it, no other power can maintain it in office. If a ministry should attempt to retain power in the teeth of a hostile house of commons, the business of government would shortly fall into chaos and the attempt would mean revolution. But with the house of commons and the opinion of the nation against it, no ministry would ever make the experiment. This is the whole theory of government by a responsible ministry. The house of commons reflects the opinion of the people in regard to the policy proposed by the government and its judgment, which is the judgment of the nation, is final in the question before it.

The constitutional position of the house of commons has been already clearly indicated. It supports the ministry so long as the policy of the ministry has the support of public opinion. In times of crisis it may hold up the hands of

the cabinet by a direct vote of confidence, which is equivalent to a formal declaration to all opponents that the country is behind the government's policy. If public opinion turns against that policy, corresponding changes will take place in the house of commons and then in a crisis conceivably the house may adopt a vote of want of confidence which is a formal declaration to the cabinet that it has lost the support of the nation and should resign. If the ministry should prove unwilling to resign, or an attempt be made to bring into office a ministry which does not have the sanction of the people, the house of commons would refuse to allow any items of its policy to be enacted into law, and it would be unable to go on. It is also of course the business of the house of commons to discuss the measures proposed by the government and to amend and improve them, but this is a duty which it still shares with the house of lords.

The results of the reform bill of 1832 disappointed both its friends and its opponents. It was not followed by the consequences which had been hoped or feared. Most pocket and rotten boroughs had been disfranchised and seats had been given new centers of population, and these were changes which had been desired. Fifty-six boroughs were disfranchised and thirty lost a member each. Twenty-two large towns, including some London districts, were given two members each and twenty others one. Sixty-five seats were added to the county representation. As to the right of voting, a common borough franchise was created for all occupiers of premises of the annual value of ten pounds, and in the counties the old forty shilling freeholders were reinforced by the addition of copyholders and leaseholders and of tenants at will paying fifty pounds rent per annum. But though the number of voters had been increased by about fifty per cent, no important change was manifest in the character of the membership of the house of commons, and no evident progress had been made towards democracy. Corrupt voting was not entirely extinguished, difficult formalities

in the process of registration kept down the number of voters, and the natural local influence of family and property combined with all the rest to reduce the significance of the reform. Its permanent importance proved in the end to be less in the immediate change it made than in introducing the possibility of change. It was the first giving way of the old aristocratic system in any material matter and it opened the door to all that followed. The radical supporters of the bill were not satisfied with the concessions which that measure secured and it was not long before agitation began for supplementary reforms. The agitators had much material to build with in the rather general discontent of the working class, discontent which was quite as much due to economic as to political conditions.

The agitation, which reached its height in 1839, is known in history as the chartist movement from the so-called People's Charter in which the radical demands were stated.[3] These were six in number: universal manhood suffrage; vote by ballot, to prevent intimidation; annually elected parliaments, to maintain the responsibility of members; payment of members of the house of commons, to make possible the election of poor men; the abolition of the property qualification for membership in the house, for the same reason; and the formation of electoral districts of equal population.

The movement was a failure. None of the demands set forth in the charter was granted by parliament, but the agitation did not cease in other ways. The democratic cause won gradually more and more support among the classes which controlled parliament, and the programme of the People's Charter may be taken as an epitome of the progress since that day. Three of the demands, the second, fourth and fifth as given above, have been fully secured; and before the close of the century, the first also, with very slight exceptions which have now been swept away and the limitation implied in the word manhood dropped as well.

[3] Cheyney, *Readings*, 701–712.

The sixth has been fully obtained in principle and in practice as nearly as some peculiar difficulties of the situation allow. The third has not been secured in form, but the possible life of a parliament has been reduced to five years, and the responsibility of members to their constituents more indirectly but sufficiently secured. The leaders of the movement of 1839 would be astonished at the England of today, if they could return to it, and would be obliged to say that, according to the standards which they proclaimed, it is a democracy, and that in some things which they had at heart, the legal protection of the workingman for instance, progress has gone far beyond their wildest dreams.

The interval of thirty-five years between the first and second reform bills was a period of many changes. A good proportion of these were economic or social in character and not strictly constitutional, but the more important may be named as indicating the general spirit of the epoch. Colonial slavery was abolished, with compensation to owners, in 1833. In the same year a beginning was made in legislation in favor of national education. The beginning was difficult and small, because education was in the hands of the various religious bodies and jealously guarded. It consisted merely in a grant of £20,000 to aid school building, but from this beginning was framed before the end of the century a system of national schools and popular education revolutionary in comparison with anything that went before it. Factory legislation, regulating hours and conditions of labor, had already begun and was now extended, leading on by degrees to the present extensive system of regulation and protection. A new poor law was adopted in 1834. The navigation laws were repealed in 1849, and the corn laws and protective tariffs before 1850. Penny postage and the postage stamp were introduced in 1839, and the postal savings bank in 1861. Much of parliament's time was occupied by Irish troubles and Irish agitation, without significant result.

Of changes between 1832 and 1910 that are to be consid-

ered constitutional, the most extensive and far-reaching after parliamentary reform are those affecting local government, urban and rural.[4] Local government as it had passed into modern times from the Tudor ages was in theory and form self-government. It was in fact local self-government if by that term is meant government free from the interference of the central power. If, however, the term is taken to imply the existence of a democratic community government, then it can be applied to the actual situation only in theory, not in fact. The accumulation of many powers in the hands of the justices of the peace, appointive from the local gentry, the requirement by law of a property qualification for all the important officers who controlled the counties and supervised the parishes, and the outcome of seventeenth century history which restored the squirearchy to as great a practical power in local affairs as the medieval lords of manors had possessed, all combined to make the local government of the eighteenth century and down to 1888 thoroughly aristocratic. The government of the boroughs, which were outside the counties, shows similar tendencies. The only interruption in borough history after the middle ages came from the *Quo warranto* proceedings of the last two Stuart kings, and the only final effect of this interruption was to hasten the process naturally going on which was putting the control of their government more and more into the hands of a close corporation. In both counties and boroughs local government as inherited by the nineteenth century was distinctly undemocratic.

The change was initiated by the success of parliamentary reform, and first in the boroughs. The effect of doing away with the medieval qualifications for parliamentary suffrage was to raise the question of the suitablity of the medieval constitution for other borough functions. Soon after the reform bill of 1832 a royal commission of inquiry into borough governments was appointed, and their report was fol-

[4] Robertson, *Statutes*, 432–437, first edition.

lowed in 1835 by the municipal corporations act — the first step in the process of reform. Fifty years later the third parliamentary reform bill of 1884 had a similar effect on rural local government. By the extension of the borough franchise to the counties it made the old conditions seem as out of place as the first reform bill had in the boroughs. In the meantime, a great variety of individual acts had been passed making single changes, conferring new powers or creating new offices or new local areas. The result was a confused mass of local authorities and districts, overlapping one another and making a "jungle of jurisdictions," a "chaos of authorities." The process of bringing this chaos into the present form has been largely one of simplification, though it has also been one of creation and extension. For our purpose there is no object in following the hundreds of particular steps by which the present result has been reached; the result itself we need to study briefly.

To the American who compares in detail the English system of local government with his own, it still seems to lack simplicity, and he finds it difficult to form a picture of it which is at the same time clear and distinct. The details tend to prevent a general view. Persistence in the attempt leads to the conclusion that the similarities in the local government systems of the two nations are on the whole more numerous than the differences, though these are striking. Perhaps we may say that the English system strikes us as being very much the result which we should get if we superimposed the local government of the states in which the county is the local unit upon that of the states in which the town is the local unit, making a not entirely perfect division between the two units of the functions which would thus be duplicated. In England there are, however, three local units one above the other: the county and county boroughs, which are divided into boroughs and urban and rural districts, these last being in turn subdivided into parishes. In this scheme the position of London is somewhat peculiar.

The government of the city, technically so-called, the square mile extending north from the Thames between the Tower and Temple Bar, has not been affected by the changes of the century, and it remains outside the jurisdiction of the London county council under its own lord mayor. The remainder of greater London, as one might call it, has been organized as a separate county under the London county council, which is formed on the same model as the other county councils but with somewhat more extensive powers. This county of London is divided, like the county boroughs, into boroughs, of which there are twenty-eight.

The county in this scheme of local self-government is not the historical county, though actually it is so in six cases, and does not vary greatly in the others, but the "administrative" county, of which sixty-two were formed from the fifty-two historical counties. The county boroughs were the towns which had anciently been made counties or which had, or should attain, a population of 50,000. Of these, sixty were provided for in the original bill, and there are now over seventy. They are independent of the counties but their position and government is practically the same. In all these the governing body is a council of elected councillors, and of additional aldermen elected for a longer term by the councillors. In the intermediate division, the boroughs and districts, the government is also conducted by an elected council, though without aldermen. In the boroughs this council serves for all borough purposes. The larger parishes have also councils, and in the smaller business is done by an assembly of all the voters, as in the New England town meeting.

To the county councils were transferred nearly all the administrative duties which had accumulated in the hands of the justices of the peace, leaving to these their judicial and a few other functions. Upon the district councils rests the chief responsibility for local sanitary matters and the care of all roads not main highways, which are under control of

the counties. In the parishes civil business has been separated from ecclesiastical, and the latter is in the hands of the vestries. In general the matters which fall naturally to local control are shared in alike by all three local units in diminishing spheres of authority and responsibility from top to bottom. No principle of division between the local units seems clear to one strange to the actual operation of the system, and in some cases, like care of the poor, the place of a principle seems to be taken by tradition from the past. The chief matters under local control are: local finance, the lower grades of education, sanitation, police (shared with the justices of the peace), poor relief and asylums, and roads and bridges. The larger part of the actual work of government is done by committees, upon which persons may be asked to serve who are not members of the councils. The changes which have been made have not taken the control of government out of the hands of the upper and upper middle classes, but there is general satisfaction with the results, and a change in this respect is always within the power of the body of voters.

To the American the least familiar feature of the English system is the supervision which is exercised over local government by authorities of the national government. We need to remember here as elsewhere that the English central government has to perform the functions both of our national and our state governments. We have I believe, however, nowhere anything corresponding to the supervision exercised over local government by certain of the English central administrative departments. There are five of these, each giving its head cabinet rank. The home office supervises local police and a part of the work of local sanitation, with a few other things; the local government board has a great variety of duties, including care of the poor, sanitation and local finance; the boards of education, trade and agriculture supervise the interests indicated by their names. These central departments have the power of issu-

ing orders of a legislative character; they have a right of veto upon many local proposals; they act through a somewhat elaborate system of inspectors; and one of their chief functions is to furnish expert advice and assistance in local enterprises. As the staff in these offices is a permanent one, and as a tendency has been detected on the part of the local authorities to rely more and more on their guidance, the fear has been expressed of the growth of central bureaucratic authority as a result.

It is hardly possible to say that the reforms in the law and in judicial institutions which followed 1832 are of less value to the individual than those in local government, though they are less conspicuous.[5] In 1836 changes were made in criminal trials by which the accused was given the right to counsel and to a more full knowledge of the evidence against him, and in 1837 further advance was made in limiting the number of capital crimes. Following these acts a long series of statutes has been passed affecting both the content of the criminal law and procedure in trials in the interest of humanity and impartial justice. In 1907 the court of criminal appeal was established and very full rights of appeal allowed. In the field of civil law the greatest need of reform was felt in the cumbrous and expensive procedure which had been inherited from medieval times. In 1832 procedure was slightly simplified and was made uniform in all three common law courts. Other reforms followed, especially in 1852 when two statutes were adopted by which extensive changes were made in procedure and in the staffs of the common law courts. Serious reforms in the chancery system began about this time, consolidating the courts, simplifying procedure, and tending to do away with the conflict between equity and common law.

These various streams all contributed to the series of judicature acts of 1873 and following years down to 1910, by which the whole judicial system has been reconstructed

[5] Robertson, *Statutes*, 437–442, first edition.

in external organization and in much of its inner content.[6] All the national courts have been brought into one "supreme court of judicature" which is generic in character, existing only in its two branches, the court of appeal and the high court of justice; the latter also exists only in its three "divisions," the king's bench, the chancery, and the probate, divorce, and admiralty court. The names of the two latter indicate their character, and in the king's bench division the old common law courts have been consolidated, exchequer and common pleas courts disappearing. A part of the business of the high court is also done in the assize courts on circuit, the modern form of the old itinerant justice system. The operation of the divisions of the high court has been made as uniform as possible both in procedure and remedies, common law and equity being fused, but in business they remain distinct. From the decisions of the high court an appeal lies to the court of appeal, and from that to the house of lords as a supreme court. Local justice in civil cases has also been provided for by a division of the country into about 500 districts grouped in circuits, first made in 1846, and called by the historical name of county courts, though they have no connection, historical or geographical, with the older system. From nearly all their judgments an appeal may be taken to the high court and carried on if desired to the house of lords. They have proved very popular in cases of minor importance, and their jurisdiction has been enlarged in the present century. The courts of the justices of the peace, as local criminal and police courts, still continue in petty and quarter sessions.

Little more need be said of the authority of the crown during this period than has already been said. For a long time it was thought that William IV had given in 1834 another example of the power of the king suddenly to dismiss his ministers while they were supported by the house of commons. It now seems proved, however, that the step was

[6] A. and S., 443–453.

taken with the consent, apparently at the suggestion, of the prime minister, Lord Melbourne, who thought his position insecure and wished to retire from it, though the king, who disliked Melbourne, was glad of the excuse. The incident affords an interesting example of constitutional practice. The leader of the opposite party, Sir Robert Peel, was in Rome at the moment. He returned to England at once, formally accepted responsibility for the king's action, organized a cabinet, and attempted to go on with the government, though hopeless of the result. The appeal to the country in the dissolution of parliament which followed shortly increased the conservative vote in the house, but still left the party in a decided minority. Peel presented to parliament an attractive programme of reform, but the hostile majority would have none of it, and after a courageous struggle of four months since his appointment he was obliged to tell the king that he must recall his opponents to office. The action throughout was entirely in harmony with the interpretation of the constitution which then prevailed, and still prevails in theory, but it is not likely that any king will repeat the attempt, or that any minister could now sustain himself in a similar situation so long as Peel did.

The action of Queen Victoria in 1839, in refusing to allow the ladies of her bedchamber to be changed by the incoming ministry, by which she maintained Lord Melbourne in office for two years after he had resigned, is hardly a case of the same kind. The queen was acting not from political motives but because she believed she was improperly required to make a personal sacrifice; the question was a new one which had never occurred as an issue before; and Sir Robert Peel was not anxious, from the uncertain party temper of the house, to take office. By the time he had obtained a secure majority in 1841, the queen had concluded that she ought to yield the point. The publication of Queen Victoria's letters gives many interesting glimpses of the relation of the sovereign to the government during the middle portion of

the century. The support which the queen gave to Sir Robert Peel during his efforts for tariff reform must have been a great encouragement to him. In 1853, when Lord Aberdeen was trying to form a ministry, the queen wrote him saying she hoped Mr. Gladstone would be made chancellor of the exchequer and Lord St. Leonards lord chancellor. In spite of this request, Aberdeen tried to get Mr. Graham to take the exchequer and Lord St. Leonards was not continued as chancellor. Particularly instructive are the accounts given in the letters, especially at the beginning of 1855, of the difficulties encountered and the methods employed by British statesmen in forming a cabinet.

The memorandum which the queen sent in 1850 to the minister for foreign affairs, Lord Palmerston, through the prime minister, throws great light on the sovereign's relation to the formation of government policy. Lord Palmerston was inclined to conduct the business of his department in an independent and somewhat arbitrary way, and the memorandum read: "The queen requires, first, that Lord Palmerston will distinctly state what he proposes in a given case, in order that the queen may know as distinctly to what she is giving her royal sanction. Secondly, having once given her sanction to a measure, that it be not arbitrarily altered or modified by the minister. Such an act she must consider as failing in sincerity towards the crown, and justly to be visited by the exercise of her constitutional rights of dismissing that minister. She expects to be kept informed of what passes between him and the foreign ministers, before important decisions are taken, based upon that intercourse; to receive the foreign despatches in good time; and to have the drafts for her approval, sent to her in sufficient time to make herself acquainted with their contents, before they must be sent off." What the queen demands is clearly not a voice in shaping the ministerial policy. The most that she implies in this direction is a possible withholding of consent. What she demands from the minister is complete and trustworthy

information. In 1851 Lord Palmerston was dismissed from office because he had officially expressed views regarding the *coup d'état* in Paris in variance with the policy adopted by the cabinet and sanctioned by the queen. In the period between 1832 and the present time there has unquestionably been a great increase of the power and widening of the activities of the executive, but this change has been to the advantage of the cabinet and not of the sovereign. For this reason, because of the supposed complete subordination of the cabinet to parliamentary control, the change has excited no opposition and no constitutional criticism.

In the history of political parties the period which followed the reform bill was one of a loosening of party ties and of unusual disorganization. A radical wing of the whig party had already formed, and grew in strength. Sir Robert Peel's repeal of the corn laws split the tory party also, as the majority refused to follow him and the smaller body who did, known as the Peelites, acted for some years by themselves. The disintegration of the older parties is shown also by the gradual disuse in this period of the names whig and tory and the substitution for them of the new names liberal and conservative, with a restricted and special meaning attached to the still occasionally used terms whig and tory. As a result of this condition of things, the decade from 1850 to 1860 is a time of coalition ministries, mostly short-lived and displaying the inevitable weakness of coalition governments, that almost every question of policy which arises is regarded by different sections of the cabinet from a different point of view. About 1859 the Peelites, whose ablest member was Gladstone, definitely identified themselves with the liberal party. Following this, unless we except the rise of the Irish home rule party to parliamentary influence in the late seventies, there was nearly a quarter of a century of more normal party relationships and party governments, though party bonds were then more elastic

than now, especially, as is the case in all countries, in the liberal party.

It was twenty years after the passage of the reform bill of 1832 before there was a serious attempt to make further changes of the same kind. In 1852 and again in 1854, Lord John Russell introduced new reform bills, the first time as prime minister and the second as a member of the cabinet and leader of the house of commons, but neither measure was pressed to a test vote. In 1859, Disraeli, chancellor of the exchequer in Lord Derby's conservative cabinet, brought in another, which was rejected and the ministry, going to the country on the issue, was defeated and gave way to the liberals, who held office until 1866. In 1860 Lord John Russell, now foreign secretary, made his third attempt, but the bill was finally withdrawn through the pressure of other business, and in 1866 the ministry of Earl Russell, formerly Lord John Russell, was defeated on another reform bill and resigned. The liberal party was at that time so divided within its own ranks upon details of the question that it could not perfect and carry a measure. None of these proposed bills had been accompanied by any very strong popular demand, but, on the defeat of the last bill, the public, especially the working classes, made it clear that a demand for reform had risen which must be satisfied. The result was the reform bill of 1867, "the second reform bill," introduced by Mr. Disraeli, again chancellor of the exchequer.

A conservative cabinet was in office under the earl of Derby, but the liberal party, when acting together, had a strong majority in the house of commons. In these circumstances Disraeli proposed that the reform bill should be made a non-partisan measure, and it was really carried by a combination of both parties. The liberals were, however, strong enough to make the bill over to suit themselves, and Disraeli wise enough to allow most of the conservative

safeguards which he had embodied in his first proposals to be thrown out. The bill passed was a liberal party bill, though it probably could not have been carried without conservative votes, and certainly it would have been rejected by the house of lords if it had not been the government measure of a conservative cabinet.

The second reform bill was framed upon the same lines as the first.[7] The qualifications required of electors were decidedly lowered, especially of voters in the boroughs, but the tests were of the same kind, virtually property qualifications. In the boroughs occupiers of houses were enfranchised, and occupiers of lodgings paying a rental of ten pounds. In the counties those able to meet a twelve pound occupation requirement were added to existing voters. About a million new voters were created by the act, not quite doubling the previous number, but the step towards democracy was a longer one than this ratio would imply, for the main increase was from the artisan class in the boroughs. The percentage of increase in the borough vote of the country was 134, and in some towns the old number of voters was multiplied by three. Agricultural laborers were still without the vote, and all laborers in towns which were not parliamentary boroughs. In the redistribution of seats which accompanied the act, fifty-two were taken from the smaller boroughs and given to eleven new boroughs, to a few old boroughs in increased representation, and to the counties.

One incidental effect of this bill was not foreseen and would not have been desired. It led to closer party organization and even to something like machine methods. By an amendment made by the house of lords and accepted by the commons, a limited proportional representation was introduced. In five boroughs and seven counties, electing three members each, the elector was not allowed to vote for more than two. The provision accomplished its purpose in most cases, but in Birmingham, under the lead of Joseph Chamberlain, by

[7] A. and S., 532–537; Robertson, *Statutes*, 425–426, first edition.

a new local organization called the "liberal association," which undertook a careful supervision of the liberal vote in the borough, the party was able to retain all three seats. This was the beginning of what came to be known in England as the caucus system. Other local "associations" were formed on the Birmingham model, and also a "national federation of liberal associations." The permanent result seems to have been, not exactly the American caucus and convention organization, but a more centralized party direction and supervision of the selection of candidates and of elections than existed before, and with it a decrease of independence on the part of the individual voter and of the party candidate as well.

The general tendencies which followed from the broadening of the suffrage led to some extent in the same direction. Gradually the dependence of the house of commons upon the electors was increased. By degrees the controlling power of constituencies began to be more immediately felt. The house itself began to change. It had been a body whose members were chosen indeed by separate localities, but to represent not the locality but the whole nation. It was the theory, and so far as human nature permits it had been the fact, that the house in full and free discussion, with a completeness of knowledge and a consideration of all circumstances impossible to the electors, reached its own decisions and determined the fate of ministries and policies. Now the electors in the different constituencies began to demand a more direct responsibility to themselves, to regard their member as the means of their own expression on national questions, and above all to expect from him a constant fidelity to the party which had elected him. These are all clear indications of growing democratic power. For the present, in the period we are considering, they were only beginnings. Men of the time were scarcely conscious of them, and we have become aware of their existence less by a study of the facts of the time alone than by tracing back to their be-

ginnings changes which are later more clearly forced upon us.

The general election of 1868 gave the liberals a strong majority, and Disraeli, who had succeeded the earl of Derby as prime minister early in the year, resigned without waiting for the meeting of parliament, the first minister to recognize in this way the decision of the country. Gladstone then became prime minister and continued in office until 1874. The five years of his administration was a time of important reforms. The Irish church was disestablished,[8] and an Irish land bill passed, the beginning of protection for the tenant farmer. An education bill carried farther the nationalization of education. Non-conformists were admitted to the universities. The purchase of commissions in the army was abolished by an act of the royal prerogative, when the house of lords seemed likely to defeat the bill for that purpose. A second bill to introduce voting by ballot was passed after the house of lords had set the first bill aside. Finally the judicature acts already discussed were passed. Meanwhile proposals for the extension of the suffrage had been made in parliament, but no favorable action was taken before Gladstone's second ministry, which began in 1880.

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[8] A. and S., 538–543.

CHAPTER XIX

DEMOCRATIC ENGLAND

If the reform bill of 1867 set England upon the threshold of a new political epoch in progress towards democracy, the third bill of 1884 threw the door wide open. In fact England was ready for a step which was nearly final. Reform had lost its terrors during half a century in which no national calamities had followed from it. Society had not been disrupted; property had not been made insecure; and the radical party had not obtained permanent possession of the government. Even the larger extension of the suffrage in 1867 had not disturbed the balance of parties. Not merely in the intellectual convictions of men, but in habits of thought and action, democracy had made great progress.

On becoming prime minister for the second time in 1880, Mr. Gladstone had a great majority in the house of commons, but he did not introduce a new enfranchisement bill until 1884. In the previous year an incident illustrates, in one of the first important cases of the kind occurring, the methods by which the constituencies were bringing their influence to bear upon parliament and also directly upon the cabinet. In October 2500 delegates from 500 liberal associations met in conference at Leeds, and discussed a reform programme which they desired to have followed by the ministry, and this was only one of several similar incidents of the time.

The new reform bill was not seriously opposed on principle by the conservatives, but they found their point of opposition in the fact that a bill for a redistribution of seats did not accompany it but was to be postponed for a year. On this ground the bill was rejected by the house of

lords. Mr. Gladstone refused to order a general election on this account, but in preparation for a new session, in which the bill should be introduced again, the subject was vigorously debated before the electors. In this debate a suggestion was heard, not indeed for the first time during the nineteenth century, but perhaps for the first time as a serious proposal, that it might prove necessary to remodel the constitution of the house of lords, and Gladstone formally called the attention of Queen Victoria to this feature of the discussion. The queen was naturally disturbed at such a possibility, and hardly less at the prospect of a deadlock between the two houses. She undertook in consequence the office of mediator, and wrote to Gladstone and to Lord Salisbury urging a personal conference between them to see if they could not arrive at an understanding which would permit the bill to pass.

In such a conference the proposed provisions of the redistribution bill were explained to the conservative leaders and found to be unobjectionable, and the bill was passed by the lords. Gladstone at once expressed his gratitude to the queen, writing her that "his first duty was to tender his grateful thanks to Her Majesty for the wise, gracious, and steady influence on your Majesty's part which has so powerfully contributed to bring about this accommodation, and to avert a serious crisis of affairs." Already in 1869 Victoria had interfered in a similar way on the prospect of a deadlock on the Irish disestablishment bill with equal success, and received Mr. Gladstone's written thanks. Again in 1885, after Mr. Gladstone had been defeated by a combination of conservative and Irish votes, she labored with success to bring about an understanding between Lord Salisbury, who was trying to form a conservative ministry, and Gladstone, who still commanded 100 more votes in the house than the conservatives unless they could have the uncertain support of the Irish. These instances are all good examples of the influence upon practical affairs which the crown may

still exert, not to make decisions but to smooth away difficulties and to make things easy for those who do decide.

By the reform bill of 1884 [1] the "occupation franchise," which had been given the boroughs in 1867, was extended to the counties, and the qualifications for the suffrage in these two kinds of electoral districts were, with some slight exceptions, made uniform for the first time in parliamentary history. The right to vote was granted to every male over twenty-one years of age who was the "inhabitant occupier" of a dwelling house, or of any part of a house occupied as a separate dwelling, whether he occupied as owner, as tenant, or by virtue of any office, service, or employment, unless the house was also occupied by the person whom he served; and to every lodger occupying rooms of a yearly value, if let unfurnished, of ten pounds. The act did not quite introduce a democratic universal suffrage. Some old privileges, property franchises, the plural voter, still remained. A young man living in his father's family, a servant living in his master's house, could not vote. But these exceptions were of comparatively small importance. The coachman or gardener living in a cottage on the estate could be put on the register, and any man earning day wages, or having an equivalent income, who was willing to take the trouble to meet the conditions, was really enabled to do so. Under this act nearly as many votes in proportion to the population have been cast in a parliamentary as in an American congressional election.

In 1885 an act redistributing seats and rearranging electoral districts was passed,[2] making far more radical changes than ever before. Twelve new members were added to the house of commons, making 670 in all. Of these 465 were to be returned by England, 30 by Wales, 72 by Scotland, and 103 by Ireland, England having the smallest representation in proportion to population and Ireland the largest. Some

[1] A. and S., 553–555; Robertson, *Statutes*, 427–428, first edition.

[2] A. and S., 554–555; Robertson, *Statutes*, 427–428, first edition.

few constituencies were left returning more than one member but the most of the United Kingdom was divided into 617 electoral districts each choosing a single member. These districts were determined by population and, while the principle of the representation of equal units of population was not quite so exactly realized in England as in the United States, there are inequalities with us, and perfect exactness of measure is hardly possible anywhere. In the meantime other acts, perhaps less strictly constitutional in character, had made the way of democracy easier. The Australian secret ballot had been adopted;[8] registration had been and was to be further simplified in the interest of the elector; and corrupt practices acts had greatly reduced the opportunity to influence elections improperly.

Since 1885 in everything except a few points, less important practically than theoretically, England has been a democracy. It is indeed fair to say that, so far as the immediate influence of public opinion upon government policy is concerned, England has been for a generation more democratic than the United States. The cabinet system of government, the ministry responsible to the house of commons, losing office when it loses its majority, provides a way by which almost automatically, without waiting for a future election day, a change of national judgment is carried out in a change of government policy, provided always that opinion changes in the house of commons with the change of opinion outside. It has done so certainly in the past and may be expected to do so in the future, indeed with the increased power of the constituencies over the house hardly any other result is possible.

This control of parliament and of the cabinet by the pressure of outside opinion is the most characteristic feature of the history of party and of the practical operation of government since the reform bill of 1884. Even before that bill could have any effect, the pressure was very consciously felt

[8] A. and S., 540–543.

by ministers. In 1880, after he had become prime minister, Gladstone wrote to Lord Rosebery: "What is outside Parliament seems to me to be fast mounting, nay to have already mounted, to an importance much exceeding what is inside;" and after the government had resigned in 1885, the duke of Argyll wrote Gladstone that he thought he had allowed "speeches outside to affect opinion, and politically to commit the cabinet in a direction . . . which was not determined by the Government as a whole." These words describe nothing more than a natural result of the establishment of democracy, and the tendency to which they refer went on unchecked and with increasing force in the years following.

The results brought about before the close of the century were very marked, and we have for them not merely the evidence of critics but the testimony of men familiar from experience with the inner working of government. They constitute unmistakably a change from the mid-Victoria period, both in the general aspect of parliamentary government and in the relationship of the component parts to one another, as these matters were described by the writers of that time, and as they then unquestionably existed. In general it may be said that the effect of these changes has been to bring about a much greater similarity in the surface appearance and in the practical working of government between England and the United States than formerly existed, notwithstanding the great constitutional differences which still remain. They are results which have not yet expressed themselves in constitutional form, except perhaps in one instance. They have affected the conventional rather than the legal side of the constitution, the interpretation rather than the form, but it need not be repeated that changes of that kind in English-speaking nations are changes of substance.

It cannot yet be asserted with confidence that these changes are so fixed that they imply the passage of the constitution from one stage of its development into another. Cab-

inet and parliamentary government are not yet so far removed from their Victorian phase, so much of the latter still lingers in theory and in popular interpretation, that a return to it in reality is not impossible if democracy should outgrow the stage of somewhat nervous experimenting to find out what it can do and how to do it, and settle down into a confident possession of power, so that the member of the house of commons need no longer be a delegate. If means can be found to relieve the house of more of the burden of local government and of minor and insignificant detail, so that opportunity of general debate on greater questions, debate that can be really fruitful of results, can be restored, the Victorian system of cabinet government may easily return. We shall notice after 1905 some qualification of late nineteenth century tendencies. The really essential change was one that concerns the relation of the cabinet to the house of commons on one side and to the constituencies on the other. To state it in the baldest way: the house of commons seemed to be no longer the master and director of the cabinet, but the cabinet, appointed and supported by the electorate, to be about to become the master and director of the house of commons. The statement is perhaps a little too strong, but the necessary qualifications can best be made in a more full account of the situation.

Since the second reform bill, the majorities by which one party or the other has triumphed in the elections have been as a rule so great as to give the government formed by that party a complete control in the house. A majority of more than a hundred is not easily turned into a minority by the desertion of dissatisfied members. The exceptions have been found chiefly where independent groups, like the Irish home-rule party, have held the balance of power. To this fact must be added two others. One is that the new constituencies demanded a much more unwavering loyalty to the party leaders than used to be shown them by the rank and file of their party in the house. They seem to have reached

a very definite conclusion that the things they desire can be best secured by a strict adherence to the party programme. The organization of the "associations" made it easier than before both to concentrate opinion at home and to bring it to bear upon the member. In the second place, secure seats were not so easy to find as under the aristocratic regime. An election, with all the cross-currents of interest in the community and with a number of candidates in the field, was always an uncertain and always, with its legitimate expenses, a costly affair. A member was not very happy in taking an independent stand unless he felt sure that he had behind him the opinion of those who elected him. In consequence the coercive power of a threat to dissolve parliament and to appeal to the country in a general election became almost irresistible. The cabinet had in its hands a whip, which it did not hesitate to use, to drive doubtful supporters back into the party lines. To declare a bill a government measure, and therefore one on which defeat would endanger the life of parliament, was an almost certain means of carrying it and of defence against any material amendment.

If we suppose this theory carried to its logical conclusion, the cabinet would be the absolute master of parliament, and the theory on which the cabinet system of government is founded would no longer correspond to the facts. That theory is, that members of the house who have supported the cabinet on one question may vote against it on another. It is the theory that the government must maintain its position by convincing a majority of the house, or the unconvinced members of its own party will vote against it and turn it out. If this is no longer true, then after an election with its great majority a cabinet will be unshakable, until the life of parliament expires by statute limitation. In that case there would be no difference of any importance between the British system and the American plan of congressional elections at fixed dates. That the tendency is towards such

a result cannot be denied, but it has hardly been reached as yet. Members of the party in the house do still occasionally turn against the government. Majorities, however large at the beginning, do still sometimes crumble and disintegrate, as had Mr. Balfour's in 1905. The outside power, which sustains or destroys a cabinet, has been, for nearly two hundred years, public opinion. It is not so much this fact which has changed as the point at which this force makes itself evident. The house of commons is no longer the place where public opinion is collected and made known, as in the middle ages, nor, as in the eighteenth century so far as public opinion existed at all, where it is led and determined. Parliament and cabinet are both, independent of one another, controlled by opinion which is formed and declared elsewhere, and the house of commons seems to be likely to be reduced more and more to the position of a registering machine recording an outside decision. As a matter of the mechanics of the constitution, it still brings that decision to bear upon government, not because the opinion is of its own formation, but because it is the historical institution through which that function has always been performed, and nothing better for the purpose has yet been devised.

If we could be sure that these tendencies which we detect in operation during the last forty years were real and permanent, then we should have to do with a constitutional change as great as any in the past. Whether that is so or not, time alone can decide, but there are certain attendant features of this democratic movement which ought not to be overlooked. One of the most significant is that debating in the house of commons seems to have little influence on the vote which follows. The really interesting portions of a debate are the little tactical scrimmages which occur now and then, not the solid arguments pro and con. If the result is a foregone conclusion, determined by the huge ministerial majority and by the decision of the constituencies,

every one knows the debate on the merits of the measure will not change it. Speeches in opposition are not of much more effect than the protests entered in the journals of the house of lords. They serve to make a record of the speaker's stand. In many cases they really are addressed to the outside public. Members do not listen to the debates. Inattention does not go quite so far as in the American congress, but it seems to be approaching our record, and for the same reason. Real discussion, by which the opinion is formed which decides public questions, has been transferred from the house of commons to the political platform and to the newspaper and periodical press. It is addressed directly to those who make the decisions.

Another characteristic is that oftentimes business, and sometimes business of great importance, is disposed of with no adequate discussion. This is not due alone to the fact that so large a portion of each session is taken up with government business. It is partly owing to the vast amount of local and detailed business which parliament must settle, and it affects government bills as well as private bills. If the house of commons loses its power to decide questions of prime importance, it may still perform a very necessary function in the criticism of details, in forcing the government, the main feature of whose measure is sure to be adopted, to defend every subordinate means it proposes to employ for its purpose. This is particularly true of financial legislation, but, notwithstanding the pains which have been taken to secure full discussion by a compulsory assignment of time to this subject throughout the session, the object has not been attained. Business is always in arrears; it is crowded into the last days of the session, and important questions often have to be settled with almost no examination.

The changes affecting relations between electorate, parliament, and cabinet did not escape the attention of men who were actively interested in parliament and government. Lord Salisbury said in 1894: "There is an enormous change in

the house of commons as I recollect it, and the evolution is still going on, and we have reached this point — that discussion of a measure is possible in the Cabinet, but for any effective or useful purpose, it is rapidly becoming an impossibility in the house of commons." In the same year he said again: "I think . . . that in respect to the larger issues, the house of commons is gradually losing its power, between the cabinet on the one side, and the electorate on the other." In 1901 Lord Hugh Cecil, a conservative leader, said in the house of commons: " . . . there is a deep seated feeling that the house is an institution which has ceased to have much authority or much repute, and that when a better institution, the cabinet, encroaches upon the rights of a worse one, it is a matter of small concern to the country." In 1911, said the present lord chancellor, then Mr. F. E. Smith, also in the house: " Honorable members know the conditions under which business is carried on in the house. It is only a form and a name to say that they are left to the house of commons. They are not left to the house at all; they are left to the cabinet."

If these observations of modern tendencies are correct, certain conclusions would seem to be inevitable. The house of commons no longer holds the ministry to its responsibility. If the house turns against the ministry only because the constituencies have turned that way, the power has passed from the house to the constituencies. The mid-Victorian judgment that the cabinet is a third house of the legislature is emphatically true; the cabinet is almost the legislature. Again, while general elections in England are somewhat more likely to turn directly upon questions of national policy than in the United States, they will most frequently be a choice of men, or of general policy, rather than a decision of specific issues. It seems inevitable also that there will be a slow lowering of the intellectual level of the house of commons, and many observers have believed that this change is already evident. There are so many points of similarity between

the features of English public life which have been noted and the political characteristics of public life in America that they would seem to indicate the natural tendencies of a democracy, or at least of a democracy learning the business of government. It is the business of the historian, however, especially with regard to his own age, to note what is, rather than to draw definite conclusions. His experience also teaches him greater caution in positive statement about his own time than even about some past age.

The house of lords during this period has undergone less real change than the house of commons. The limits of its power have been for the first time expressed in statute form, but the statute did not make a change; it defined in specific terms a change which had already taken place. Apart from this one fact, the history of the house of lords has followed the same lines of development for many centuries. During modern times it has slowly grown in numbers with the increase of the population and wealth of England. The essential facts have been given for the sixteenth century. The Stuarts made a net addition of 94, and William and Anne raised the total number to 178 besides the Scotch representative peers. Many creations were made by George I and George II, but on the accession of George III the number was still only 174. His creations numbered 388, but of these only 128 were in existence as separate peerages, in the 460 members of the house, in 1860. Some titles had of course become absorbed in others, but many had become extinct. Nowhere is the tendency of the race to die at the top so easily illustrated as in the history of the British peerage. In the first twenty-eight years of Queen Victoria's reign there was no increase in members, one peerage becoming extinct for every new one created. Few families survive the second century after they attain rank, and the peerage has practically been renewed at about that interval of time ever since the Norman conquest. Creations have been freely made in recent times. The house numbered 591 at the acces-

sion of Edward VII, and 623 at that of George V. Its number on March 31, 1919, was 698. Of these 130 are recorded as liberal, though between 1905 and 1919, 149 peerages had been created by liberal and coalition ministries.

Since the democratic movement began in England the house of lords has become somewhat more representative, at least of the wealth of the country. To make it so, is said to have been the deliberate policy of the younger Pitt. Creations have been more freely made from those who have distinguished themselves in commerce and manufactures, and distinction in literature and science, particularly the latter, has also been recognized. But these creations have had no effect on the attitude of the house towards public questions. It has not become more representative of the nation politically. As has been said above, it has always seemed to be difficult, with distinguished exceptions, for a family to remain long liberal after it enters the house of lords, and this has been especially true since the secession of the old whig families in protest against Gladstone's first home rule bill. Between 1830 and 1910 the conservatives in 34 years of office created 181 peers, and the liberals in 45 years, 270, but in the peerage books of 1911 the number of liberals recorded is 105, and by no means so many could be depended upon to be present in a division.

In responding to a toast to the house of lords in 1881, the earl of Derby said: "I am not going to give you a constitutional essay on the rights and duties of the house of lords—rights which for the most part it does not practically enjoy, and duties which for the most part it does not practically perform." Undoubtedly Lord Derby had no intention of being taken literally. He was merely putting, in a pleasant after-dinner way, a popular feeling about the lords, but an exaggerated one. The house of lords has still important rights which it enjoys, and important duties which it performs, as we shall see. A function of the house of great value which still survives is that of debate and amend-

ment. The course of business in the lords is far more leisurely than in the commons. It is not so buried in details. It can give abundant time to the more important subjects which come before it, and its rules of debate allow of thorough discussion. Those who attend regularly and take part in the debates are the ablest members of a picked body, especially trained in public affairs, and the debating is on a very high level. The average is much above the average of the house of commons debates, and its influence, with the exception of occasional speeches in the lower house, is greater. The amendments made by the lords, and not infrequently accepted by the commons, often go far to make up the latter's deficiencies in the examination of a measure. Even the rejection of a bill which the commons has passed may be accepted as a more accurate expression of public opinion, or at least as a not unwelcome postponement of a doubtful measure. The rejection by the upper house of Gladstone's second home rule bill in 1893 has commonly been regarded as warranted by the general feeling of doubt and reluctance among the people. The attitude of the house of lords towards the measures proposed by the liberal ministry after the election of 1906 will be considered in the next chapter.

The cabinet not merely inherited, during the nineteenth century, the executive power of the crown and the legislative power of parliament, it was also itself directly affected by the currents of change which then prevailed. For one thing, it steadily increased in size. The cabinets of the opening century numbered barely a dozen members; by the middle of the century the number had risen to fourteen or fifteen; at the end there were nineteen or twenty members. The increase was not due primarily to a wish to have the advice of a larger number of political leaders. Such a wish is disproved by the tendency, which has been particularly marked of recent years, to form an inner circle of especially influential ministers, like the *conciliabulum* of the eighteenth century. The increase has been due chiefly to the growth of new

administrative departments, charged with work of so great importance that the head of the department seemed necessarily of cabinet rank, or to a corresponding increase of the importance of the work of older departments. The growth of the business of these departments, old and new, and the character of the work they have had to supervise, are significant signs of the expansion which government has undergone in the past two or three generations. The two secretaries of state of Elizabeth's time grew into five in the nineteenth century. During most of the eighteenth century there had been three, the third a part of the time for Scotland, a part of the time for the colonies; but the third did not become permanent until 1794, when a secretary for war was appointed. In 1801 he was given charge also of the colonies. In 1854 these two departments were separated and a secretary of state for the colonies appointed, and in 1858, when India was transferred from the East India company to the crown, a secretary of state for India. Since 1782 the two original secretaries have been, the one at the head of the home department, the other of the foreign. The office of the secretary at war, never a secretary of state, and generally occupied with subordinate duties only, was not continued after 1863. In strict legal theory, the five secretaries of state are one, that is, they perform the duties of one office. In most things any one of them can do the work of any other, and most statutes, in conferring powers upon "the secretary of state," do not distinguish any one of them specifically. The home secretary is technically the first secretary of state.

Equally great transformation, though rather in the opposite direction, has overtaken the other great offices of the old king's council. The lord high chancellor remains, with his original rank, and with his original functions changed only in part. The lord high treasurer and the lord high admiral disappeared altogether early in the eighteenth century, both offices being put into commission. The lord

president of the council and the lord privy seal still exist as offices, the first with formal duties infrequently occurring, the latter with none. These two offices are treated as sinecures and given to members of the house of lords, almost never to a commoner, who are desired in the cabinet but who are unwilling to undertake the duties of an active office. The office of chancellor of the duchy of Lancaster is also a sinecure, and is often used in the same way for a commoner, The treasury is nominally "in commission" in the hands of four lords of the treasury, but the practical duties are performed by the chancellor of the exchequer, so that the four lordships are also sinecures, the prime minister usually being the first lord and three of the whips of the party in office the junior lords.

Most indicative of the character of changes since the middle of the century are the departments known as "boards," for the business of those which are older than 1850 has shown as great expansion as that of those which have been more recently created. The term "board" is really a misnomer, for no board exists except in legal theory; each is really an executive department, like the American department of agriculture, with a minister at its head, who is recently almost, though not quite, always a member of the cabinet. A considerable part of the work of the boards is not administration in the strict sense, but supervision of the activities of local bodies. The oldest of these departments is the board of trade, which goes back to a not continuous history in the seventeenth century; it was given a new organization and a new name, the board of trade and plantations, in 1696, and was again reorganized as the committee of council for trade in 1786. Since that date various minor changes have been made, of name in 1862 and of organization in 1867, and the field of its work has been enlarged, though it lost its major connection with the colonies when they were transferred to the secretary of state for war in 1801. The board of education began also as a committee

of the privy council in 1839. The vice-president of the council at the head of the committee was made a minister responsible to parliament in 1856, and in 1899 the committee was reorganized as a board with a president. The local government board, whose work has already been indicated, was formed in 1871, as the successor of the poor law board which had been established in 1847. The board of works was created in 1851, and the board of agriculture in 1889. A vast amount of detail is looked after by these boards in the course of the year, and much of it of great importance. This fact has been recently recognized in the case of the board of trade and the local government board by making the salary of their presidents equal to that of a secretary of state, £5,000.

The account of the British cabinet and its activities, as given in this chapter, is no doubt incomplete. The fact should not be overlooked, however, that it cannot be the purpose of a book of this kind to explain fully what the cabinet is and how it operates. That duty belongs to books descriptive of the English government of today. The task undertaken here is to record changes which have occurred, and to describe tendencies which seem to be going on, and which may have constitutional consequences.

The first years of the parliament which was elected in January, 1906, seemed to promise the opening of a new epoch in English constitutional history, or at least a time of reversion to an earlier type. Two of the tendencies noticeable during the previous half century appeared to be declining: the cabinet seemed to be returning to a dependence upon the house of commons, and the house of lords seemed about to resume its older place in legislation. It is now possible to say that the apparent change was not a real one, but the deviation from the straight line of development is worthy of note.

It is true that in some respects, down to the outbreak of the war, the cabinet was obliged to defer to the opinion of

the house, as many in 1905 thought it would never do again. This at least is the way in which the fact would have been described by a mid-Victorian writer, who would have seen it particularly after the second election of 1910. A study of details, however, shows that the dependence was more apparent than real. In the first place, what it affected was not the general policy of the ministry, nor the chief features of the legislation which the cabinet proposed. In these respects the cabinet was as supreme as it had been during the past dozen years, and the house had as little power of alteration. It was comparatively minor details which were affected. In the second place, such dependence as the cabinet showed was not upon the house of commons as a whole, as an organized body, but it was dependence upon the more or less independent groups among its own supporters.

In continental states having parliamentary government, the tendency of liberal parties, of parties of the general left, to split up into groups has long been manifest. Subdivision seems to be a natural characteristic of parties whose chief programme is change and reform. Some groups wish to go faster than others do; some groups emphasize strongly a particular change in which others are not as interested. In all these parties it is difficult to maintain a common programme and united voting strength except by concession and compromise, and compromise is usually not upon the main items of the party programme, upon which all divisions are apt to agree, but upon subordinate details. The more divided the party is, the greater is the necessity of compromise, and the greater the opportunity to obtain its demands which is offered to the subordinate group, more devoted, as is often true, to its own peculiar reform than to the programme of the party as a whole.

Down to the end of the nineteenth century, while a tendency in the liberal party to divide into groups was not wanting in England, it had no effect upon actual legislation. During most of the last quarter of the century the party

was out of office, and had no opportunity to write its policy in the statute book. The one question which brings out most clearly the evidence and influence of subordinate groups, the Irish home rule question, the party failed to settle while in power. In the house of commons elected in January, 1906, the liberal party had so overwhelming a majority, well over 300, and more than 150 even if the Irish nationalists voted against them, and subdivision into groups was still so incomplete, that it was not necessary to carry the policy of compromise very far. Still the ministry did not always feel secure of its position, and the party showed an independence and a spirit of criticism not unlike a return to earlier times. After the elections of January and December, 1910, the strength of the independent element was greatly increased. In both those elections the liberal party proper lost heavily, as compared with 1906, and the unionists, the term now coming into use as the common name for the united conservatives and liberal unionists, gained, so that these two parties stood in the house in almost equal numbers, the unionists at times even having two or three votes more than the liberals. The liberal cabinet remained in office, but it was entirely dependent upon subordinate parties, now stronger and better organized than before, not merely to maintain itself in office, but to carry its measures into law.

This is the period, then, from February, 1910, to the summer of 1914, which is to be studied in pre-war English history for recent tendencies, especially for the effect of subordinate parties upon cabinet government. Apparently it is not possible to say that there was a return to the position in which the cabinet stood in relation to the house in 1870. Its real power of dictation to the house was not modified. There was more effective criticism of government measures in matters of detail than there had been during the ten years of the conservative government which followed 1895; but the really effective criticism was not that of the house, nor of the opposition, in the sense of the writers of

fifty years ago, but of the government's own party, or of the parties in general alliance with it. At the same time it was made clear that the ultimate controlling power was the opinion in the constituencies, now well supplied with means of expressing itself. If we may judge by the opinions voiced in the reviews and leading political weeklies between 1906 and 1914, English students of their own political life saw no decline of the tendencies noticed earlier in this chapter as modifying cabinet government. On the contrary, a recognition of these tendencies and of the probable constitutional results was more general than it had been at any time in the nineteenth century.

The resumption of its legislative position by the house of lords, after the election of 1906, was more real. After ten years' possession of power, the unionist conservative party had been overwhelmingly defeated. The house of lords, however, seemed to take the ground that the great popular victory did not give the liberal party authority to carry into immediate effect their whole programme. The upper house resumed in full force its right of suspensive veto, and demanded in effect that the will of the nation should be conclusively shown on the more important contentious measures of reform which were proposed. While it cannot be asserted that the house of lords went beyond the function of a brake upon the wheel assigned to it in the preceding half century, it can be said that it seemed to be trying to find out what limit there was upon its action in that direction. The matter must not be numerically exaggerated. Out of 213 government bills between 1906 and 1910, eighteen failed to pass. The lords rejected only a part of these, but they amended others in such essential respects that they were dropped. Five acts which the majority in the house of commons regarded as of prime importance were among these: an education bill, a plural voting bill, a Scotch land-holding bill, a licensing bill, and the government budget of the year 1909. So that in substance the action of the lords was more

of an interference with liberal plans of legislation than it appears to be when measured numerically.

It was the rejection of the government's finance bill in 1909 that led to a constitutional settlement of the question raised by the house of lords. The budget involved a reassessment of land values, a taxation of the unearned increment, and in general a heavier taxation of wealth. It excited intense opposition among the classes naturally belonging to the conservative party. The right of the house of lords to amend a money bill had been lost, but the right to reject was recognized. It was generally felt, however, that to reject the bill, leaving the national finances of the year in confusion, was an extreme act and almost a direct challenge to the house of commons to define its own power and the power of the lords as well. It was also pointed out by some that in this rejection the lords were really claiming new powers. If the government, in consequence of their action, reintroduced the budget without the clauses to which they objected, the upper house would have established a right of indirectly amending a money bill; and, if the government chose to appeal to a new general election, it would have gained the right of forcing a dissolution of parliament. The assertion of the lords that some of the clauses of the bill were legislative and so cases of "tacking," which gave them a right to reject, was not convincing to many. Almost from the beginning of this parliament the proposal had been heard in the commons, and more frequently outside, that a definite limit ought to be placed upon the veto right of the upper chamber, and in June, 1907, the necessity was affirmed by a large majority of the house of commons in a formal resolution proposed by the prime minister, but no further action was taken at the time.

The lords rejected the bill on November 30, 1909. Two days later the house of commons declared the action to be a breach of the constitution and a usurpation of privilege. Parliament was speedily dissolved, and a general election held

in January, 1910. The election reduced the number of liberals proper in the house to 274, and increased the unionist vote to 272, leaving the balance of power in the hands of the 41 labor members and the 82 Irish nationalists. These parties were, however, equally determined with the liberals that the veto power of the lords should be limited, and even more insistent that this question should be dealt with in advance of the financial difficulty. To meet this demand, resolutions embodying the points of their proposed bill were introduced by the government and adopted on April 14. With these resolutions and a statement by Mr. Asquith of what the ministry would do if the lords refused to accept the plan proposed, the parties supporting the government were satisfied, and the finance bill, the same as that of 1909, was voted, and was now immediately agreed to by the lords. The course of action on the veto bill was interrupted by the death of King Edward VII in May, and a general wish not to force matters to an extreme crisis on a fundamental question of the constitution at the beginning of a new reign.

To avoid such an issue, an interesting experiment was tried, not unlike those proposed by Queen Victoria and referred to above. A conference was arranged between leaders of both the great parties, members of both houses, four from each party, to see if action which both sides would accept could not be agreed upon. Many meetings of the conference were held during the summer and early autumn without success, and early in November it abandoned the task. This method of trying to settle a serious disagreement was tried again, with as little result, on the Irish question, when King George summoned, in July, 1914, a conference at Buckingham Palace of the speaker of the house of commons and two representatives each from the ministerialists, the opposition, the nationalists, and the Ulsterites, which held several meetings. Though the method did not in these cases obtain a success equal to its promise, it was not felt that the promise had proved fallacious.

The failure of the conference led at once to the extreme action foreshadowed to the house by Mr. Asquith in April. The cabinet advised the king to dissolve parliament, and presented at the same time to the king, as became known some time later, a memorandum asking him to agree in case of a favorable election to create peers enough to carry the veto bill through the house of lords, if that should ultimately prove to be the only way to save the bill. As this memorandum stands in interesting relation to earlier incidents of this history and is in itself constitutionally significant, it should be quoted in full: "His Majesty's Ministers cannot take the responsibility of advising a dissolution unless they may understand that, in the event of the policy of the government being approved by an adequate majority in the new House of Commons, His Majesty will be ready to exercise his constitutional powers, which may involve the prerogative of creating peers, if needed, to secure that effect shall be given to the decision of the country. His Majesty's Ministers are fully alive to the importance of keeping the name of the king out of the sphere of party and electoral controversy. They take upon themselves, as is their duty, the entire and exclusive responsibility for the policy which they will place before the electorate. His Majesty will doubtless agree that it would be inadvisable, in the interests of the state, that any communication of the intentions of the crown should be made public unless and until the actual occasion should arise."

Nothing so extreme had ever been asked, however, of any earlier sovereign. The creation of twelve peers was sufficient in Queen Anne's time. Fifty would have been enough in 1832. Now the estimated number of necessary new creations was 400. Naturally the opposition lords were excited and angry, both when they only suspected such cabinet action and when it became known. The cabinet's memorandum was called an ultimatum, and the action was spoken of as coercing the king. Very generally it was believed that, if

the extreme steps were actually taken, it would be the ruin of the peerage. The king, after full discussion of the question with the prime minister and with Lord Crewe, leader of the government party in the house of lords, gave the pledge asked for. The election, held in December, 1910, left parties as they were in the house of commons. None of the four parties was increased or decreased by as many as four votes. The result was regarded, however, as authorizing the ministry to go on to limit the powers of the upper chamber.

In the meantime proposals for the reconstruction of the house of lords had been made by members of it, and even by the house itself in formal resolutions. They were hardly less drastic than those of the government but differed from them in more or less important details, in dealing largely with relations between the two houses and especially in emphasizing the plan of submitting disputes between the houses to a decision of the people by a referendum. These proposals indicated at least a conviction on the part of the lords that extensive constitutional changes could not be avoided. In the new house of commons the prime minister immediately reintroduced the parliament bill of the previous year, and it passed the house in May, 1911. At first the lords attempted to amend the bill, but when it became evident that their amendments would not be accepted, and when it was made clear that the king would follow the advice of the cabinet and create the required number of peers, the house voted not to insist on the amendments. The vote was 131 to 114. Most of the unionist peers refrained from voting; a few voted with the liberals, and the bill passed the house very much as the first reform bill had in 1832.

The parliament bill as passed was limited to "restricting the existing powers of the House of Lords," and made no provision for a reconstruction of the house, though this part of the plan had been as much discussed as the other, and was declared by the preamble of the bill to be intended. It was provided that two classes of bills might become laws without

the consent of the house of lords: money bills and other "public bills." A money bill becomes an act of parliament if it is not passed by the lords within one month after receiving it from the commons. A certificate of the speaker of the house of commons guarantees that the bill is a money bill, that is, that it does not contain other legislation. Other public bills, if passed by the house of commons in three successive sessions, whether of the same parliament or not, and rejected by the house of lords each time, become acts of parliament on the third rejection, provided the passage through the house of commons has occupied two years from the second reading in the first session. The bill must be identical in all sessions except for such changes as the speaker may certify to be necessary from lapse of time, or as may be contained in amendments proposed by the lords and accepted by the commons. In practice, however, it may be accompanied with a separate amending bill. By the parliament bill also the life of a parliament was reduced to five years, and this limitation cannot be changed without the expressed assent of the house of lords. Under this act the home rule for Ireland bill and the Welsh disestablishment bill became laws in 1914, though the operation of both was suspended during the war.

To an outside student of English history, the constitutional importance of the parliament act seems to have been a good deal exaggerated, especially by its opponents. It has made only one real change. It has taken away the power of the house of lords to delay for more than two years a measure sanctioned by the people, as the bills referred to above were delayed, or the plural voting bill, later twice passed by the house of commons under the parliament act before August, 1914. It does not seem possible, however, to defend such a right of indefinite delay on any ground which does not deny the existence of democratic government. This change being admitted, the parliament act does no more than to put into fixed statute form the theory regarding the

function of the upper house in legislation which had been universally held, as a theory, for three-quarters of a century. It specifies two years as the limit of delay, but the right to delay a measure until public opinion had clearly declared in its favor is all that had been claimed for the lords, though they can now only occasionally cause a delay until after an election. The accepted theory required them to yield at some time, as completely as they did on the budget of 1909 when presented to them again in 1910.

Two other constitutional results, which have been asserted, must be noticed. It has been said that the constitution of England is now in part written. This is no more a result of the parliament bill than of many other statutes in the past, and none of them makes a written constitution, or part of one, in quite the American sense. They do not mark out a new way for the future; they rather make a record of past progress. The parliament bill embodies in written and binding form the results of the constitutional advance since 1688, as they affect the house of lords, as the Bill of Rights did the results of the seventeenth century, as they affected the monarchy. It was also asserted that the tendency of the parliament act would be to increase the power of the cabinet over the house of commons. The majority party would be bound, it was thought, to keep the ministry in office till the end of the fixed term rather than to run the risk of bringing to an end the progress already made towards some desired legislation. It was quite possible that in individual cases the act might have this effect. They were likely to be individual cases, however, not numerous enough to form a tendency, and they were not likely to reinforce materially the influences working in the same direction.

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CHAPTER XX

THE WORLD WAR

For more than four years, from August, 1914, to November, 1918, Great Britain was engaged in the most costly and destructive war in all history. The activities of the government and the people were concentrated on national defence and the winning of the war, and little attention could be given to matters not directly related to these objects. The prime minister announced, even before the formal declaration of war, that all controversial legislation would be postponed. Party differences were laid aside and, except for the action of a few irreconcilables, almost disappeared in common support of the government. The two controversial measures that were passed under the parliament act without the approval of the house of lords — the bill for Irish home rule and the bill to disestablish the Anglican church in Wales — were, indeed, placed on the statute book after the outbreak of the war, but their operation was suspended for its duration. Under the provision of the parliament act limiting the life of parliament to five years the existing parliament would have come to an end not later than January, 1916, but it seemed undesirable to all parties to hold a general election during the war. Acts were accordingly passed by the war parliament prolonging its own existence, and it was not dissolved until November, 1918, nearly eight years after the beginning of its first session. Nothing illustrates more clearly the legal sovereignty of parliament and the flexibility of the English constitution than the power of parliament to extend its own duration.

The tendency of modern war is to increase the powers of

the executive government. For years before the war the authority of the house of commons had, on the whole, been diminishing as the power of the cabinet increased, and the immediate effect of the war was to exalt the cabinet and depress the house still further. In its relation to war legislation and finance parliament was little more than a body for the registration of executive decrees. Its legislative initiative, which had declined greatly before the war, now disappeared. Autocratic powers demanded by the government were conferred upon it with little or no debate and as a matter of course. By a number of defence of the realm acts parliament delegated to the king in council — actually to the government of the day — the power to make regulations for securing the public safety and even to authorize the trial by court martial of persons committing offences against the regulations. Upon this foundation there was erected a vast structure of administrative legislation which profoundly affected the life and liberty of the citizen. In a few instances the legality of regulations issued under these acts was questioned in court. In the leading case of Rex *v.* Halliday (1917) the house of lords, the highest court of appeal, was called upon to decide as to the legality of a regulation, made under a defence of the realm act passed in 1914, authorizing the home secretary to intern persons of hostile origin or associations. The legality of the regulation was upheld, and the result of the decision, as has been said, "was to make it almost impossible for the Courts to interfere with the exercise of the legislative powers delegated to the Executive for the period of the war by the Defence of the Realm Act."[1]

The exigencies of war led to some remarkable and radical changes in the system of cabinet government. For nearly a year after the beginning of hostilities the liberal cabinet of Mr. Asquith remained in power. In May, 1915, a coalition cabinet was formed, consisting of liberals, unionists and laborites; the Irish nationalists, who constituted the other

[1] D. L. Keir and F. H. Lawson, *Cases in Constitutional Law*, 9.

party in the house of commons, declined to enter the cabinet, though they gave it general support. For all practical purposes there ceased to be an opposition in parliament. Mr. Asquith remained as prime minister. The difficulties involved in the attempt to conduct war upon a scale of magnitude unprecedented in history by means of a cabinet of twenty odd members, whose time and energy were divided between parliamentary, departmental and cabinet business, soon began to attract public attention. Several committees were formed within the cabinet, but these by no means solved the problem. The lead in educating public opinion to a realization of the inadequacies of the existing system and the need of more effective control of policy and coordination of effort was taken by the Northcliffe press. As early as September, 1915, *The Times*, the most influential of Lord Northcliffe's newspapers, urged the formation of a small war cabinet, and before the end of the year a "war committee" of the cabinet, consisting of some half dozen members with the prime minister at its head, practically took over from the larger body the management of the war. It was more efficiently organized than the cabinet, with a secretariat which recorded its proceedings and transmitted its decisions to those concerned.

At the beginning of December, 1916, Mr. Lloyd George, the most popular member of the cabinet and a member of the war committee, notified the prime minister that he could not remain in the government unless thorough-going changes were made in the conduct of the war and proposed that the war committee should be limited to three or four members, not including the prime minister. This proposal having been rejected, the insurgent minister resigned, and Mr. Asquith felt obliged to do likewise, thus putting an end to the existing cabinet. The unionist leader, Mr. Bonar Law, was asked to form a ministry, but declined, and on December 6 the king sent for Mr. Lloyd George, who undertook the task.

This political crisis resulted in very much more than a mere change of ministry. It was the occasion of a radical

alteration of governmental organization. Hitherto it had been an accepted convention of the English constitution that the cabinet should consist of and be confined to the heads of the more important executive departments, with the addition of the holders of two or three nominal offices, such as the lord president of the council and the lord privy seal. Under this arrangement the same men who, as individuals, presided over the departments, in their collective capacity as a cabinet determined questions of public policy. In the early twentieth century cabinets had contained about twenty members.

When the list of the Lloyd George ministry was published it was seen that the old type of cabinet had disappeared. Its place was taken by a much smaller body, a "war cabinet" of five members, headed by the new prime minister. Like the cabinet which it succeeded this war cabinet was a coalition. One of its members was a liberal (Lloyd George), one was a laborite (Arthur Henderson), and three were unionists (Lord Curzon, Lord Milner and Bonar Law). Of these only one had any departmental duties to perform; this was Mr. Law, who was chancellor of the exchequer. Two of the others held no office, and two held nominal offices that involved no administrative work. The heads of the great executive departments, such as the foreign office, the admiralty, etc., were not of cabinet rank and appeared under the modest heading "other ministers."

Under this new system the management of the war and the control of governmental policy was entrusted to a small body of men who, with one exception, were freed from administrative duties. The heads of the executive departments, on the other hand, were released from the burden of cabinet business and were able to devote much more time and energy to problems of administration than had been possible under the old system. This division of labor resulted in an increase in efficiency both in the work of the cabinet and in the work of administration. A notable feature of the new system as compared with the old was the appointment to ministeria'

office of men who had acquired reputations as technical experts rather than as politicians. The creation of a number of new departments (the ministries of labor, shipping, air, pensions, reconstruction and others) added to the size of the ministry but not of the cabinet. In 1918 the total membership of the ministry was almost one hundred.

Everybody who has written on the English cabinet as it was before December, 1916, has referred to its secrecy. Not only were its meetings private, but it had no secretary and kept no formal record of its own proceedings. It was one of the duties of the prime minister to write to the sovereign after every cabinet meeting, informing him of the decisions that had been reached, but these letters were confidential and were never published. According to Gladstone no member of a cabinet except the prime minister was entitled to make any note of proceedings, and Asquith has related that on one occasion when his attention was called to the fact that a member of his cabinet was apparently taking notes he felt obliged to remonstrate with him. Since there was no written record to appeal to, it is not surprising that cabinet ministers sometimes had very hazy notions of what had been decided, or that different ministers had different impressions of decisions that had been reached. Members of the cabinet were always privy councillors, and as such were sworn to secrecy; it was understood that no member of the cabinet should refer afterwards to anything that had transpired in its meetings. The procedure of pre-war cabinets was decidedly unbusinesslike, to say the least.[2]

Under the new system it became necessary to devise new means to insure prompt communication between the cabinet and the departments whose heads no longer sat in the cabi-

[2] The cabinet has always been supposed to be a secret body, but it has been shown that in the eighteenth century its meetings were not as secret as they came to be later on. Outsiders, it seems, were often summoned to attend, and private minutes of proceedings in the cabinet were made by members for their own use. See E. R. Turner, *The Cabinet Council of England in the Seventeenth and Eighteenth Centuries*, chapter xix.

net, and these in turn involved the abandonment of the old secrecy. The war cabinet took over the secretariat of the war committee; its principal duties were to record the proceedings of the cabinet, transmit its decisions to the departments, prepare the agenda of cabinet meetings, procure documents required for the information of the cabinet, carry on correspondence, prepare reports, and arrange for the attendance of outsiders at cabinet meetings. During the first year of the existence of the war cabinet no fewer than 248 persons, including experts in all branches of administration, attended its meetings. Under such circumstances the cloud of mystery that had surrounded cabinets in the past disappeared. Perhaps the most striking evidence of the abandonment of the old secrecy was the publication by the war cabinet of reports for the years 1917 and 1918.

The war cabinet met much more frequently than cabinets had ever done in the past. From the date of its establishment in December, 1916, to the close of 1918 it held 495 meetings. The following brief description of its procedure is taken from the report for 1917:

At each meeting the Cabinet begins by hearing reports as to the progress of the war since the preceding day. Unless it wishes to confine its deliberations to general questions of policy, it then proceeds to deal with questions awaiting its decision. As these questions in the vast majority of cases affect one or more of the administrative departments, almost all its meetings are attended by the ministers and their chief departmental officials concerned. The majority of the sessions of the War Cabinet consist, therefore, of a series of meetings between members of the War Cabinet and those responsible for executive action, at which questions of policy concerning those departments are discussed and settled. Questions of overlapping or conflict between departments are determined and the general lines of policy throughout every branch of the administration co-ordinated so as to form part of a consistent war plan. Ministers have full discretion to bring with them any experts, either from their own departments or from outside, whose advice they consider would be useful.

In the chapter on "Democratic England" attention was called to a change in the relation of the cabinet to the house of commons that was observable in the latter part of the nineteenth century. To state it broadly, the cabinet, which had been regarded as the servant of the house of commons, seemed to be becoming its master. In a brilliant description of the English government as it worked in the mid-Victorian period Walter Bagehot represented as its most distinctive feature the responsibility of the cabinet to the house of commons. A generation later Sidney Low gave evidence to show that this responsibility had become little more than a fiction.[3] "The House of Commons," Mr. Low said, "no longer controls the Executive; on the contrary the Executive controls the House of Commons. The theory is that the ministers must justify each and all of their acts before the representatives of the nation at every stage; if they fail to do so, these representatives will turn them out of office. But in our modern practice the Cabinet is scarcely ever turned out of office by Parliament *whatever it does.*" Mr. Low did not mean that the cabinet had become totally irresponsible, but that responsibility to the house of commons had been supplanted — to a great extent at least — by responsibility to the people. Public opinion, whether expressed in a general election or through extra-constitutional agencies, especially the press, seemed to have succeeded the house of commons as the maker and unmaker of cabinets.

During the war there were two changes of ministry, and in neither case was the change brought about by action of the house of commons. It was not an adverse vote in the house that put an end to the liberal cabinet in 1915 or to the coalition cabinet in 1916. A distinguished English publicist, commenting on the crisis of December, 1916, said: "In the

[3] As to the change in the relation between the cabinet and the commons the student will be interested in comparing Low's *The Governance of England,* chapters iv–v, with Bagehot's *The English Constitution,* chapter ii.

present instance the House has not been defied, but it has not been consulted. Mr. Lloyd George draws his strength from outside the walls of Parliament; he owes his elevation to a kind of informal and irregular, but unmistakably emphatic, plebiscite. The House of Commons did not make him Premier; it is doubtful whether it could unmake him."

Before the establishment of the war cabinet it had been an accepted rule that all members of the cabinet must be members of the house of commons or the house of lords, and that the prime minister, when not a peer, should be the leader of the house of commons. The members of the war cabinet were, with one exception,[4] members of parliament, but most of them seldom attended at debates. The prime minister ceased to be the leader of the house of commons and was not present as a rule at its sittings. His place in the house was taken by the chancellor of the exchequer, who spoke for the government and answered questions addressed to the prime minister. The withdrawal of the cabinet, and especially of the prime minister, from parliament naturally elicited some adverse comment and criticism.

A constitutional innovation that concerned not only Great Britain but the whole empire as well was the temporary merging of the British war cabinet into a wider imperial cabinet. One of the first acts of the Lloyd George government was to invite the prime ministers of the self-governing British Dominions to attend a series of special meetings of the war cabinet; and there thus came into existence a new institution known as the imperial war cabinet, consisting of the members of the British war cabinet, the prime ministers of the Dominions, the secretary of state for India, and the secretary of state for the colonies, the last attending to speak on behalf of the crown colonies and protectorates. It

[4] The exception was General Smuts, the South African statesman, who was a member of the war cabinet from June, 1917, to December, 1918. His position was peculiarly anomalous inasmuch as he was not a member of the British parliament, nor did he hold any ministerial office in Great Britain.

was presided over by the British prime minister and held a series of meetings extending from March to May, 1917. The oversea representatives did not attend in a subordinate capacity, but were on a footing of equality with the members of the British war cabinet. As was later explained in the house of lords:

> The British Cabinet became for the time being an Imperial War Cabinet. While it was in session its overseas members had access to all the information which was at the disposal of His Majesty's Government, and occupied a status of absolute equality with that of the members of the British War Cabinet. It had prolonged discussions on all the most vital aspects of imperial policy, and came to important decisions with regard to them — decisions which will enable us to prosecute the war with increased unity and vigour, and which will be of the greatest value when it comes to the negotiation of peace. . . .

The imperial war cabinet was not a cabinet in the usual meaning of that term. Its members were not all members of the same parliament, nor were they all responsible to the same parliament. It was, rather, an intergovernmental council of a peculiarly intimate kind. One of its members, Sir Robert Borden, prime minister of Canada, described it as a " Cabinet of Governments rather than of Ministers."

The imperial war cabinet held a second series of meetings beginning in June, 1918, and lasting till August. A third series began on November 20, 1918, shortly after the armistice. These were held to consider questions involved in the approaching peace settlement, and it was the imperial war cabinet that constituted the British empire delegation at the Paris peace conference in 1919.

The imperial war cabinet was successful in dealing with the problems confronting it, and it seemed possible that an imperial cabinet would remain as a permanent institution. Such was the hope of many people, both in Great Britain and in the Dominions, who desired to strengthen bonds of imperial unity. At the last meeting of the first series the Brit-

ish prime minister proposed, with the approval of the oversea representatives, that similar meetings should be held annually, or more frequently if desirable. But the new institution proved to be short-lived and came to an end with the war.

The British war cabinet continued in existence for nearly a year after the armistice. A general election was held in December, 1918 — the so-called " khaki election " — and resulted in an overwhelming victory for the Lloyd George coalition. The prime minister decided to form a new administration, and there was a widespread belief that the war cabinet system would be given up. But when the new ministry was announced, in January, 1919, it was stated that the war cabinet would be continued until there had been time to make permanent peace arrangements.

After the cessation of hostilities some reaction against executive autocracy was naturally to be looked for. The new house of commons soon showed itself to be of more independent spirit than its predecessor. A series of by-elections during the first half of 1919 showed a falling off in the coalition vote and were damaging to the prime minister's prestige, and even more significant was the growing criticism of the government in parliament and in the country. Resentment was freely expressed at the continuance of war-time methods of government — more specifically of the war cabinet and the lack of ministerial responsibility, the habitual absence of ministers and especially of the prime minister from their places in parliament, and the increasing number of subordinate government officials in the house of commons.

Discontent culminated on October 23, 1919, when the house of commons by a large majority defeated a legislative measure of the government. Four days later it was announced that the cabinet had been reconstructed and that it would consist of nineteen members including, as in pre-war days, the heads of most of the important executive departments. This meant that the war cabinet system was at an end and that the cabinet was again on a peace basis. The

fact is that the house of commons had administered a stinging rebuke to the government and thereby regained at a stroke something of its old prestige. It should be noted, however, that the supporters of the ministry in this house of commons, though more than twice as numerous as the opposition groups, were not a single well disciplined party, but a coalition lacking in permanent cohesiveness. In this circumstance lay the possibility of sudden realignments and political surprises. Commenting on the vote of October 23 *The Manchester Guardian* said editorially: "The House seemed servile, ineffective, almost a corpse. Then suddenly something within it roused the old instinct of self-assertion, of independence. The Government seemed all-powerful. All at once it finds itself powerless and is seen almost to grovel . . . the House of Commons has begun to recover its own soul, to be a House of Commons and no longer a chattering and registering machine."

During the war a long step forward was taken in that march of democracy which began with the reform act of 1832. Universal manhood suffrage, which had been approached but not quite reached by the reform act of 1884, was established and the vote was given to more than 6,000,000 women, with the result that the electorate was considerably more than doubled. Plural voting was restricted, the law relating to the parliamentary franchise was simplified, the principle of proportional representation was introduced, and there was a new distribution of seats and rearrangement of electoral districts.

For several years after the franchise act of 1884 and the redistribution act of 1885 there had been little discussion regarding further electoral reform. During the period of unionist rule from 1895 to 1905 the subject received slight attention. In 1906 the liberal government introduced a bill to abolish plural voting, which was passed by the commons but rejected by the lords. Again, in 1913, the commons passed a similar bill, but it met the same fate at the hands of

the lords. It was re-passed by the commons in the following year, and it was again defeated in the lords. Had it not been for the coming of the war, it would probably have been passed for the third time by the commons and would have become law over the lords' veto, in accordance with the provisions of the parliament act, in 1915.

The first serious discussion in parliament of women's suffrage took place when John Stuart Mill moved an amendment to the reform bill of 1867 to enfranchise women; it was defeated by a large majority. A similar amendment to the reform bill of 1884 met a like fate. The suffrage movement grew rapidly among women during the first decade of the twentieth century, but a cleavage developed between those who advocated militant tactics and direct action as a means of accomplishing their object — the "suffragettes" — and those who were unwilling to go beyond constitutional methods — the "suffragists." Militancy began during the electoral campaign of 1906. The liberal cabinets which were in power from that time till the beginning of the war were divided on the subject of women's suffrage, and while a number of bills to enfranchise women were introduced in the house of commons by private members during this period, none of them passed the house. The militant movement reached its climax early in 1914, when the suffragettes carried on a campaign of terrorism in which window-smashing, church-burning and bombing of houses and public buildings figured conspicuously. Upon the outbreak of the war the militants patriotically declared a truce and used their organizations for war relief work.

In 1916 the prime minister, Mr. Asquith, asked the speaker of the house of commons to convene a conference in order to consider the question of electoral reform and submit proposals to the government. The conference, consisting of twenty-seven members of the house of commons and five peers, and representative of all shades of political opinion, met in October of that year and in the following January

made its report to Mr. Lloyd George, who had meantime become prime minister. The house of commons approved the recommendations of the conference in March, 1917, by an overwhelming majority, and a bill based upon them was passed by both houses of parliament and became law in February, 1918. Though it was more radical in certain respects than any preceding reform act, especially in its provision for women's suffrage, it encountered far less opposition than any of its predecessors. This is to be explained largely by the fact that it was passed at a time when the women of the country, by their patriotic and devoted work in support of the war, seemed to have earned the right to vote, when, moreover, a coalition government was in power and the normal partisanship in parliament was in abeyance.

The act of 1918 greatly simplified the law relating to the parliamentary franchise. It abolished the previous property qualifications and completely assimilated the county and the borough franchise. Like the acts of 1832 and 1867 it provided both for extension of the suffrage and for redistribution of seats. It gave the right to vote to women, though not on the same terms as to men, limited plural voting, increased the number of university constituencies and applied to them the principle of proportional representation, and regulated registration and election expenditures.

As to the franchise, it provided that a man could be registered as a parliamentary elector for a constituency (other than a university constituency) if he had reached the age of twenty-one years, was not subject to any legal incapacity, and could satisfy the requirements of the act as to either residence or the occupation of business premises, business premises being defined as premises of the yearly value of not less than ten pounds, occupied for the purpose of the business or profession of the elector; in both cases the qualifying period was to be six months. A man could be registered for a university constituency, subject to the same requirements as to age and the absence of legal incapacity, if he had re-

ceived a degree (other than an honorary degree) at a university forming the constituency or part of it; the qualifications were slightly different in the case of the Scottish and Irish universities. University constituencies date from the reign of James I when Oxford and Cambridge were given representation in the house of commons. By the reform act of 1867 the university of London became a parliamentary constituency, and the four Scottish universities — Glasgow, Aberdeen, Edinburgh and St. Andrews — were grouped so as to form two constituencies.

A woman could be registered for a constituency (other than a university constituency) if she had reached the age of thirty, was not subject to any legal incapacity, and was either entitled to be registered as a local government elector or was the wife of a man entitled to be so registered; the qualification for a local government elector was occupation of a dwelling or other premises of the yearly value of not less than five pounds. A woman could be registered for a university constituency, subject to the same requirements as to age and the absence of legal incapacity, if she either would be entitled to be registered if she were a man or, in the case of a university which did not admit women to degrees, would have been entitled to a degree but for this discrimination. The reason why the suffrage was not given to women on the same terms as to men was because there was at the time a considerable excess of women over men in the population, and the government and parliament were unwilling that there should be a preponderance of women in the electorate. Every person, man or woman, registered for any constituency was entitled, while so registered, to vote in that constituency at a parliamentary election.

The act made provision for a new distribution of seats. The total membership of the house of commons was raised from 670, at which it had been fixed by the redistribution act of 1885, to 707; to England and Wales were assigned 528 seats, to Scotland 74, and to Ireland 105. The total number

was later reduced to 615 when the establishment of the Irish Free State, in 1922, separated the greater part of Ireland from the United Kingdom; Northern Ireland, which remains a part of the United Kingdom, is represented by thirteen members. The principle of the single-member constituency, which had been adopted in 1885, was continued. In general, each constituency was to be represented by one member, the exceptions being the city of London, a few boroughs, the universities of Oxford and Cambridge, and a group of English universities forming a single constituency, each of which was to elect two members, and a constituency comprising the four Scottish universities, which was to elect three. In England, Wales and Scotland the ratio of representation to population was approximately 1 to 70,000; in Ireland, 1 to 43,000. In the university constituencies to which two or more seats were assigned, elections were to be on the principle of proportional representation.

Plural voting was restricted though not entirely abolished. No man could vote for more than one constituency for which he was registered by virtue of a residence qualification, or for more than one for which he was registered by virtue of any other qualification; and no woman could vote for more than one constituency for which she was registered by virtue of her own or her husband's local government qualification, or for more than one for which she was registered by virtue of any other qualification. The effect of these restrictions was that no man or woman could vote in more than two constituencies, nor in more than one by virtue of the same qualification. For example, if a man resided in one constituency and occupied business premises in two or more others, he could vote in the first but in only one of the others. If he resided in one constituency, occupied business premises in another, and held a degree from a university, he could vote in the first, but if he chose to vote in the second, he could not vote in his university constituency and *vice versa*.

Women were admitted to the house of commons by an

act passed in 1918, and in the following year Lady Astor, an American by birth, took her seat as the first woman member of the house. Women cannot sit in the house of lords, though a woman may be a peeress in her own right. In 1919 it was provided by statute that no person should be disqualified for office-holding or for the exercise of any public function by reason of sex, and in 1922 a peeress in her own right, the Viscountess Rhondda, claimed the right to a writ of summons to the house of lords, but it was ruled by the lords' committee of privileges that she was not entitled to it. If and when the upper chamber is reformed, it is probable that women will be admitted to it.

During the last hundred years many proposals have been made for the reorganization of the house of lords, sometimes combined with recommendations to lessen its powers and alter its relations to the house of commons, and it has even been urged that a second chamber of any kind is useless or worse. The parliament act of 1911, as has been seen, diminished the powers of the house of lords, but it did not provide for its reform. The preamble of the act made it clear, however, that radical reconstruction of the upper house was in contemplation, for it declared that "it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation."[5] It has not yet been brought into operation, and the old unreformed house of lords is still (1934) in existence. It will be appropriate to make some reference in this chapter to projects for its reform, inasmuch as the whole question, including the subject of the powers of the second chamber and its relation to the house of commons, received prolonged and careful study during the war.

The house of lords then consisted — and still consists —

[5] D. Oswald Dykes, *Source Book of Constitutional History from 1660*, 189.

of the following classes of members: (i) the holders of hereditary peerages, including peerages of England, created before the union with Scotland in 1707, peerages of Great Britain, created between 1707 and the union with Ireland in 1800, and peerages of the United Kingdom of Great Britain and Ireland, created since 1800; this class is by far the most numerous and embraces nine-tenths or more of all the members of the house of lords; (ii) princes of the blood royal, a few members of the royal family, who rarely attend meetings of the house and take no part in its proceedings; (iii) the representative peers of Scotland, sixteen in number, elected by the Scottish peerage for each parliament; (iv) the twenty-eight representative peers of Ireland, elected by the Irish peerage for life; (v) the lords spiritual, consisting of the two archbishops of the established church and twenty-four bishops; (vi) the lords of appeal in ordinary, six in number, appointed by the crown under statutory authority for the purpose of increasing the number of judges in the house of lords, which, it must be remembered, is a court of law as well as a branch of the legislature.

The house of lords has been criticized on various grounds, and criticism has come from its friends as well as its enemies. With the advance of democracy and the progressive democratization of the house of commons after 1832 a second chamber predominantly hereditary in its composition has come to seem more and more of an anomaly, a survival of feudalism and medievalism. A large majority of the members of the house are members, as a reforming peer once remarked, because they gave themselves the trouble to be born. Men of ability and political experience, well qualified for the business of legislation, have been made peers, but they have seldom been succeeded by heirs similarly qualified. The majority of the members of the house do not take their membership seriously, and it is seldom that more than a small minority are in attendance at a sitting. Partisanship is another ground on which the house of lords

has been attacked. Ever since 1832 a majority of its members have been conservative in politics, and since 1886, when a number of liberal peers seceded from their party on the issue of Irish home rule, the liberal members of the house have been in a very small minority; in 1905 there were only 45 liberals in a total membership of more than 600. At times when the conservative party has been in office and in a majority in the house of commons the relations between the two houses have been harmonious, but it has been otherwise when the liberals have controlled the commons. This was conspicuously the case during the years of liberal rule from the election of 1906 till the outbreak of the war, when friction between the lords and the commons resulted in the passing of the parliament act. It has also been objected to the house of lords that it is unduly representative of wealth, especially of landed wealth, and that many important interests in the country are not represented in it; and the privileged position of one religious organization, the established church, has naturally not found favor with other denominations. Fault has been found, too, with the size of the membership of the house and the slim attendance at its sittings. The number of persons who have the right to attend is now (1934) between 700 and 800, considerably more than the membership of the house of commons, but it is seldom that more than 200 actually attend.

An analysis of the proposals for reform that have been offered shows the recurrence of a few leading ideas. The earliest of these was the creation of life peers, which was advocated from time to time during the second half of the nineteenth century and the early years of the twentieth as a means of improving the quality of the upper house. In the Wensleydale case (1856) it was decided that while the crown could by prerogative create life peers, it did not have the right to confer upon such persons the privilege of a seat in the house of lords. A few bills to empower the

crown to confer life peerages with seats in the house upon specially qualified persons were introduced in parliament — the earliest was in 1869 — but none of them became law. A small group of members of the house of lords who are virtually life peers came into existence as a result of the appellate jurisdiction act of 1876, which authorized the crown to appoint four — the number was later increased to six — "lords of appeal in ordinary," who were to act as judges and receive salaries. They are fully members of the house of lords, however, and can take part in its legislative proceedings if they desire to do so, and they remain members for life even if they cease to discharge judicial functions. Another type of proposal has been that the whole body of the peers should elect a number of their own members to represent them in the house of lords, in other words, that the representative principle, which had previously been applied to the Scottish and Irish peers, should be extended to the peerage as a whole. This was advocated, in conjunction with other reforms, by Lord Rosebery in 1888, by a committee of the house of lords in 1908, and by Lord Lansdowne in a bill introduced in the house of lords in 1911 but not passed. Another important type of reform seems to have been first broached by Rosebery in 1888, namely, the election of a number of members of the upper house by outside bodies. Lansdowne's bill provided for the election for large constituencies of 120 members of the house of lords by members of the house of commons having seats within those constituencies.

In August, 1917, the prime minister appointed a conference to investigate and report upon the question of second chamber reform, including the powers to be exercised by a reformed upper house and its relation to the house of commons. The conference made a thorough study of the whole subject and submitted its conclusions in the form of a letter written by the chairman, Lord Bryce, to the

prime minister in April, 1918.[6] It agreed that the following functions were appropriate to a second chamber: (i) examination and revision of bills passed by the commons, especially as the latter had been obliged during the last thirty years or so to work under pressure and subject to rules limiting debate; (ii) initiation of bills of a relatively non-controversial nature, which might pass the commons more easily if they had already been fully discussed and put in well considered form; (iii) interposition of so much delay, and no more, in the passing of a bill into law as might be needed in order to enable the opinion of the nation to be adequately expressed, especially in the case of bills of a constitutional character and those introducing new principles of legislation; (iv) full and free discussion of important questions of policy at times when the house of commons might happen to be so busy that it could not find opportunity to discuss them. The conference agreed, also, that a second chamber ought not to be coordinate with the house of commons, especially with regard to finance and the making and unmaking of ministries, that no one set of political opinions ought to be likely to hold a permanent predominance, that it should aim at ascertaining the opinion of the country as a whole, that it should endeavor to inform and influence the public through its debates, and that it should, as far as possible, have continuity with the historic house of lords.

How a second chamber should be composed the conference found to be the most difficult subject it had to consider. It was agreed, on the one hand, that it ought to have some institutional continuity with the existing house of lords and, on the other, that it should have popular authority behind it, that its membership should be open to all British subjects, and that it should be responsive to public opinion. After prolonged consideration, the majority of the

[6] Howard Lee McBain and Lindsay Rogers, *The New Constitutions of Europe*, 573.

conference recommended that one section of the proposed second chamber should consist of about 250 members, elected by members of the house of commons grouped according to geographical areas, the number of seats in the second chamber allotted to these areas to be roughly in proportion to their population. For example, the 63 members of the house of commons for the Greater London area (with a population of about 4,500,000) would choose 27 members of the second chamber for that area; the 57 members of the house for the Yorkshire area (with a population of about 4,000,000) would choose 24 members. It was proposed that there should be a second section, consisting of about 80 members chosen by a joint standing committee of both houses appointed at the beginning of each parliament, that all these members should be selected in the first instance from among the holders of hereditary peerages and the bishops of the established church, but that the number of peers and bishops so chosen should eventually be reduced to thirty. Members of both sections, it was proposed, should hold their seats for twelve years, one-third of each section retiring every fourth year. If and so long as the new second chamber should perform the judicial functions of the old house of lords, the conference recommended that the lord chancellor and any ex-lord chancellors and the lords of appeal in ordinary should be members *ex officio*, and that they should retain their seats as long as they continued to act as judges.

There was no disposition in the conference to give the second chamber power to amend or reject finance bills, nor to enable it permanently to block other bills passed by the house of commons. With respect to the latter a somewhat elaborate procedure for adjusting differences between the two houses was proposed which would give the second chamber only a limited power of delay.

The recommendations that have been outlined were not acted upon. Some proposals for second chamber reform

have been made since 1918, but no government has yet taken the question seriously in hand. When the time for this comes, if it does, the conclusions of the Bryce conference will probably receive careful consideration.

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CHAPTER XXI

THE IRISH FREE STATE

An event of outstanding importance in the constitutional history of the United Kingdom since the World War was the establishment of the Irish Free State in 1922. This gave to the greater part of Ireland the status of a self-governing British Dominion and put an end to the union of Great Britain and Ireland, which had been formed in 1801.

The large majority of the Irish people had never been satisfied with the provisions of the union, and discontent had taken both revolutionary and constitutional forms. An example of the latter was the Irish nationalist party, formed in the early '70's, which advocated a system of home rule, with an Irish parliament in Dublin subordinate to the British parliament. In 1886 and in 1893 Gladstone introduced home rule bills, but the former failed to pass the house of commons, owing to a split in the liberal party, and the latter, having passed the commons, was rejected by the lords. At length, in 1914, at a time when the liberal ministry then in power was dependent for support in the house of commons upon the Irish nationalists, a government of Ireland, or home rule, act was passed, under the provisions of the parliament act, over the veto of the house of lords. It provided for an Irish parliament and a responsible ministry, but various subjects were reserved for British control, and Ireland was to continue to be represented in the parliament at Westminster. Though accepted by the nationalist party, it did not really fulfill Irish national aspirations, and it never went into operation. Before it became law the United Kingdom had entered the World War, and its operation was

suspended for the duration of the war by a subsequent act of parliament.

The chief obstacle to all plans of home rule had always been the unwillingness of the Protestants of Ulster to be subjected to the rule of an Irish parliament which would inevitably be preponderantly Catholic. From 1912 to 1914, when the government of Ireland act was pending, Ulster was preparing to defy the authority of the proposed Irish parliament if and when it should be established, and Ulster had the moral support of opponents of home rule in England. Civil war would probably have broken out in Ireland in 1914, for the Protestant north and the Catholic south were both armed, the former to resist, the latter to support the home rule bill. But the outbreak of the World War led to a temporary truce.

In 1920, after the close of the war, parliament passed another government of Ireland act, which was based upon the principle of partition. It provided for two separate Irish parliaments and administrations, one for the greater part of Ulster, henceforth known as Northern Ireland, the other for all the rest of Ireland, referred to in the act as Southern Ireland. Northern Ireland, though it included only about one-sixth of the area of Ireland, contained nearly one-third of the entire population of the island and the greater part of its manufacturing industry. There was to be a council for all Ireland, consisting of members appointed by the two parliaments, intended to promote harmony between Northern and Southern Ireland, and the ultimate establishment of a single parliament for all Ireland was contemplated. Northern Ireland accepted this arrangement, though without enthusiasm, because the Ulster leaders believed that the only effective means of forestalling future attempts to bring their section under the authority of an all-Ireland parliament was to have a parliament of its own. The system of government provided for in

the act of 1920 went into operation in Northern Ireland in 1921.

In Southern Ireland conditions were such that there was no possibility of the act of 1920 being put into operation. An association known as "Sinn Fein," which means Ourselves Alone, had come into existence in the early years of the twentieth century and had become the most potent political force in the country. It advocated the establishment of an independent Irish republic. In the general election of December, 1918, Sinn Fein candidates were nominated in all constituencies, pledged not to take their seats in the parliament at Westminster, if elected, but to form a national Irish parliament. The result of the election was a sweeping victory for Sinn Fein and the virtual elimination of the old nationalist or home rule party. The successful Sinn Fein candidates met in Dublin in January, 1919, and constituted themselves the "dail Eireann," which means assembly of Ireland. This body issued a declaration of independence and adopted a constitution which vested executive authority in a cabinet consisting of a president, elected by the dail, and four ministers named by the president, subject to confirmation by the dail. The name "Saorstat Eireann," meaning Irish Free State, was the official designation of the new state. Eamonn De Valera, a prominent Sinn Fein leader, was elected president. Under the government of Ireland act, 1920, there was to be an election in 1921 for the parliament of Southern Ireland provided for by that act. The dail, though declaring the act to be illegal, decided that the election should take place and should be regarded as the election for the next dail. In all but four of the constituencies Sinn Fein candidates were returned unopposed. It was thus that the second dail came into existence.

Meanwhile Ireland had passed into the throes of revolutionary violence and terrorism. From the standpoint of the militant supporters of Sinn Fein the Irish republic es-

tablished by dail Eireann was the only rightful government, and those who opposed it were traitors to Ireland. An organized campaign of assassination was carried on against the officials and constables of the "usurping" foreign government. Murder involved little risk, for the Sinn Fein terror was so drastic that as a rule nobody dared to interfere or give testimony. To avoid resort to the regular law courts, Sinn Fein courts of arbitration were established and grew into a comprehensive judicial system. There was a republican army and a republican police force. A national loan was floated, and propaganda in favor of the republic was organized in the United States and other foreign countries. Terror led to reprisals and counter-terror. The Royal Irish Constabulary, whose morale had been badly broken, was reorganized and its depleted ranks were filled by British and Irish ex-service men, the notorious "black and tans." The government deemed it necessary to go so far as to make certain areas collectively responsible for the murder of policemen and soldiers. The country thus suffered from what has been called "a ruinous competition in destruction."

In June, 1921, the British prime minister, Lloyd George, invited Mr. De Valera, not as the president of an Irish republic, which Great Britain had not, of course, recognized, but as "the chosen leader of the great majority of Southern Ireland," to attend a conference to be held in London with the object of considering how a settlement might be reached. The conference, attended by British and Irish representatives, met in October, after correspondence between Lloyd George and De Valera, in which the British government offered to Ireland the status of a self-governing Dominion, subject to certain restrictions intended to insure British naval and military security, and the Irish leader declined the offer as inconsistent with the position of his country as a sovereign, independent republic, though he was willing to recommend a treaty of association between Ireland and

the British Commonwealth. At the conference, which was not attended by De Valera in person, the divergent points of view of the British and Irish representatives appeared to be irreconcilable, and it was only the threat that failure to come to an immediate agreement would be followed by a renewal of hostilities on a much larger scale that induced the Irish delegates to sign a treaty, or, as it was officially styled, "Articles of Agreement for a Treaty between Great Britain and Ireland." This was to be submitted for ratification to the British parliament and to the members who had been elected to sit in the house of commons of the parliament of Southern Ireland, a body which had never been organized or performed any functions. It included all the members of the second dail and a few others.

The treaty provided that Ireland, to be known as the Irish Free State, should have the constitutional status of a British Dominion. Its relations to the British parliament and government were to be the same as those of the Dominion of Canada, and "the law, practice and constitutional usage" governing the relationship of the British crown and parliament to Canada were to govern their relationship to the Irish Free State. The Irish Free State, it will be noted, was to include all Ireland, but the treaty provided that if within one month from its ratification by the British parliament, the parliament of Northern Ireland should so request, the powers of the parliament and government of the Irish Free State should not extend to Northern Ireland, as to which the provisions of the government of Ireland act of 1920 should continue in force. The request was, of course, made and Northern Ireland has remained outside the area of the jurisdiction of the Free State. Neither the parliament of the Irish Free State nor the parliament of Northern Ireland was to make any law to endow any religion or prohibit the free exercise thereof. The Irish Free State was to afford to British forces certain harbor and other facilities for purposes of defence. Arrangement was to be

made for constituting a provisional government for the administration of Southern Ireland pending the establishment of the system of government to be provided for by a new constitution.

In Ireland the treaty was approved by the dail on January 7, 1922, by the close vote of 64 to 57, the opposition being led by Mr. De Valera, and it was subsequently submitted to and approved by a meeting of the members elected to the house of commons of Southern Ireland, held on January 14. The British parliament approved the treaty and gave it the force of law by the "Irish Free State (Agreement) Act" of March 31, 1922, which provided that for the future no members of the British house of commons should be elected in Southern Ireland. It may seem paradoxical that the majority of the members of both houses in this British parliament which approved the treaty consisted of unionists, members of the party which for a generation had opposed all efforts to give Ireland a measure of self-government that fell far short of the "Dominion status" which was conceded by the treaty. But it should be remembered that the earlier home rule projects, unlike the settlement made by the treaty, contemplated the establishment of Catholic rule over an unwilling Protestant minority. In accordance with the treaty a provisional government was set up by a meeting of the members elected to the house of commons of the parliament of Southern Ireland.

On the basis of proposals submitted by a committee which made a careful study of foreign constitutions, especially those of the new states of Europe resulting from the World War, the provisional government prepared a draft constitution, which was modified in certain particulars after consultation with the British government. In June, 1922, a new dail, the third, was elected to act as a constituent assembly, but owing to civil war between the supporters and the opponents of the treaty it did not meet until September. On October 25 it passed "The Constitution of the Irish

Free State (Saorstat Eireann) Act," to which the constitution and the treaty were appended. In the preamble to this constituent act the dail, acting as a constituent assembly and "acknowledging that all lawful authority comes from God to the people," proclaimed the establishment of the Irish Free State. It gave to the constitution and the treaty the force of law and decreed that if any provision of the constitution or of any law made thereunder should be repugnant to any provision of the treaty, it should be void and inoperative, thus making the treaty the supreme law of the land. In the following December the British parliament passed a statute enacting that the constitution appended to the Irish constituent act should be the constitution of the Irish Free State. The Irish view, for which there is much to be said, has always been that the constitution became effective in law by virtue of the constituent act alone, and that the confirming British act was not necessary to give it legal validity. The constituent act was appended to the British act, and there was no suggestion that the Irish constituent assembly, in passing that act, had exceeded its authority. There is no parallel to this Irish constituent act in the case of any of the over-sea British Dominions, and there is no doubt that *their* constitutions owe their legal force solely to acts of the British parliament. The constitution of the Irish Free State went into operation upon the issue of a royal proclamation on December 6, 1922, exactly one year after the signature of the treaty.

The constitution provides for a legislature (Oireachtas) consisting of the king, a chamber of deputies (Dail Eireann) and a senate (Seanad Eireann). Upon this legislature is conferred "the sole and exclusive power" of making laws for "the peace, order and good government of the Irish Free State." This seems to have been intended to exclude any interference by the British parliament in the affairs of the Free State. The British parliament, however, in its act confirming the constitution, expressly declared its right to

legislate for the Free State "in any case where, in accordance with constitutional practice, that Parliament would make laws affecting other self-governing Dominions." But this really implied no right of interference, since it was understood at the time that the British parliament would legislate for a Dominion only at the request of the Dominion, an understanding which has since received formal recognition in the Statute of Westminster of 1931. The right to vote for members of the dail is conferred upon all citizens of the Irish Free State of both sexes who have attained the age of twenty-one and have complied with the electoral laws. Under the original constitution all citizens who had reached the age of thirty were to have the right to vote for members of the senate, their choice being limited to a panel nominated by the two houses of the legislature. But under amendments to the constitution adopted in 1928 the members of the senate are elected by the two houses jointly on principles of proportional representation.

With regard to money bills the dail has exclusive authority, though the senate may make "recommendations," and in the case of other bills the senate has only a limited power of amendment and delay. Every bill passed by the two houses must be presented to the governor general, who, acting in the king's name, has power to assent to the bill, withhold assent, or reserve the bill for the signification of the king's pleasure, but it was understood that the last two powers were purely nominal and could not be exercised; a proviso was added to the effect that in withholding assent to bills or in reserving them the governor general should act in accordance with "the law, practice, and constitutional usage" prevailing in Canada, where those powers had long since passed into disuse. In other words, all bills passed by the legislature of the Free State have received the royal assent.

The framers of the constitution believed that it would be desirable in the interest of good government to permit con-

stitutional amendments to be made for a period of years by the ordinary process of legislation and thereafter to require the approval of the electorate. It was accordingly provided that until the expiration of eight years (changed by constitutional amendment in 1929 to sixteen years) from the date of the coming into operation of the constitution amendments might be made by the legislature, after which they must be passed by the legislature and subsequently approved on a referendum by either a majority of the voters on the register or by two-thirds of the recorded votes. As many as eighteen acts amending the constitution were passed during the first ten years of the existence of the Free State.

The constitution declares that all governmental authority is " derived " from the people, that executive authority is " vested " in the king, and that it shall be " exercisable," in accordance with " the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada " by the representative of the crown, i.e., by the governor general. It is provided, both in the constitution and in the treaty, that the governor general shall be appointed in like manner as the governor general of Canada. Until recently the governor general of a Dominion was appointed by the king on the advice of the British government, though care was taken to insure that the person appointed should be acceptable to the government of the Dominion in question. At an Imperial Conference held in 1930 it was agreed by the British and Dominion governments, and formally recorded, that the advice on which the king should act in making such appointments is the advice of the government of the Dominion concerned, not the advice of the British government. The governor general of the Irish Free State, accordingly, is appointed by the king, acting on the advice of the government of the Free State. He is not in any sense the agent of the British government, nor is he invested with any

personal discretionary authority, since he must act in all cases upon the advice of his ministers. He is free, of course, to discuss questions of public policy with them and to use such personal influence as he may happen to possess.

The constitution provides for a cabinet, known as the executive council, consisting of not more than twelve nor less than five ministers, appointed by the governor general on the nomination of the president of the executive council and with the assent of the dail. All members of the executive council were required to be members of the dail, but by a constitutional amendment of 1929 one member of the council may be a member of the senate. The rule of cabinet responsibility, which in the British constitution is a rule of convention, not of law, is explicitly laid down in the constitution of the Irish Free State, which provides that the executive council shall be collectively responsible to the dail, and that the president of the council and the ministers nominated by him shall retire from office if he ceases to retain the support of a majority of its members. The executive council lacks one very important power possessed by the cabinet in Great Britain, a power which greatly strengthens the latter in its relation to the house of commons: it cannot dissolve the legislature and appeal to the country in a general election if it has lost the confidence of the dail. The president of the executive council, who occupies a position similar in general to that of the prime minister in Great Britain, is appointed by the governor general on the nomination of the dail, but since the governor general has no personal discretion in making the appointment, the president is virtually elected by the dail. The constitution provides that the governor general, on nomination by the dail, may appoint ministers who shall not become members of the executive council and shall be individually, not collectively, responsible to the dail for the administration of their department. The appointment

of these "extern" ministers, as they were called, was permitted but not required; only a few such have actually been appointed, and none since 1927.

The framework of a judicial system was laid down in the constitution. The legislature was required to establish courts of first instance, including a high court with original jurisdiction, civil and criminal, and a court of final appeal to be known as the supreme court. Their organization and procedure and the establishment of inferior courts were left to the legislature. Judges are appointed by the governor general on the advice of the executive council, and the judges of the high court and of the supreme court may not be removed except for misbehavior or incapacity, and then only by resolutions passed by both branches of the legislature. As in the United States, the judiciary is the guardian of the constitution and possesses a power with regard to legislation which is not enjoyed by the courts in Great Britain. If the question of the constitutionality of an act of the legislature is raised in judicial proceedings before the high court, the act may be adjudged to be invalid on the ground that it is in conflict with the constitution. In such cases the high court has exclusive original jurisdiction. The supreme court has appellate jurisdiction from decisions of the high court, and the constitution provided that its decisions should be "final and conclusive." But a seemingly contradictory proviso was added, that "nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave." The tribunal which decides cases that are carried on appeal to the king in council is the judicial committee of the privy council, and effect is given to the judgment of this court by an order in council issued on the authority of the British government. Opinion in the Irish Free State has been strongly opposed to appeals to this outside tribunal as inconsistent with the

principle of self-government. At the Imperial Conference of 1926 the members of the British Commonwealth, that is, Great Britain and the Dominions, were declared to be equal in status, and appeals from the Dominions to a British tribunal could not be reconciled with equality of status. This question was considered at the conference, and it was formally declared that it was not the policy of the British government "that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected." So far as the Irish Free State is concerned the appeal to the Privy Council is virtually a dead letter, and in 1933 a bill was introduced in the dail to amend the constitution by deleting the proviso quoted above.

The people of Ireland, leaving the Protestant North out of consideration, were by tradition intensely hostile to external control and suspicious of government in general, and their experience under the rule of a sovereign British parliament helps to explain their unwillingness to set up a parliament of their own with unlimited powers. A distinctive feature of the constitution of the Irish Free State, which finds no counterpart in the constitutions of the oversea British Dominions, is the inclusion in it of a number of fundamental declarations intended to safeguard national and individual rights.

The very first article of the constitution asserts the equality of the Irish Free State with Great Britain by declaring it to be "a coequal member of the Community of Nations forming the British Commonwealth of Nations." This implied that all members of the British Commonwealth (namely, Great Britain, the Irish Free State and the oversea Dominions) were equal in constitutional status and anticipated the declaration made by the Imperial Conference of 1926 that the members of the Commonwealth "are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their

domestic or external affairs." The democratic nationalism of the Irish revolutionary movement is reflected in a declaration that all powers of government and all political authority in Ireland are derived from the people of Ireland. A distinctive Irish Free State citizenship is defined, and the Irish language is declared to be the "national" language, with English as equally an "official" language. Individual rights are safeguarded by a group of articles which declare that liberty of the person and the dwelling of every citizen are inviolable and guarantee freedom of conscience and worship, the right of free expression of opinion, the right to assemble peaceably and to form associations and unions, and the right of all citizens of the Irish Free State to free elementary education.

Government under the new constitution was inaugurated under most unfavorable conditions, for a civil war was actually in progress. The treaty of 1921 had led to a division in the ranks of Sinn Fein. It was approved by the dail, it will be recalled, but only by a narrow majority, and its opponents clung to their ideal of an independent Irish republic. Their leader, De Valera, resigned as president of the dail and was succeeded by Arthur Griffith, who had been chairman of the Irish delegation that signed the treaty. Michael Collins, another member of the Irish delegation, became chairman of the provisional government set up in January, 1922, under the terms of the treaty. In a destructive civil war which broke out in the following June the republican insurgents were finally suppressed, but it was not until the autumn of 1923 that the government of the Irish Free State succeeded in restoring order throughout the land, and secret republican military organizations remained in existence for some time longer. Timothy Healy, an old home ruler, was appointed as the first governor general of the Irish Free State, and William Thomas Cosgrave became the first president of the executive council and continued to hold this office until 1932. Griffith and Collins,

the two leading supporters of the treaty, died before the new constitution went into operation.

During Mr. Cosgrave's administration important advances were made in the constitutional position of the British Dominions. The Irish Free State, having the status of a Dominion, shared in these advances. But it did more. It played a leading part in bringing them about. At the Imperial Conference of 1926, for example, the Irish and the South African representatives took the lead in pressing for a declaration of equality of status as between the members of the British Commonwealth. The advance in the position of the Free State was especially notable in the realm of international relations. It was the first British Dominion to establish diplomatic relations with a foreign country, and in 1931 it adopted new procedure in treaty-making which eliminated all participation by the British Government in the making of treaties negotiated under the authority of the Free State.

No other constitutional question has given rise to so much controversy and contention in the history of the Irish Free State as the oath which members of the legislature were required to take. The treaty thus specified the form of the oath "to be taken by members of the Parliament of the Irish Free State":

"I, . . . do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established and that I will be faithful to H. M. King George V, his heirs and successors by law, in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations."

The treaty did not provide expressly that this oath must be taken by every member of the legislature, and it was argued in the constituent assembly that such was not its intent. But the opposite view, which was supported by much better evidence, prevailed, and the constitution required *every* mem-

ber of the legislature, before taking his seat, to take the oath as formulated in the treaty. Throughout his administration Mr. Cosgrave maintained that the oath was an obligation imposed upon all members of the legislature by the treaty. This oath differed significantly from the oath of allegiance to the king which members of the British and Dominion parliaments were required to take. Members of the Irish parliament were to swear allegiance not to the king but to the constitution of the Irish Free State, a constitution which professed to be based upon the will of the people of Ireland. Faithfulness to the king was secondary and subordinate.

For several years after the establishment of the Irish Free State republican opponents of the treaty who were elected to the legislature refused to take the oath and therefore were unable to take their seats. An act passed in 1927 required parliamentary candidates to subscribe to a declaration of intention to take the oath, if elected, and disqualified elected members who failed to take the oath within a specified period. Fianna Fail, De Valera's party, which included a majority of those opposed to the treaty, decided to permit its candidates to comply with this law, and in September, 1927, it won 57 seats in the dail out of a total of 153. The party, however, had merely made a temporary concession to expediency, and it was certain that if it should come to power it would try to abolish the oath.

A general election in February, 1932, gave Fianna Fail 72 seats in the new dail, slightly less than a majority, but an assurance of support from the labor party, which won seven seats, made it possible for Mr. De Valera to form an administration. His first legislative measure was a bill to amend the constitution by abolishing the oath, for which he claimed that the country had given him a mandate at the recent election, though his opponents denied this, and with much force, since the labor party had not made the abolition of the oath an issue in its electoral campaign. The bill proposed to delete from the constitution the article which

made the taking of the oath compulsory upon all members of the legislature, and a part of another article which imposed the same obligation upon "extern" ministers. But merely to eliminate these provisions would not be sufficient if the oath was mandatory under the treaty. De Valera himself and other members of his party had repeatedly denied that this was the case, but the weight of legal opinion was against them. The bill, accordingly, provided for the amendment of the constituent act of 1922 by the omission of the article which gave the treaty the force of law and provided that if any provision of the constitution or of any amendment thereof or of any law made thereunder was repugnant to any of the provisions of the treaty, it should be void and inoperative. Opponents of the bill asserted that its principal purpose was not to abolish the oath but to divest the treaty of the position which it had held as the supreme law of the land, and De Valera himself avowed that this was one of its objects. The most serious legal objection to the bill was that which Professor A. Berriedale Keith, the foremost authority on the government and constitutional law of the British Dominions, called attention to in a book written before the bill became law.[1]

> The Parliament of the Free State owes its existence in Irish eyes solely to the activity of the Constituent Assembly; that Assembly representing the will of the people of Ireland deliberately limited the constituent power of the Parliament, but its creation now asserts that it is entitled to act as a fully sovereign power and to disregard the essential conditions of its operation. . . . It is important to note that no question of imperial control is involved . . . the point is the Irish constitution itself. . . . The objection that a treaty should not be made part of municipal [i.e., national] law is clearly irrelevant; the point is that it has been made part of that law by a Constituent Assembly to which the Irish Parliament on Irish theory owes its being, and by which it was accorded only limited powers.

[1] *The Constitutional Law of the British Dominions*, 115–116.

The bill was passed by the dail in May, 1932, and was sent to the senate, in which Mr. Cosgrave's party had a majority. It was drastically amended by the senate, which voted to omit the provision amending the constituent act. But the dail refused to agree to the senate's amendments, and the bill as passed by the dail became law in May, 1933. It is not going too far to say that it destroyed the foundation on which the Irish Free State had been established.

Mr. De Valera's goal was avowedly an independent Irish republic. His position was strengthened by a general election which took place in January, 1933, and gave his party a majority of one in the new dail over all other parties combined. In the following summer bills were introduced to amend the constitution in the direction of republicanism. One of these proposed to transfer from the governor general to the executive council the function of recommending to the dail the purpose of appropriations; another provided for the deletion from the constitution of the provision as to the withholding of the king's assent to bills and their reservation by the governor general; another proposed to terminate the right of appeal to the privy council. These changes in the constitution were calculated to weaken the position of the king in the Irish Free State and to weaken the relations between the Free State and Great Britain.

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CHAPTER XXII

THE POST-WAR PERIOD

The years since the war have witnessed some noteworthy events in English constitutional history, but perhaps more significant than any particular occurrence is a change in perspective with regard to democracy. There has been some weakening of confidence in democratic parliamentary government. Even before the war critics had found a good deal to object to in its actual working, in Great Britain as well as in other democratic countries. The house of commons, like other representative legislative assemblies, had undoubtedly suffered a decline in prestige and popular esteem. It seemed that in fact, if not in form, it was losing to the cabinet, on the one hand, and, on the other, to extra-parliamentary agencies for the formation and expression of public opinion, especially the press, much of the authority which it had previously enjoyed. But representative democracy as a political ideal had not, at any rate, been challenged by the rise of rival forms of government. Optimistic democrats believed that it was only a matter of time until the governments of the remaining autocracies, notably Russia, would be democratized. Democracy seemed to be the only appropriate form of political organization for civilized peoples, and with the advance of civilization — another article of faith among optimists — the conclusion was obvious. On the morrow of the war, democracy in its parliamentary form, of which Great Britain was the leading exemplar, appeared to be making rapid headway. The new constitutions of Germany, Austria, Czechoslovakia, Jugoslavia, Poland, Finland and Esthonia (adopted in 1919–

21) provided for universal suffrage and responsible parliamentary government, more or less on the British model. In India a constitution intended as a transitional stage on the road to parliamentary government went into operation in 1921.

But there was one ominous exception to the democratic trend. In Russia the tsarist autocracy was overthrown during the war, but democrats and liberals were unable to control the course of the revolution, and a dictatorship was established — a dictatorship nominally of the proletariat but really of the communist party, which was and is numerically an insignificant minority of the population. The Fascist dictatorship in Italy dates from 1922, and ten years later the national socialists of Germany (the "Nazis") virtually overthrew the liberal and democratic constitution of 1919. Meanwhile, in a number of smaller European countries dictatorship had been substituted for parliamentary democracy. It remains to be seen, of course, whether dictatorship, either in its Bolshevist or its Fascist form, has come to stay, whether it will make further gains, or whether it will pass away, leaving the world safe for democracy. At present it is dominant in eastern and central and southern Europe, and a large majority of the population of the continent is subject to its sway. Democracy is on trial.

During the fifteen years of the post-war period (1919–1933, inclusive) Great Britain had eight administrations, six parliaments and five general elections. Three of the administrations were coalitions, two of which were called "national" governments, three were conservative governments, and two were labor governments. The coalitions held office for an aggregate of six years and two months, the conservative party for five years and ten months, and the labor party for three years. Since the war the liberal party was never in a position to form a ministry, and in none of the elections did it succeed in winning more than

a little over one quarter of the seats in the house of commons.

Four men held the position of prime minister: Mr. Lloyd George (liberal, in a coalition ministry) once, for three years and ten months,[1] Mr. Bonar Law (conservative) once, for seven months, Mr. Stanley Baldwin (conservative) twice, for an aggregate of five years and three months, and Mr. J. Ramsay MacDonald (labor, and national labor in two coalitions) four times, for five years and four months. In the nineteenth century the premiership used to be held by peers as well as by commoners, but since the war it would appear to have become a recognized convention that the prime minister must be a member of the house of commons. The last peer to occupy the position was Lord Salisbury, who resigned in 1902. Since the passing of the parliament act (1911) the house of lords has been so definitely subordinate to the house of commons that a prime minister sitting there would find his position very unsatisfactory. In May, 1923, Mr. Bonar Law was compelled by ill health to resign the premiership. On the score of ability, experience in public life and party services Lord Curzon had the best claim to succeed him, but the king appointed Mr. Stanley Baldwin, who was by no means Curzon's equal in these respects. The decisive consideration seems to have been that the prime minister ought not to be a member of the house of lords at a time when the labor party, which then constituted the official opposition in the house of commons, was unrepresented in the upper chamber. At a meeting of the conservative members of parliament held shortly afterwards Lord Curzon proposed Mr. Baldwin as leader of the party. After enumerating his other qualifications he added, "And lastly, Mr. Baldwin possesses the supreme and indispensable qualification of not being a peer."

1 Mr. Lloyd George had been prime minister in the previous coalition government from December, 1916, to January, 1919.

In party history the period was marked by the general predominance of the conservatives, the rise of the labor party, followed by what seemed to be a disastrous setback, and the decline of the liberal party. In the first of the post-war parliaments, which lasted from January, 1919, to October, 1922, the conservatives (or unionists, as they were then called) formed the dominant wing in the parliamentary coalition that supported the Lloyd George government and constituted, of themselves, a majority of the members of the house of commons.[2] They withdrew from the coalition in October, 1922, and in the general election in November of that year they won 344 seats in the house of commons out of a total of 615. This was the second general election to be held after the great enlargement of the electorate by the reform act of 1918, and the result seemed to indicate that the extension of the franchise had not been injurious to the interests of the conservative party. In the general election of December, 1923, fought on the issue of protection, the party won about sixty-five seats more than labor and nearly one hundred more than the liberals, but about ninety less than the total number secured by both these parties. The result was that labor, supported by the liberals, was able to form a ministry, and the conservatives went into opposition. In the next election, which was held in October, 1924, they won two-thirds of the seats in the house of commons. In the election of May, 1929, following a period of four and a half years of conservative rule, the

[2] In the last decade of the nineteenth century the conservatives joined with the liberal unionists, who had withdrawn from the liberal party on the issue of Irish home rule, to form the unionist party, so called because it stood for the maintenance of the union of Great Britain and Ireland. In 1922 the greater part of Ireland, henceforth known as the Irish Free State, was separated from the United Kingdom and given a form of self-government within the empire on the model of the British Dominions. The name "unionist" thereupon ceased to have any meaning and was soon supplanted by the older name "conservative." At present the official name of the party is "The National Union of Conservative and Unionist Associations."

party, for the first time since the war, failed to secure a plurality in the house, and labor again took office. Between the elections of 1924 and 1929 the electorate was enlarged by the addition to it of some 5,000,000 women. The discriminations against them in the reform act of 1918 could not be permanently justified, and in 1928 an act was passed reducing the voting age for women from thirty to twenty-one years and otherwise putting them on an equality with men for electoral purposes. The result of this was to give women a decided preponderance in the electorate. In the last general election, held in October, 1931, at a time of acute economic stress, when a coalition which called itself a "national" government was in office, the conservative party, which was supporting the government, won 470 seats, more than three-fourths of the total number, the largest party majority in British parliamentary history.

In each of the post-war elections except that of 1931 the labor party secured more seats than the liberals did, and even in that election, when labor suffered a débâcle, it won more seats than either of the two factions into which the liberal party was then divided. The labor party was a product of trade unionism and socialism. It owed much of its ideology to the Fabian society, an association of middle-class intellectuals with socialist leanings which was formed in 1884, and the independent labor party, a workingmen's political organization established in 1893 on definitely socialist principles. In 1900 an association known as the labor representation committee was formed under trade union auspices with the object of electing representatives of labor to parliament. In 1906 it succeeded in winning some thirty seats in the house of commons and took the name of "the labor party." Most of its members and of its funds came from the trade unions, and much of its leadership from the independent labor party. Before the war there were never more than fifty labor members in parliament, but the influence of the party was increased when the liberal govern-

ment lost its parliamentary majority in 1910 and had to depend thereafter for its support in the house of commons upon the two minor parties, labor and the Irish nationalists. The labor party was represented in both of the coalition ministries formed during the war, but in 1918 it decided to terminate the party truce which had been agreed upon at the beginning of the war, and in the house of commons elected in December of that year the labor members, about sixty in number, assumed the position of a parliamentary opposition.

Before 1918 the labor party was not organized as a national party, open to anyone who might wish to join it; it was rather, as has been said, "a federation, nationally and locally, of trade unions, trade councils, socialist societies, and a few local labor parties," and in most of the constituencies "there was no way by which a person who could not be, or did not care to be, a trade unionist, and who also did not want to identify himself with a socialist society, could become an effective labor party supporter." The party was reorganized in 1918, and it became possible for persons not connected with a trade union or a socialist society to join it. The extension of the franchise in the same year also contributed materially, no doubt, to the subsequent increase in the labor vote, which was approximately 4,240,000 in 1922, 4,440,000 in 1923, 5,490,000 in 1924 and 8,385,000 in 1929. In those same years the number of seats in the house of commons won by the labor party was, respectively, 142, 191, 151 and 288, and labor ministries were formed in 1924 and 1929. Even in the election of 1931, when the labor party was campaigning under the most unfavorable circumstances, in opposition to the existing "national" government which had been formed to deal with a grave economic emergency, the labor vote was 6,650,000, though the party secured only 52 seats. Both of the labor ministries were minority governments; that is to say, the party in office did not have a majority in the house of

commons. The post-war conservative administrations, on the other hand, were majority governments.

Concurrent with the advance of labor, and largely on account of it, was the decline of the liberal party, which suffered from defections on both wings. Some of its conservative members, alarmed by the socialist principles of the labor party, went over to the conservatives, while many of its more radical members joined the labor party. The liberal party suffered also from divided leadership and internal dissensions. When Mr. Lloyd George formed his coalition ministry in December, 1916, Mr. Asquith and his followers refused to serve in it, and a schism within the party began which lasted till 1923. In the election of that year, when the liberals were reunited, they won 159 seats, but in the 1924 election the number fell to 40. It should be said, however, that the number of seats won by the liberal party has not been commensurate with the number of votes polled. As the smallest of the three great parties the liberals have suffered most seriously from the existing system of representation.

Since the redistribution act of 1885 the unit of parliamentary representation has been, speaking in general, the single-member constituency, and the basis of representation has been, not communities — counties and boroughs — with corporate feeling and local traditions of their own, as had been the case before, but masses of people grouped geographically and organized solely for the purpose of electing members of parliament. At present 577 members of the house of commons out of a total of 615 are elected in single-member constituencies, the remainder being chosen in constituencies each of which returns two members, with the exception of one, which returns three. In the single-member constituency, to which our attention will be confined, the candidate who receives the largest number of votes, whether a majority or not, is elected. If the contest is between two candidates only, one of them, of course, is almost sure to

receive a majority, but when there are three or more parties in the field, as has been the case since the war, it is usual for candidates to be chosen by minorities. Thus in the election of 1922 a successful conservative candidate in one constituency polled 7,666 votes as against 7,659 for a national liberal, 7,129 for a liberal, and 6,126 for a laborite. Under a two-party régime the party which obtains a majority of the votes cast in the county as a whole is likely to secure a still larger majority of the seats in the house of commons, but at any rate it will probably, though not certainly, secure a majority. But when there are three or more parties, their relative strength in the house is almost sure to be grossly out of proportion to their relative strength in the electorate. A few examples will serve for illustration. In the election of 1922 the conservatives polled approximately 5,500,000 votes, which was only 38 per cent of the total vote cast, yet they won 344 seats in the house of commons, or 56 per cent of the total number. The labor party, with 4,241,000 votes obtained only 142 seats, while the liberals, with 2,500,000, nearly one-half of the conservative vote, seated only 53 of their candidates. In 1923 the conservatives, with practically the same percentage of the popular vote as in 1922, obtained only 258 seats. In 1924, with 47 per cent of the vote, they won 412 seats, more than two-thirds of the total. In 1929 they received a larger vote than labor did, but secured 28 fewer seats, while the liberals, who polled nearly one-fourth of the total vote, obtained less than one-tenth of the seats. In 1931, with 56 per cent of the total vote, they won more than three-fourths of the seats, while labor, with 30 per cent of the total vote, secured less than 9 per cent of the seats.

It is obvious, then, that the present system of representation cannot be justified on democratic grounds. It is clearly repugnant to democratic principles that a minority of the electorate should be able to elect a majority of the members of the legislature, as actually happened in 1922

and 1924, and put in power a government which might carry out a program obnoxious to the majority of the people of the country, or even that a slight majority of the electors should be able to elect an overwhelming majority of the members. John Stuart Mill, who was an early champion of the reform of the representative system, wrote in his *Responsible Government*, published in 1861: "In a really equal democracy, every or any section would be represented, not disproportionately, but proportionately. A majority of the electors would always have a majority of the representatives; but a minority of the electors would always have a minority of the representatives. Man for man they would be as fully represented as the majority. Unless they are, there is not equal government, but a government of inequality and privilege: one part of the people rule over the rest: there is a part whose fair and equal share of influence in the representation is withheld from them; contrary to all just government, but, above all, contrary to the principle of democracy, which professes equality as its very root and foundation."

During the last seventy-five years or so many plans for the reform of the representative system have been put forward. The most widely advocated is known as proportional representation, of which there are several varieties, all intended to give fairer representation to minorities. A Proportional Representation Society, formed in 1884, has carried on extensive propaganda. The conference which drafted the plan of electoral reform that was embodied in the act of 1918 recommended that in all constituencies returning more than one member, elections should be by proportional representation. This recommendation, however, was not adopted except in the case of university constituencies returning two or more members. Since the war the inequality and unfairness of the electoral system have been accentuated by the existence of more than two great parties. The liberals, as the smallest of the three major parties

and the one least fairly represented in parliament, have strongly advocated proportional representation. The labor party in its infancy favored it, but as it grew in strength it became less interested in it, and when it was in office it did nothing to alter the existing system.

The form of proportional representation that has the largest body of support in Great Britain at present is known as the system of the single transferable vote. If this were adopted, single-member constituencies would disappear, and larger multiple-member constituencies would take their place, each returning three or more members to the house of commons. "Whatever the number of members in the constituency," says an advocate of the system, "each elector would have one vote only; but he would be entitled to indicate on the ballot paper the order of his preference among the candidates by numbering them, 1, 2, 3, 4, etc. If the candidate of his first preference did not require his vote, or was hopelessly out of the running, the vote would be transferred to his second preference, and if need be to his third, and so on. In no case would his vote be wasted: it would always help to return somebody. This is the essence of the whole system, the means by which it is ensured that every vote counts."[8] Proportional representation has made rapid headway in the world of late. It was provided for in all of the European constitutions that came into existence as a result of the World War, and it has been adopted in various parts of the British empire, including the Irish Free State, South Africa and Tasmania.

In 1919 the small war cabinet was given up, as we have seen, and the cabinet was restored to its normal pre-war size and again included the heads of the more important departments. While the war was still in progress problems of reconstruction (social, economic and constitutional) forced themselves upon the attention of the government, and a ministry of reconstruction was established to deal with them.

[8] Ramsay Muir, *How Britain is Governed*, 181.

A committee of this department, known as the machinery of government committee, presented a report in December, 1918, in which various recommendations were made for improving governmental efficiency. Its inquiry was conducted while the war cabinet was in existence, and its report bears evidence of this fact. Viewing the cabinet as "the mainspring of all the mechanism of Government," the committee was of the opinion that it could perform its proper functions most efficiently if it was small in size, consisting of ten or at most twelve members, meeting frequently, and adequately supplied with all information necessary to enable it to reach rapid decisions. The committee was strongly in favor of continuing the cabinet secretariat which had recently been established.

As regards size, the committee's recommendation was not followed, for post-war cabinets have, with one exception, included about twenty members. But the secretariat was retained as a permanent institution, performing, in general, the same functions as in the days of the war cabinet. It became the object of a good deal of criticism, especially in 1922, when the secretarial staff had increased to 137 at an annual cost of nearly £37,000. After this the staff was reduced to more modest proportions. Cabinet meetings have been more frequent than they were as a rule before the war, and more use has been made of cabinet committees, at the meetings of which persons are sometimes present who are not members of the cabinet.

Cabinet secrecy, in the extreme form which it had taken before the war, was not revived. Minutes of cabinet meetings are regularly kept, though they are not published, and statements of decisions reached are transmitted to the departments concerned. A departure from pre-war practice has been the publication in the press of notices of cabinet meetings; these give the place and date of the meeting and the names of those who were present, but do not tell what business was transacted nor what conclusions were arrived

at. Occasionally, "stories" of cabinet meetings have been published, evidently "inspired" and doubtless given out with the knowledge and approval of the prime minister. These were unofficial, and statements were usually qualified by some such phrase as "it is understood" or "there is reason to believe." Another feature of the old cabinet system was not restored for some years after the war: the prime minister did not act as the leader of the house of commons until Mr. Baldwin formed his second administration in 1924. Before that another member of the cabinet discharged this duty, as had been the case in the war cabinet system.

In the Victorian period ministries came to an end either because the house of commons had expressed want of confidence in them, or because the ministerial party had been defeated at the polls. The former was the normal cause of the resignation of ministries between the first two reform acts (1832–1867). The Disraeli ministry of 1868 was the first to resign immediately after a general election, without waiting to meet the new parliament, thus taking its dismissal directly from the electorate. In the latter part of the nineteenth century the house of commons seemed to be losing its control over the executive, and informed students of English government were beginning to question whether the cabinet was in any real sense responsible to the house of commons, as it had been in the mid-Victorian era. Between 1895 and the World War no ministry resigned because of action taken by the house, and even in 1895 an adverse vote in the commons was the nominal rather than the real cause of the resignation of Lord Rosebery's government.[4]

[4] The terms "ministry," "administration" and "government" are used interchangeably in England. The group so designated consists of the heads of the executive departments, the parliamentary secretaries, and a few officers of the royal household. The ministry as a whole never meets. The cabinet is an inner body within the ministry and includes only those of its members (usually the heads of the more important de-

The increase in the power of the cabinet in its relation to the house of commons, the growth of what has been called "cabinet dictatorship," came about in large measure because of the extension of the parliamentary franchise and the consequent development of party organization. The enlargement of the electorate in 1867 and 1884 led to more elaborate organization, more centralized control and more rigid discipline within the two great parties, liberals and conservatives; and this naturally strengthened the cabinet, which consists of the leaders of the party in office, and correspondingly diminished the influence of the rank and file of the private, non-ministerial members of the house of commons. The first national party organization was the National Liberal Federation, which was founded in 1877, and the conservatives presently followed suit with the National Union of Conservative Associations. The central party organizations accumulated funds, which were used to carry on propaganda and assist the local party associations in the constituencies in conducting election campaigns. It became customary to hold annual party conferences or congresses, at which resolutions similar to American party platforms were adopted, and all candidates of the party were supposed to accept them. The tendency of these developments was to deprive the private member of parliament of the exercise of personal discretion and to transform him into a party delegate, sent to parliament to support his party leaders, to vote for or against the government. In the labor party, discipline has been carried even further than in either of the older parties.

The reform act of 1918, which enfranchised a much larger proportion of the population than any of its predecessors had done, was not likely to be followed by any relaxation of

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partments and the holders of two or three offices which require little or no administrative work) who are summoned to cabinet meetings by the prime minister. The resignation of a cabinet always involves the resignation of the entire ministry.

party discipline that would tend to strengthen the house of commons in its relation to the cabinet. But on the other hand, a three-party system, such as has existed since the war, made it probable that at times no single party would have more than half the seats in the house of commons, and that there would be minority ministries, dependent for their parliamentary support upon one of the other parties in addition to their own. Such support is, of course, more precarious, more likely to be withdrawn, than the support given by a single, well-disciplined majority party. Cabinet dictatorship has been fostered by majority governments. A minority government cannot wield the autocratic powers of a majority government, it cannot carry through legislation which is desired by its own party only, it cannot refuse to consider amendments to its measures, it cannot ruthlessly stifle parliamentary criticism. Both of the labor governments (in 1924 and 1929–31) were minority governments, with the liberal party holding the balance of power in the house of commons, and neither of those governments was able, therefore, to put into effect the socialist policies which the labor party advocated. This was entirely in accord with the principle of democracy, since in the elections preceding the formation of these governments the nation had made it clear that it was opposed to socialism. It is easy enough to see why those who are anxious to "get things done" at all costs should look with disfavor upon a three-party system and minority governments, but it should be remembered that under the present system of representation in Great Britain a party may have a large majority in the house of commons and no majority at all in the country, as was actually the case with the conservative party in 1922–23 and 1924–29. There is much force in the remark made by Mr. Ramsay Muir, a defender of the three-party system and minority administrations, that "a minority Ministry is the best means of ensuring majority government; because a minority Ministry cannot force through Parlia-

ment proposals which would be rejected by a majority in the country."

A glance at the circumstances under which post-war ministries came to an end will show that in no case was it because of action taken by the house of commons on its own initiative and at its own discretion. Following the election of December, 1918, Mr. Lloyd George formed his second coalition government, which remained in office from January, 1919, till October, 1922. It came to an end when the conservatives, who constituted by far the largest party in the coalition, decided to withdraw from it and participate in the next election as an independent party. This decision was made at a meeting of the conservative members of parliament held in the Carlton Club in London, at a time when parliament was not sitting. Mr. Lloyd George at once resigned. The conservative ministry which followed, and which was supported by a large party majority in the house of commons, was terminated in May, 1923, when Mr. Law, the prime minister, resigned on account of illness. The Baldwin administration, which succeeded, decided to dissolve parliament, though it had been in existence for only a year, and seek a mandate from the country to set up a protective tariff. In the election, which came in December, 1923, protection was defeated, the labor and liberal parties, which stood for the maintenance of free trade, together winning 92 seats more than the conservatives. Since the latter, however, secured more seats than either one of the other parties, Mr. Baldwin did not resign immediately but waited to meet the new parliament, which at once voted want of confidence in his government. Technically the Baldwin ministry took its dismissal from the new house of commons, but actually its fate was sealed by the election and its resignation was a foregone conclusion. Mr. MacDonald's short-lived labor administration (January-November, 1924) existed only by sufferance of the liberals in the house of commons. After sustaining a number of defeats

the cabinet decided to treat a motion supported by conservatives and liberals as a vote of censure. But instead of resigning it advised the king to dissolve parliament, though there was a question whether a minority government was entitled to ask for a dissolution. The election, in October, 1924, gave the conservatives a majority of two-thirds in the new house of commons and put an end, of course, to the labor ministry. Sustained by this majority the second Baldwin administration remained in office from November, 1924, to June, 1929. It resigned as a result of the election of May, 1929, and was followed by a second labor ministry, which lasted till August, 1931. The extraordinary circumstances under which this administration came to an end will now be considered; but it should be stated here that the house of commons was not sitting at the time and had nothing to do with the course which events took.[5]

In the summer of 1931 Mr. MacDonald's labor government was confronted with an acute financial crisis which led to a political crisis. In July the Bank of England warned the government of an alarming drain of gold. It seems that London financial houses, in order to meet heavy demands of foreign creditors, had been drawing large amounts of gold from the bank in exchange for currency, and the drain on its gold reserve was so severe that it had been obliged to borrow large sums from New York and Paris. The drain continued, and early in August the government was informed that unless it borrowed immediately from

[5] Before the war a member of the house of commons who was appointed to ministerial office thereby lost his seat in the house and could not sit thereafter without reelection. The formation of a new ministry, therefore, unless immediately followed by a dissolution of parliament and a general election, necessitated a number of by-elections, in which the new ministers who had been members of the house of commons stood for reelection. By an act passed in 1919 a member of the house accepting ministerial office within nine months after the summoning of a new parliament could continue to hold his seat without reelection, and an act of 1926 did away with the necessity of reelection altogether, no matter when the member was appointed to office.

abroad some £80,000,000 to maintain the gold reserve, it would be necessary to declare a financial moratorium, with disastrous results to British credit.

At the same time the state of the government's budget gave ground for serious apprehension, since expenditure was running far ahead of revenue. Before parliament adjourned at the end of July the house of commons passed a resolution, supported by all parties, in pursuance of which a committee was appointed to examine and make recommendations with regard to government expenditure. The committee recommended economies in the budget aggregating nearly £100,000,000, the largest item of which was a reduction in the expenditure on account of unemployment insurance, popularly spoken of as "the dole." The committee thought that even these economies would not be sufficient to produce a balanced budget for the year 1932, and that further reductions or new taxation would be necessary. A committee of the cabinet to consider these recommendations was appointed, consisting of the prime minister, the chancellor of the exchequer (Mr. Snowden) and three other members of the cabinet. The leaders of the conservative and liberal parties, Mr. Baldwin and Sir Herbert Samuel, let it be known that they would support the government in a program of drastic economy.

When the government, through the Bank of England, attempted to make an emergency loan in New York in order to maintain the gold reserve, it was intimated that it would be necessary for it to effect immediate economies, including a reduction of unemployment insurance expenditure. The cabinet committee outlined its proposals to the full cabinet on August 19. There was no disagreement as to the instant need of balancing the budget by economies and additional taxation. But a large majority of the members of the cabinet objected to the proposed cut in unemployment payments which the prime minister, the chancellor of the exchequer and two of their colleagues deemed necessary if the

emergency loan from abroad was to be secured. On August 21 the general council of the trade union congress strongly opposed a cut in the dole.

It was evident that Mr. MacDonald could not remain at the head of a labor ministry if three-fourths or more of his cabinet should resign, especially as it quickly became known that an overwhelming majority of the members of his party in parliament agreed with the majority of the cabinet and would repudiate his leadership. During the next few days he consulted with the conservative and liberal leaders and had audiences with the king, whose hurried return to London from his holiday in Scotland emphasized to the public the gravity of the political crisis. After learning from the prime minister how matters stood in the cabinet, the king, it seems probable, dissuaded him from immediate resignation and consulted personally with the opposition leaders, though not with any of Mr. MacDonald's colleagues in the cabinet. On the evening of August 23 the cabinet authorized the prime minister to tender to the king the resignation of the ministry, it being assumed that Mr. Baldwin, as the leader of the conservative party, would be called upon to form an administration.

On Monday morning, August 24, Mr. MacDonald had another audience with the king. Precisely what transpired is not known, though rumor, of course, was active. At noon he informed the members of his cabinet that the labor ministry was at an end, and, to their amazement, that he had accepted the king's commission to form a "national government" (in which, of course, he would be prime minister) to deal with the financial emergency. In the evening of the same day the following official announcement was issued:

> The Prime Minister this afternoon tendered to the King the resignation of the Ministry, which was accepted by his Majesty, who entrusted Mr. Ramsay MacDonald with the task of forming a National Government on a comprehensive basis for the purpose of meeting the present financial emergency.

Mr. Ramsay MacDonald accepted the commission, and is now in conference with Mr. Stanley Baldwin and Sir Herbert Samuel, who are co-operating with him in the constitution of such an Administration.

Later in the same night it was announced that the new administration would not be a coalition government in the usual sense of the term, but a government of "cooperation" for the single purpose of dealing with "the national emergency," and that when that object had been accomplished, the different parties would "resume their respective positions."

On the following day the personnel of the new cabinet was made public. It consisted of only ten members — Mr. MacDonald and the three other members of the late cabinet who had sided with him, four conservatives, and two liberals. Labor felt that it had been betrayed, and it was not slow in making known its attitude. On August 26 the national executive committee of the labor party and the general council of the trade union congress urged that the new government should be vigorously opposed and recommended the labor members of parliament to constitute the official opposition when the parliamentary session was resumed. At a meeting of the labor members, held shortly afterwards, Mr. MacDonald was deposed as leader of the party, and Mr. Arthur Henderson, who had held the office of secretary of state for foreign affairs in the late government, was elected to succeed him. Subsequently all members of the labor party who were associated with the new administration were formally expelled from the ranks of the party. When parliament met after the adjournment all but fourteen of the labor members of the house of commons (about one-twentieth of the total number) went into opposition. Under these circumstances it seems to have been little less than a pretense for the new administration to call itself a "national" government.

The political crisis that has been outlined is memorable

in the history of English cabinet government for several reasons. If Mr. MacDonald were to be regarded as really the leader of the labor party when he formed the "national government," as he still was in name, then it would have to be said that he took an extraordinary and unprecedented course in attempting to commit the party to a coalition with the conservatives and the liberals without any consultation with his labor cabinet. His action could be justified only on the theory, which has never been put forward, that a British party leader is an autocrat. But when he accepted the king's commission to form a new administration, if not when he broke with the majority of his cabinet on the issue of unemployment insurance economy, he virtually ceased to be the leader of his party, and he ceased to be so even in name, by action of the party, a few days after the new ministry was formed. On this view, he became prime minister in the national government not as the leader of a party, not for the same reason that Mr. Baldwin and Sir Herbert Samuel entered the cabinet, but as an individual who owed his position to the pleasure of the king and the fact that the conservatives and the liberals were willing, in the emergency, to accept his leadership, though it was certain to be repudiated by his own followers. In modern times the premiership has always been bound up with party leadership. This is not to say that the sovereign has never had any influence in the choice of the prime minister. As recently as 1923 the king, as we have seen, had passed over Lord Curzon and appointed Mr. Baldwin, though the latter had not yet been chosen as leader of the conservative party. But Mr. Baldwin could not have remained as prime minister if his party had decided to reject him as its leader. The statesman "sent for" by the king to form a ministry has been either the recognized leader of a party, or a leader whom a party was prepared to follow. Mr. MacDonald was neither. The parliamentary support which he brought to the administration of which he was the head was negligible. When

the session was resumed the house of commons expressed confidence in the new government by a vote of 311 against 251. The majority consisted of 243 conservatives, 53 liberals, and only 12 self-styled laborites, most of whom were members of the ministry. Mr. MacDonald acted, as Professor Laski has said, "not in cooperation with those who had made him their leader, but against them. He built his strategy, not on the forces of his friends, but on the strength of his enemies. The underlying thesis of his action was, no doubt, that he was himself indispensable in a position of national emergency, but it is a dangerous thing in a democratic State when any man, however eminent, builds his strategy upon the basis of his own indispensability."[6]

What part did the king play in the crisis of August, 1931? A definite answer to this question cannot be given. The king's conversations with Mr. MacDonald and with the conservative and liberal leaders were confidential, of course, and what was said is known only to those who were present. It was an open secret for a good while before the crisis that the relations between the prime minister and his labor cabinet were not altogether harmonious, and the idea of a coalition or "national" government had been entertained in various quarters for some time past. The formation of such a government may have been proposed by the king or by Mr. MacDonald. It has been said, and it was generally believed, that the king acted with scrupulous regard for constitutional propriety. It has been said, also, that the national government was the result of a "palace revolution." Whatever may have been the precise influence which the king exerted on the course of events, it seems safe to say that his rôle was not that of a passive spectator.

While the government formed under these extraordinary circumstances was in office, the power of the executive reached a height unknown, at least in times of peace, since the revolution of 1688. At the opening of the resumed ses-

[6] Harold J. Laski, *The Crisis and the Constitution: 1931 and After*, 16.

sion of parliament, which began early in September and lasted only one month, a motion introduced by the government was passed by the house of commons to take the whole time of the house for government business, thus depriving private members of such limited privileges in the way of introducing bills and otherwise as they had previously enjoyed. Extraordinary financial power was delegated by parliament to the executive. By the national economy act, which became law on September 30, the government was empowered, in the interest of economy, to issue orders in council reducing appropriations which had been authorized by parliament with respect to various public services, including unemployment insurance, and to the remuneration of persons in the service of the government, and by such orders to modify or terminate existing contractual rights. For many years past the executive had virtually controlled expenditure, as parliament had invariably approved the appropriations asked for, but never before had parliament formally authorized the executive to act in this vitally important function of government wholly at its own discretion and without any opportunity for debate. It was, indeed, largely in order to avoid the delays of debate that the particular economies to be made were not specified in the act. This procedure of economy by orders in council has been called "a momentus and unprecedented change of constitutional practice."[7] As a result of the economies that were effected and of additional revenue provided for by a finance bill (the second of the year) the budget was balanced before parliament was dissolved on October 7. By the irony of circumstance, however, the drain of gold from the Bank of England continued, and the very administration that had been formed to maintain the gold standard was forced to abandon it.

In the election, which came late in October, the national

[7] Sidney Webb (Lord Passfield), "What Happened in 1931: A Record," *The Political Quarterly*, vol. III, 1 ff.

government appealed to the country for "a doctor's mandate," on the ground that the emergency was not yet at an end, for a free hand to take whatever steps it might deem advisable for the purpose of promoting economic recovery. But the doctors disagreed as to the remedies that ought to be applied to the suffering patient. Mr. Baldwin, as leader of the conservative party, advocated a tariff as "the quickest and most effective weapon not only to reduce excessive imports" but as a means of inducing other countries to lower their tariffs. On the other hand, the liberal party reaffirmed its belief in freedom of trade as "the only permanent basis" for the economic prosperity of the nation. Mr. MacDonald, speaking as head of the government though not of any party, insisted that the administration must be "free to consider every proposal likely to help, such as tariffs, expansion of exports and contraction of imports, commercial treaties, and mutual economic arrangements with the Dominions."

In the electoral campaign the government was supported by the conservatives, the liberals (divided into two wings — national liberals and liberal nationals) and a new party, organized by those former members of the labor party who followed Mr. MacDonald and calling itself the national labor party, which put up candidates in a few constituencies. Emotional factors played a great part in the campaign and were no doubt deliberately exploited in the interest of the government — patriotic though vague apprehensions of impending disaster, a belief that only a "national" government could save the country, suspicions of the intentions of labor, and, in general, a "fear complex." The result was a smashing victory for the government, whose followers obtained about two-thirds of the total popular vote and nine-tenths of the seats in the new house of commons. It was, equally, a tremendous victory for the conservative party, which, as we have seen, won 470 seats, which was eighty-five per cent of the total number secured by sup-

porters of the government. In November Mr. MacDonald formed a second national government, preponderantly conservative in complexion. In the cabinet, which included twenty members, there were eleven conservatives, four national laborites (though this party had won only thirteen seats in the house), three national liberals, and two liberal nationals. The size of the government majority and of the conservative majority were alike unprecedented. The labor party, for the time being at least, was submerged, though it had polled approximately thirty per cent of the total vote.

The new parliament met early in November. A bill to check what were called "abnormal importations" was hurried through all its stages in both houses and became law on November 20. It is memorable as the first act by which parliament delegated to the executive the power to levy taxes. It gave to the board of trade, with the concurrence of the treasury, authority to impose customs duties up to one hundred per cent *ad valorem* upon articles which, in the judgment of the board, were being imported in abnormal quantities, provided that any order of the board for this purpose must be laid before the house of commons and should cease to be effective at the end of twenty-eight days after the order had been made unless it had been approved by resolution of the house. By another act, passed soon afterwards, the minister of agriculture and fisheries was empowered, with the concurrence of the treasury, to impose such duties as he deemed advisable upon a variety of horticultural products specified in the act, any order of the minister imposing such duties to be similarly laid before the house of commons.

The conservatives took their huge majority as a mandate for a permanent protective tariff, and a cabinet committee was appointed to study the question and report to the full cabinet. A majority of the committee and of the cabinet were in favor of protection as a permanent system, but four members of the cabinet — Lord (formerly Mr.) Snow-

den and the three national liberals — threatened to resign on this issue. If they had done so, the national government would have been at an end. To avoid this it was agreed that the dissentient ministers might, while remaining in the cabinet, speak and vote against the proposed tariff. This startling departure from the long established rule of the solidarity and collective responsibility of the cabinet was announced in the following statement issued on January 22, 1932:

The Cabinet has had before it the report of the Committee on the Balance of Trade, and after prolonged discussion it has been found impossible to reach a unanimous conclusion on the Committee's recommendations.

The Cabinet, however, is deeply impressed with the paramount importance of maintaining national unity in presence of the grave problems that now confront this country and the whole world.

It has accordingly determined that some modification of usual Ministerial practice is required and has decided that Ministers who find themselves unable to support the conclusions arrived at by the majority of their colleagues on the subject of import duties and cognate matters are to be at liberty to express their views by speech and vote.

The Cabinet, being essentially united on all other matters of policy, believes that by this special provision it is best interpreting the will of the nation and the needs of the time.

No parallel to this "agreement to disagree" can be found in modern British constitutional practice. In the eighteenth and early nineteenth century the rule of cabinet solidarity had not yet been firmly established, and differences of opinion in the cabinet on important public questions were tolerated. According to Lord Oxford (formerly Mr. Asquith) the convention which requires a dissentient member of the cabinet to resign before openly speaking or voting against a government measure dates from the Duke of Wellington's ministry in 1828.[8] It is not surprising that this

[8] The Earl of Oxford and Asquith, *Fifty Years of British Parliament*, vol. II, 214–15.

constitutional innovation did not pass unchallenged. Resolutions of censure were introduced in both houses of parliament, but they were defeated, of course, by overwhelming majorities. "Mr. MacDonald," said *The Manchester Guardian*, "has in six months been the instrument for carrying through two constitutional revolutions. In the autumn he broke up the British party system. Last week he broke up the Cabinet system."

The tariff act became law on the last day of February, 1932, reversing the national policy of free trade which had been adopted nearly a hundred years before. It provided for a tariff of ten per cent on all goods imported into the United Kingdom, with the exception of those which were expressly exempted from the payment of duty. It authorized the treasury, upon the recommendation of an advisory committee, both to exempt particular commodities from the payment of duty and to impose additional duties. In other words, it did what the abnormal importations act had done, it delegated to an executive department the power to levy taxes.

A subject that has been discussed from time to time in the last fifty years or so is what is known as devolution. It has long been apparent that parliament is called upon to do more than it can possibly do efficiently. In order to carry on at all it has been compelled to restrict debate severely and to delegate legislative power to the executive on a very extensive scale.[9] Years ago Gladstone said, "The Parliament is over-weighted; the Parliament is almost overwhelmed." The scope of its legislative activity has been greatly widened as the state has undertaken to deal with the multifarious and complex conditions and problems of modern industrialism. The British parliament, moreover, is the sovereign legislature not only of the United Kingdom but also of a vast and variegated collection of dependencies; in normal practice, it is true, subordinate local legislatures

[9] Delegated legislation is discussed below, 573 ff.

throughout the empire are left to deal with local affairs, but from time to time imperial subjects come before parliament. It legislates, furthermore, not only for the United Kingdom as a whole, but also specifically for its several component parts. In 1912, before the establishment of the Irish Free State removed the larger part of Ireland from the jurisdiction of parliament, it was estimated that about one-half of all the laws which it had enacted during the preceding twenty years related to parts only of the United Kingdom — England, Ireland, Scotland, Wales — and even since the formation of the Irish Free State a very considerable part of its time has been devoted to regional legislation. The parliament at Westminster, then, legislates nationally, imperially and regionally. The primary object of most of those who have advocated a system of devolution has been to relieve the pressure of business in parliament by "devolving" legislative authority upon new subordinate regional legislatures. Another aim has been to satisfy regional patriotic aspirations.

As early as 1874 Isaac Butt, the "father" of the movement for Irish home rule, referred in a speech in the house of commons to the congestion of business in parliament and said that he would favor home rule for England and Scotland, if desired by the people of these countries, as well as for Ireland. In 1889 a motion was made in the house advocating the establishment of a Scottish national parliament. The combination of regional patriotism and the desire to increase the efficiency of parliament is manifest in the first proposal for a comprehensive scheme of devolution, or "home rule all around," that was offered in parliament. In 1895 a resolution was introduced in the house of commons, "that . . . in order to give speedier and fuller effect to the special desires and wants of the respective Nationalities constituting the United Kingdom, and with a view to increase the efficiency of the Imperial Parliament to deal with Imperial affairs, it is desirable to devolve upon Legis-

latures in Ireland, Scotland, Wales and England respectively the management and control of their domestic affairs."

The most thorough parliamentary discussion of devolution that has taken place was in June, 1919, when the house of commons went on record as in favor of the creation of subordinate regional legislatures within the United Kingdom, "with a view to enabling the Imperial Parliament to devote more attention to the general interests of the United Kingdom and, in collaboration with the other Governments of the Empire, to matters of common Imperial concern." In the following October the prime minister appointed a conference composed of members of both houses of parliament, to be presided over by the speaker of the house of commons, to consider and report upon a comprehensive plan of devolution. Its report was in the form of a letter from the speaker to the prime minister written in April, 1920.

The members of the conference agreed that subordinate legislatures should be established for England, Scotland and Wales. In view of the special treatment of Ireland which was under consideration at the time, and which was embodied in the government of Ireland act of 1920, the conference made no recommendations with respect to Ireland. As regards England it felt that a division of the country into separate areas for purposes of devolution raised such serious difficulties that it ought not to form part of a general scheme of devolution in its initial stage. General agreement was reached as to the powers which could properly be devolved upon local legislatures and those which should be reserved to the British parliament. But opinion was divided with respect to the composition of the local legislative bodies, and two schemes were presented. One of them contemplated the establishment of local subordinate legislatures for England, Scotland and Wales, to be styled "grand councils," bicameral in form, the lower house to consist of all the members of the house of commons sitting for constituencies in that area, and the upper house to be composed of members

of the house of lords, chosen for the duration of each parliament by a committee of the house. It was proposed that there should be an executive committee for each grand council, consisting of a chairman appointed by it and heads of departments, appointed by the chairman. In the second plan it was recommended that the local legislatures should be entirely separate in personnel from parliament, and that their members should be elected, by direct popular vote, for the same constituencies and by the same electors as returned members to the house of commons. Neither of these plans for devolution has been put into effect.

The establishment of the Irish Free State, with a parliament of its own, though it has done something toward relieving the strain on the British parliament, cannot be regarded as an instance of devolution. The parliament of the Irish Free State is not a subordinate legislature, to which the British parliament has delegated power to legislate in local affairs for a part of the United Kingdom. The Irish Free State is not a part of the United Kingdom, and its parliament, like those of the oversea Dominions, is coordinate and equal in status with the British parliament. An example of true devolution is to be found, however, in the case of Northern Ireland, which came into existence as a distinct political entity within the United Kingdom by virtue of an act passed by the British Parliament in 1920, to which reference has been made.

The legislative power of the parliament of Northern Ireland is strictly limited, many subjects being excluded from the scope of its authority and reserved for regulation by the British parliament. There is a governor, appointed by the king, who acts on the advice of ministers who constitute an executive committee of the privy council of Northern Ireland, which is virtually a responsible cabinet. The parliament consists of a senate and a house of commons. The senate is composed of twenty-four members chosen by the house of commons, and the mayors of Belfast and London-

derry *ex officio*. The house of commons is composed of fifty-two members elected by a system of proportional representation. Revenue bills must originate in the lower house and may not be amended by the senate. In the case of ordinary legislation a bill passed twice by the house of commons and not accepted by the senate may be referred to a joint sitting of the two houses, in which the members of the lower house would outnumber the senators, and passed by a majority of the votes of those present.

The congestion of business in parliament could be relieved by devolving responsibility and authority for the regulation of particular subjects for the entire kingdom upon bodies which would be free to devote their whole time and attention to such subjects. Devolution of this type, functional rather than regional or territorial, has been advocated especially for the better regulation of industrial conditions and activities. It is not, however, in the realm of industry, but of religion, that functional devolution has actually been put into operation.

In May, 1919, the convocations of the two ecclesiastical provinces of England, Canterbury and York, presented addresses to the king submitting the text of a constitution of a national assembly of the church of England. Provision was made in this constitution for an assembly consisting of three houses — bishops, clergy, and laity — authorized to pass "measures." All measures to which it was desired to give the force of law were to be referred to a "legislative committee," appointed by the assembly, which should take such action as might be provided for by act of parliament in order that the measures might become law.

In December, 1919, an act was passed by parliament conferring powers upon the national assembly of the church of England thus constituted. It provided for a committee of parliament, to be called the "ecclesiastical committee," consisting of fifteen members of each house. In accordance with this act every measure passed by the assembly is submitted by

its legislative committee to the ecclesiastical committtee of parliament, which is required to draft a report on each measure, setting forth its nature and legal effect and expressing opinion as to its expediency. The ecclesiastical committee communicates its report to the legislative committee of the assembly, but does not present it to parliament until the legislative committee so requests. A measure, in the words of the act, may relate to " any matter concerning the Church of England," and may " extend to the amendment or repeal . . . of any Act of Parliament." When the ecclesiastical committee has reported to parliament on any measure submitted by the legislative committee, the measure is laid before parliament and is presented to the king if both houses pass a resolution directing that it be presented. Upon receiving the king's assent, the measure has the force of an act of parliament.

The National Assembly of the Church of England has met regularly ever since it was established and has passed several measures every year which have become law. Commenting upon this experiment in functional devolution a recent writer says: " Measures which, though they do not become law without the intervention of Parliament, are nevertheless the work of another body, and which can repeal or amend Acts of Parliament, are a striking constitutional novelty. This method of law-making has perhaps in it the germs of further development, and is susceptible of being made applicable to other bodies than the Church of England. Its working, therefore, will be closely watched by all students of constitutional law." [10]

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[10] Maurice L. Gwyer in *The Law and Custom of the Constitution,* by Sir William R. Anson, Vol. I, 5th ed., 1922, 321.

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CHAPTER XXIII

THE GROWTH OF ADMINISTRATION

A well-informed student and keen observer of the contemporary British system of government, in close contact with the realities of British public life, declared in a book published in 1930 that the rapid growth of the numbers, functions and powers of professional administrators was not less significant than the growth of political democracy, and added that it was "absurd to write and speak about our system of government as if this immense development had made no difference to it."[1] The growth of administration has undoubtedly had far-reaching effects upon the development of the constitution. It has been caused partly by the increase of population and the expansion of trade and industry, but primarily by a vast extension of the functions of the state, which has involved new and complex activities on the part of government and a high degree of specialized and technical knowledge on the part of officials. Old executive departments, such as the treasury, the foreign office and the colonial office, are much more highly organized than they were a hundred years ago, and many new departments have come into existence. In the early nineteenth century there were no executive offices that performed the functions of the present ministry of health, ministry of labor, ministry of transport, ministry of agriculture and fisheries, ministry of air, board of trade or board of education. "In a century," to quote an eminent authority on administration, "the State has developed from the State as policeman to the State as nurse, doctor, chemist, and benefactor, guide, philosopher, and

[1] Ramsay Muir, *How Britain is Governed*, New York, 1930, 53–54.

friend from cradle to grave," and " with every added activity has come the experience that laws without administrative agents are vain." [2]

In the eighteenth century the conditions of life in Great Britain were much more simple than they are today, and the range of governmental activity was far less extensive. Society was still predominantly agricultural; the problems of modern industrialism had not yet arisen. The collection of taxes and the administration of trade regulations required the services of a considerable number of officials, but government did not concern itself with such matters as education, public health, the regulation of factories, mines and transportation, or the insurance of wage-earners against sickness and unemployment, nor, apart from the simple services performed by the post office, did it engage directly in business. There was no need of an army of civil servants such as exists today. The country was governed, both centrally and locally, by amateur administrators. For the enforcement of its acts parliament depended largely upon the justices of the peace and other local officers, who were not salaried professional administrators and of whom no qualifications of competence were required. It is not surprising that administration was lax and inefficient.

In the sphere of central government, with which alone this chapter is concerned, administration was conducted by, or under the direction of, a group of ministers, who presided over the executive departments — much less numerous then than now — and were assisted by subordinate officials and clerks. The ministers were political and party leaders who owed their offices to their wealth, social position and family influence, success in parliament, party services or court favor, rather than to administrative ability or special knowledge of the work of the departments over which they were called upon to preside. Under the system of patronage then

[2] Sir Josiah Stamp, *Studies in Current Problems in Finance and Government*, 31.

existing appointments to subordinate offices were commonly made for political and party purposes, to influence and reward members of parliament and voters, with little or no regard to the personal qualifications of the individuals appointed. The civil service, it has been said, was "the coin with which the great political parties and families bought support in Parliament and votes at elections." Many offices were profitable sinecures which involved no public service on the part of those who held them.

Attempts were made in the eighteenth century to lessen the corrupt influence over the house of commons and the electors which the government of the day was able to exert through patronage, though reformers in general showed little interest in improving the quality and efficiency of officials. Beginning soon after the Revolution of 1688 a series of statutes, extending to the nineteenth century, excluded various classes of office-holders from the house of commons. A provision in the Act of Settlement went so far as to enact that "no person who has an office or place of profit under the King or receives a pension from the Crown shall be capable of serving as a member of the House of Commons," but this was repealed before it went into operation, and patronage long continued to be a potent means of manipulating the house of commons. In the house elected in 1761, to take a single illustration, there were approximately 50 ministers and other government officials, 50 court officials, 50 holders of sinecures, more than 50 army and navy officers, nearly 40 government contractors and 10 holders of secret service pensions — in all some 250 out of a total membership of 558.[3] It would be a mistake to assume that the government could count on the unswerving support of every one of these 250 members, but it was unlikely that any large proportion of them would oppose its policies or measures. Among the remaining 300 odd members, moreover, were many who were

[3] L. B. Namier, *England in the Age of the American Revolution*, 257–262.

attached to the government by strong ties of gratitude for offices or other favors bestowed on their relatives, friends, or constituents, or for their own elections. It is not strange that the resignation of a ministry because it had lost the confidence of the house of commons was an extremely rare occurrence in the eighteenth century. It happened only three times. Government influence over the house of commons was materially diminished, though by no means totally abolished, by an act passed in 1782, for which Edmund Burke was principally responsible, which did away with a number of government and court offices. By another act, passed in the same year, government contractors were excluded from the house. At different times various classes of government employees have been excluded, and nowadays this exclusion applies to the whole body of what is called the civil service.

Offices were used freely, also, as a means of securing the election of members of parliament who would support the ministry, and it is significant that throughout the eighteenth century there is not a single case in which a general election went against the government of the day. In a provision of the Bill of Rights it was declared that the election of members of parliament ought to be "free," but without specifying what should be deemed to constitute a violation of this freedom, and as a matter of fact elections in many constituencies long continued to be controlled by influence, exerted through patronage, over electors and borough patrons. Lord Rockingham, when he was prime minister in 1782, said that in 70 boroughs elections were decided by the votes of revenue officers. In that year postmasters and officials employed in the collection of customs and excise taxes were debarred from voting by act of parliament, and they continued to be excluded from the electorate until 1868. The Reform Act of 1832, by abolishing many boroughs which had been controlled by the government, or by borough patrons who supported the government, greatly diminished ministerial influence over elections, though appointments to office

continued to be made for political purposes. The practice of wholesale removal of office-holders when one party or faction succeeded another in control of the government, the practice known in American history as the "spoils system," was not established in England, but vacancies were normally filled by the appointment of partisans, and it was customary for members of parliament belonging to the party in power to nominate to posts within their constituencies. In 1829 the Duke of Wellington wrote to Sir Robert Peel, complaining not that political patronage existed, but that it was enjoyed by private members of parliament instead of by the government.

The growth of administration during the last hundred years, and especially during the last three or four decades, has resulted in great part from laws passed to deal with the social problems of modern industrial life. During the first half of the nineteenth century, notably after 1830, a beginning was made in the work of social reconstruction, and this involved some extension of governmental functions and administrative activities. But for thirty years or so after 1830 the prevailing opinion was that the general welfare could best be promoted by removing restrictions upon individual liberty, not by increasing governmental regulation. The predominant public opinion, as it affected legislation, was profoundly influenced by the teachings of the great law reformer, Jeremy Bentham, whose ideal was "the greatest happiness of the greatest number." Believing that the individual is in general the best judge of his own happiness, Bentham and his followers, the utilitarians as they came to be called, favored the maximum of liberty for each individual that was compatible with the like liberty of others, and most of the reformers of the early Victorian period, whether avowed Benthamites or not, were individualists. The general tendency of the reforms that were made in all branches of the law was to extend the scope of liberty.

But during the third quarter of the nineteenth century

confidence in *laissez-faire* as a means of realizing the "greatest happiness" principle declined, and reformers came to look increasingly to government for the amelioration of social conditions. What is called collectivism succeeded individualism as the predominant current of public opinion, collectivism being defined as "the school of opinion . . . which favors the intervention of the State, even at some sacrifice of individual freedom, for the purpose of conferring benefit upon the mass of the people."[4] Various factors contributed to bring about this change in opinion. Even when individualism was still in the ascendant there were critics of existing social conditions who repudiated *laissez-faire* and advocated governmental intervention in the interest of social justice, for it was evident that the gospel of "individual liberty" and "self-help" had not redeemed the masses of the people from poverty and misery. The early factory legislation represents a victory of collectivism over individualism. The rise of trade unionism in the third quarter of the nineteenth century strengthened the position of workers in skilled trades, and the Reform Act of 1867 gave them greater political influence than they had ever possessed before. The reforms of the *laissez-faire* period were the work of the middle and upper classes and of parliaments in which those classes were dominant. But wage-earners as a class were not individualists; the trade unions were teaching them the advantages of collective action, and they were more inclined than the middle classes to look to government for measures of social welfare. Before the end of the nineteenth century socialist doctrines made rapid headway in trade union circles and claimed converts even among the middle classes. During the last decade of the century trade unionism gave rise to a socialist political party, the independent labor party, and at the beginning of the twentieth century the labor party, a more inclusive organization, was founded.

[4] A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, 2nd ed., 64.

In the general election of 1906 it succeeded in winning some thirty seats in the house of commons. The liberal party, which had come to power just before this election, was committed to a program of thorough-going social reconstruction, and the years from 1906 to the outbreak of the World War in 1914 form a period of unprecedentedly rapid collectivist reforms. The necessities of war led to a vast extension of governmental activities, reflected in the establishment of new executive departments and other administrative agencies, a great expansion of the work of many of the old departments and a striking increase in the number of civil service employees and of expenditure on account of administration. The country was governed by a "bureaucracy" to a far greater extent than ever before. Most of the wartime emergency organizations came to an end with the advent of peace, but on the other hand the work of post-war reconstruction led to further governmental intervention and control.

Government, moreover, has not confined itself to the regulation of industry and of social relations for the public welfare. It has itself gone into business on a large scale. Through the post office, which now employs more than half of the total number of civil servants, it not only conveys letters and parcels but conducts the great business of the telegraph and telephone and maintains savings banks. A public authority known as the central electricity board buys and sells electric current, and another, the British broadcasting corporation, administers the business of broadcasting as a government monopoly.

Recent writers on English government emphasize the importance of the part played by the permanent civil service, sometimes called the "bureaucracy." Professor Ogg, for example, says that it is "a less conspicuous part of the government than the ministry, but it certainly is not a whit less essential,"[5] and Mr. Ramsay Muir declares that it has

[5] *English Government and Politics*, 207.

become "the most vital and potent element in our system of government, although in the eyes of the law it wields scarcely any formal authority." [6] The effect of the reform legislation of the early twentieth century upon the permanent civil service was thus described by Mr. Sidney Low in 1913. In the Introduction to the revised edition of his book, *The Governance of England*, he wrote:

The last decade has witnessed the creation of a new bureaucracy, with its army of inspectors, statisticians, rate-collectors, surveyors, valuers, and clerks. Englishmen have always distrusted "officialism". . . . The civil servant, the national or municipal employee, has been regarded rather as a necessary evil than an object of admiration or affection. Yet the increase, both in the numbers, and in the multifarious duties, of this hierarchy might have been, and indeed was, anticipated. A government which is superintending elementary and secondary education, providing pensions for aged persons, conducting a colossal insurance business, furnishing medical aid to the greater part of the industrial population, surveying and valuing all the landed estates of the country, and managing labour bureaus, evidently needs a very large staff of servants. The professional administrator, of one kind or another, is a characteristic product of modern conditions like the professional politician.

Government officials appointed under the conditions which prevailed in the eighteenth and early nineteenth century could not have performed the work that is done in the upper ranges of the modern British civil service. A movement looking to an improvement in the quality of officials began in the early nineteenth century. In 1820 a rule was adopted that higher offices in the customs should be filled by promotion from the lower ranks of the service, and ten years later promotions in general ceased to be made for partisan reasons. Between 1830 and 1850 the examination of candidates for office was instituted in many of the departments as a means of guarding against the appointment of unqualified persons,

[6] *How Britain is Governed*, 66.

though the system of open competitive examination, which had been proposed by Bentham, was not yet adopted; the selection of the candidates to be examined was still controlled by patronage. What is known as the "merit system," based upon open competition, was first adopted in the Indian civil service in 1854, largely through the labors of Macaulay, who had held office in India and was deeply interested in improving Indian administration. Meanwhile Gladstone, then chancellor of the exchequer, had appointed a commission to inquire into the organization of the civil service, consisting of Sir Stafford Northcote and Sir Charles Trevelyan; the latter was a brother-in-law of Macaulay, had long been interested in civil service reform and was then permanent secretary of the treasury. Their report, submitted in November, 1853, may be regarded as the foundation upon which the present civil service of Great Britain has been built. The commissioners declared that the government of the country could not be carried on without "an efficient body of permanent officers, occupying a position duly subordinate to that of the Ministers . . . yet possessing sufficient independence, character, ability, and experience to be able to advise, assist, and, to some extent, influence those who are from time to time set over them." Periodical open competitive examination as a means of recruiting the civil service was the basic recommendation of the report, with different types of examination corresponding to the distinction in administration between intellectual and mechanical work. For the higher positions in the civil service attempts should be made, the commissioners urged, to secure the services of the most promising young men by competitive examinations "on a level with the highest description of education in this country," and successful candidates should be allowed to enter the departments of their choice in the order of their ranking in the examination. The commissioners were opposed to departmental control and regulation of examinations and advocated the creation of a central

examining board which should include, or have the assistance of, educators and persons familiar with official business. The report found favor in disinterested and public-spirited circles, but the proposed substitution of merit for favor in the appointment of office-holders was greeted with a chorus of disapproval from beneficiaries of the existing system and others who, for one reason or another, were opposed to change.

It did not seem expedient to the government to adopt at once all of the recommendations made by the commissioners. But by an order in council of May 21, 1855, a civil service commission was established, consisting of three members, to examine all persons proposed to be appointed to junior positions in the civil service. Open competition, however, was not provided for, and for some years appointments were made by a combination of patronage and limited competition. A select committee of the house of commons reported in July, 1860, that though the order in council had checked some of the earlier abuses, it had been largely evaded, and that the competitions held under it had been for the most part shams. This committee was in favor of open competition but contented itself with recommending for the immediate future a real and effective limited competition. The government approved of its recommendations, and for the next ten years the civil service was recruited to a great extent by competitive examination of nominated candidates. By an order in council of June 4, 1870, open competitive examination was made compulsory, with certain exceptions, for entrance to the service. Since then several royal commissions have been appointed to investigate and report on the civil service, and in the light of their recommendations many modifications and alterations have been made. The most recent, known as the Tomlin commission, was appointed in 1929 and reported in 1931.

We need not attempt to trace the historical development of the civil service, but something should be said of its present

organization and functions. In the report of the Tomlin commission civil servants are defined as "those servants of the Crown, other than holders of political or judicial offices, who are employed in a civil capacity, and whose remuneration is paid wholly and directly out of monies voted by Parliament." This excludes from the civil service not only ministers (heads of executive departments and parliamentary secretaries), judges, and military and naval officers, but also all employees of local government (policemen, school teachers, etc.), and members of the Indian and colonial services, whose salaries are not on the British budget. Of civil servants so defined, the total number in 1931 was about 445,000, including some 123,000 industrial workers (employed in dockyards, arsenals, the post office and other departments), about 180,000 manipulative workers (employed mainly in the post office, such as postmen, mail-sorters, telegraphists and telephonists), and about 18,000 messengers, porters, caretakers and charwomen. Included in the civil service, also, are a number of administrative-clerical classes and of professional, scientific and technical (specialists) classes, and it is by members of these classes, working in the various departments of government, that the multifarious and complex business of administration is carried on.

The highest class, which may be regarded as the aristocracy of the civil service, is known as the "administrative class." In 1930 it included about 1100 officers, excluding the staff of the foreign office and the diplomatic and consular services. It is recruited by competitive examination, open to men and women between twenty-two and twenty-four years of age, and by promotion from other classes. The examination, which is designed as a test of liberal education rather than of technical training, is severe in character, and only those who have taken an honors degree at a university are in a position to pass it. Oxford and Cambridge supply a very large majority of the successful

candidates. To this class belong the permanent secretaries of the executive departments, assistant secretaries, principals and assistant principals.

The executive departments of the British government have come into existence at different times and differ widely in their organization. Some of them originated in the middle ages, others have been established since the World War. The heads of the departments, variously designated, are the ministers (such as the secretary of state for foreign affairs, the first lord of the admiralty, the president of the board of trade, the minister of health), the more important of whom, under the leadership of the prime minister, constitute the cabinet. Subordinate to the ministers are the parliamentary secretaries of the departments, who, like their chiefs, are members of the ministry, though not of the cabinet. Both ministers and parliamentary secretaries are members of the house of commons or the house of lords. In the administration formed by Mr. Ramsay MacDonald in 1929 there were sixty-two members of the ministry (including some half dozen officers of the royal household), nineteen of whom sat in the cabinet. Subordinate to ministers and parliamentary secretaries are the permanent officials of the departments.

In several important respects the ministers and their civil service subordinates are sharply contrasted. In the first place, the former are political in character, and the latter are non-political. Ministers are politicians, party leaders and members of parliament, and it is usually because of their services and prominence as such, rather than by reason of administrative ability, that they are appointed to office. Civil servants, on the contrary, are not permitted to take any part in politics beyond voting, they are excluded from parliament, and they owe their admission to the service and subsequent promotions to evidence they have given of administrative promise and capacity. Being party leaders, ministers hold office only so long as their

party remains in power. A change of ministry normally involves a change in the headship of all the departments. Ministers, that is to say, are temporary; in relation to their departments they are birds of passage. Civil servants, on the other hand, are permanent. Nominally, it is true, they hold office at the pleasure of the crown, but in fact they are never removed except for misbehavior. Thus while the minister is connected with a department for only a relatively short time, varying from a few months to a few years, the civil servant finds his professional career there. These conditions go far to explain another contrast. The minister is necessarily an amateur in the business of his department, which includes many different activities, each calling for specialized knowledge and training. He usually knows little or nothing about the work of the department when he is appointed, and he is not free to devote more than a part of his time to it while he is in office. His duties and activities as a member of parliament, a member of the cabinet and a party leader claim much of his time and energy. The expert knowledge required to keep the department running is supplied by his civil service subordinates. "Government by amateurs," an expression that has been applied to the British system of administration, is likely to be misleading. Ministers are amateurs, but nowadays by far the greater part of the work of the departments is done by the civil service officials, and when ministers are called upon to make decisions or otherwise to take action, they normally consult with the permanent secretaries or technical advisers of their departments. Still another contrast is that the minister is responsible for everything that is done in his department, and the civil servant is not responsible. If a minister is attacked in parliament for some action of his department, he cannot shield himself by saying that the action was taken by, or on the advice of, one of his subordinates. On the other hand, if the conduct of his department has been successful, he gets the credit. Ministers are constantly in the public gaze — in

parliament, on the platform, in the press. They talk incessantly. Civil servants, by a well-observed convention, never talk in public about the work of their departments or claim any credit for what has been done by them.

It would be impossible in this chapter to give even a summary description of the vast and various volume of business that is carried on by the executive departments.[7] Much of it, no doubt, is routine in character, but in its higher ranges it calls for expert knowledge, trained judgment and political inventiveness. It is not exclusively executive; it involves much more than the mere execution of existing laws. It includes study of the operation and effects of administrative methods and policies, consideration of ways and means of improving them, and formulation of legislative projects. A thoughtful and experienced official in the colonial office once said, "It is one business to do what must be done, another to devise what ought to be done. It is the spirit of the British Government, as hitherto existing, to transact only the former business." This was written in 1836, when *laissez-faire* still held sway. It is not an over-statement to say that it is now one of the functions of administration, and the one that calls for the highest qualities of knowledge, judgment and insight, to devise what ought to be done.

Two important developments connected with the growth of administration have given rise to much discussion and deserve the attention of all students of recent English constitutional history. The first is administrative legislation, usually spoken of as delegated legislation, and the second is administrative justice.

Nowadays only a relatively small part of the total legislative output of the central government is enacted directly by parliament. Much more extensive in bulk than the statutes are the multitudinous "regulations," "rules" and

[7] The activities and organization of the various departments is described by competent authorities in the volumes of "The Whitehall Series," edited by Sir James Marchant.

"orders" made by subordinate authorities upon which parliament has conferred law-making powers. The extent to which the practice of delegating legislative authority has gone can be seen from the fact that instances of it are found in twenty-six of the forty-three public general acts passed by parliament in 1927, to take a single year for illustration. Delegated legislation has been published officially since 1893 in a series of volumes entitled *Statutory Rules and Orders*. During the years 1926–28, inclusive, the number of statutes averaged fifty a year, while the number of sets of regulations, rules and orders averaged over 1400. In the words of Mr. Cecil T. Carr, the present editor of the *Statutory Rules and Orders*, "the statute book is not only incomplete but even misleading unless it be read with the delegated legislation which amplifies and amends it." Ministers are the principal recipients of delegated legislative power, though sometimes it is conferred on the king in council or some other authority. But when power is given to the king in council it is really exercised by some minister, and the order in council is framed in the executive department concerned. The difference between statutory orders in council and departmental regulations issued in the name of ministers is one of form, not of substance.

The delegation of legislative powers by parliament to the executive is not confined to recent English history. Some examples of it can be found in the Tudor period, especially in the reign of Henry VIII, and occasional instances occur in the eighteenth century. But prior to the middle of the nineteenth century it was exceptional and comparatively rare.[8] The functions of government were few and simple, as has been said, and parliament was able to make nearly all the laws that were required for the government of the realm. The growth of delegated legislation has been caused in great

[8] One of the earliest writers on English government to give it any attention was Alpheus Todd in his *Parliamentary Government in England*. In the second edition of this work, published in 1887, there is a chapter on "Legislation by Public Departments."

part by the expansion of the sphere of governmental activity.

In delegating legislative powers parliament has acted in response to immediate needs or convenience and sometimes, it would seem, with little appreciation of the significance or probable effects of its action. It has not followed any general principles, and it is therefore not surprising that administrative legislation should exhibit anomalies, inconsistencies and serious defects. A committee called the committee on ministers' powers, appointed by the lord chancellor in 1929 to investigate the legislative and judicial powers exercised by ministers, came to the conclusion that the defects of the system of delegated legislation, if it can be called a system, were results of its "haphazard evolution."

A fundamental distinction in law is to be noted between parliamentary legislation and delegated legislation. The legislative authority of parliament is inherent and legally unlimited, but delegated legislative power, to whatever authorities it may be entrusted, is derivative and limited by the terms of the statute by which it has been delegated. It follows that while courts of law in Great Britain cannot question the validity of any provision of a statute, they can and do pass upon the validity of delegated legislation and sometimes adjudge it to be *ultra vires* (that is, beyond the legal powers of the law-making authority) and therefore invalid. Sometimes, however, powers of legislation have been delegated in such terms as to limit, if not entirely to preclude, the exercise of this function by the courts.

We now proceed to a consideration of the nature and extent of the legislative powers which parliament has delegated to the executive, existing safeguards against unwise exercise and abuse of these powers, justification and criticism of administrative legislation, and proposals that have been made for its reform.

In examining the nature and extent of the legislative powers which have been conferred upon the executive we can-

not do better than to follow the committee on ministers' powers in distinguishing between what may be called the normal and the exceptional practice of parliament.[9] In delegation of the normal type the limits of the delegated powers are clearly defined and can be enforced by the courts, and the authority to which power is delegated is not authorized to legislate on matters of principle, impose taxation, or amend acts of parliament. If delegation had always been of this type, it would probably have caused little public dissatisfaction. But in some cases extraordinary powers have been conferred, some of them of such character and scope, in the opinion of many, as to invest the executive with dangerous discretionary authority and constitute a distinct menace to individual liberty.

Occasionally, wide and ill-defined discretion to legislate on matters of principle has been given to ministers. An example of this kind of delegation is found in the Poor Law Act, 1930, which authorizes the minister of health to make such regulations "as he may think fit" for "the management of the poor." Under such a provision the minister could make important changes in matters of policy.

Since the World War there have been a few instances in which powers of taxation have been delegated. A notable case in point is the Import Duties Act, 1932, referred to in the preceding chapter, which has been described as "one of the most important delegating enactments which Parliament has ever passed." This is a general tariff and imposes a duty of ten per cent on all goods imported into the United Kingdom, with the exception of those expressly exempted from duty. By one of its provisions the treasury, upon the recommendation of the import duties advisory committee, is authorized to levy additional duties on imports of certain descriptions, though any treasury order issued for such purpose is required to be laid before the house of commons and ceases to

[9] Committee on Ministers' Powers, *Report*, 1932, published by H. M. Stationery Office, Cmd. 4060, 30 ff.

be effective at the expiration of a specified period unless it has been approved by resolution of the house.

A few acts of parliament passed since 1888 empower ministers to modify the provisions of the acts. An example of this exceptional grant of legislative power, which has been nicknamed "the Henry VIII clause," is found in the Rating and Valuation Act, 1925, in which it is provided that "if any difficulty arises in connection with the application of this Act to any exceptional area . . . or otherwise in bringing into operation any of the provisions of this Act, the Minister may by order remove the difficulty . . . or do any other thing, which appears to him necessary or expedient for . . . bringing the said provisions into operation, and any such order may modify the provisions of this Act so far as may appear to the Minister necessary or expedient for carrying the order into effect." Grants of legislative power of this type occur in only eight or nine statutes passed between 1888 and 1929, and when they have been made, a time limit has always been set for the exercise of the powers. Apart from "the Henry VIII clause" parliament has occasionally authorized ministers to modify provisions in statutes other than the statute conferring the authority.

In a good many instances parliament has provided that regulations made in pursuance of delegated powers should have effect as if they were included in the act by which the powers were delegated. For example, the Poor Law Act, 1927, authorizes the minister of health, "for executing the powers given to him by this Act," to make regulations which "shall have effect as if enacted in this Act." Such a regulation, issued for such purpose, would have to be treated by the courts as if it were a part of the act. It would seem that the object of a provision of this kind is to prevent the courts from inquiring into the validity of the regulations. It has been laid down judicially, however, that it does not have this result; even if this formula is used in the act, a

regulation will not be held to be valid by a court if it is inconsistent with the provisions of the act under which it is made or does not come within the scope of the powers conferred.

In some statutes there appears what has been called the "conclusive evidence provision," which can have been intended only to exclude all control by the courts. An example of this occurs in the London Traffic Act, 1924, by which the minister of transport is empowered to make regulations regarding traffic in and near London. It is provided that "the making of any regulations under this section shall be conclusive evidence that the requirements of this section have been complied with." In a few acts it has been provided that if an order drafted by a local authority for a specified purpose is confirmed by a designated government department, such confirmation "shall be conclusive evidence that the requirements of this Act have been complied with, and that the order has been duly made and is within the powers of this Act."

There are three principal safeguards against the unwise exercise or abuse of delegated legislative power. There is, in the first place, the judicial safeguard afforded by the *ultra vires* principle that any enactment made by an authority to which legislative power has been delegated is invalid if it is not within the scope of the delegated power. Sometimes, however, as has been seen, provisions have been introduced into delegating statutes intended to prevent the courts from inquiring into the validity of regulations made under the statutes. Two safeguards have been provided by parliament, though they do not apply to all delegated legislation. The first is a requirement that appears in many delegating statutes, that regulations made thereunder shall be laid before parliament; the second is the provision for publicity made by the Rules Publication Act, 1893.

When a statute authorizes the making of regulations it often stipulates that they shall be laid before parliament,

sometimes with no further provision, sometimes with the added provision that such regulations may or shall be annulled if a resolution to that effect is passed by either house within a specified period of time, or that the regulations shall not be effective unless approved by resolution of both houses or of the house of commons, or that they shall not be effective after the expiration of a specified period unless so approved. The question of whether particular regulations shall be laid before parliament or not depends entirely upon the statute under which they are made. There is no general law requiring all delegated legislation to be laid.

The Rules Publication Act not only provides for the publication of the more important classes of delegated legislation after it has been enacted but also for a system of antecedent publicity. If it is proposed to make regulations under any statute which requires regulations to be laid before parliament, at least forty days' notice must be given in the *London Gazette*, and the notice must state where copies of the draft regulations can be procured. This is a valuable safeguard as far as it goes, since it enables interested public bodies to make representations and suggestions which the authority proposing to make the regulations is required to consider. But it does not apply to regulations which are required to be laid before parliament before taking effect, or to those which are made by certain specified departments, or to those which are not required to be laid before parliament at all.

What are the main arguments that have been advanced to justify the practice of delegated legislation? It is said, in the first place, that parliament could not possibly give consideration to the vast mass of legislation called for by conditions in a modern industrialized community which is committed to the principle of social service through governmental action.

Moreover, it is asserted, the subject-matter of a great deal of modern legislation is too technical to be dealt with by

a legislative assembly. Parliament can lay down general principles, but the details of legislation can best be framed by the experts in the departments concerned.

It is desirable, furthermore, and perhaps necessary, so it is said, for parliament to authorize the executive to legislate in cases of emergency. Parliament is not always in session, and its procedure in legislation is slower than that of the executive. In the Defence of the Realm Acts, passed during the World War, parliament conferred upon the executive the widest powers to make regulations for public safety and defence, and under these acts a vast quantity of delegated legislation was enacted. By the Emergency Powers Act, 1920, the crown is authorized to declare by proclamation that a state of emergency exists, if it appears "that any action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life." So long as such a proclamation is in force, the king in council may make regulations "for securing the essentials of life to the community." The proclamation, however, must be communicated to parliament, which, if not in session at the time, must be summoned to meet within five days, and any regulations made must be laid before parliament and shall not remain in force for more than seven days unless a resolution for their continuance is passed by both houses. The powers conferred on the executive by the Emergency Powers Act were used at the time of the general strike in 1926.

Another advantage that is claimed for delegated legislation is its flexibility. It can be modified and altered more easily and more rapidly in the light of experience than acts of parliament can be.

Critics of delegated legislation, as it has developed in

England, generally concede the necessity of some measure of delegation, but they find grave fault with various features of the system. They point out that delegated legislation is not always confined to matters of detail, and some of them believe that it has gone so far as to constitute a violation of constitutional principle and a dangerous invasion of the sphere of legislation by the executive. They assert that parliamentary supervision of delegated legislation, where provision is made for it, is not in practice effective, and that legislative power is sometimes conferred in such general and vague terms that the intention of parliament is not clear and judicial control is thereby weakened, and they protest against attempts that have been made to prevent the courts from applying the *ultra vires* principle.[10] The chief justice of England, Lord Hewart, has gone so far as to say in a book which received wide attention that "there is in existence, and in certain quarters in the ascendant, a genuine belief that Parliamentary institutions and the rule of law have been tried and found wanting, and that the time has come for the departmental despot, who shall be at once scientific and benevolent, but above all a law to himself." The committee on ministers' powers, on the other hand, after careful investigation of the whole subject of delegated legislation, found no evidence to support the opinion that departmental officials have been trying to secure arbitrary power for themselves, as the chief justice had suggested.

Various proposals have been made for reform of delegated legislation, most notably by the committee on ministers' powers. This committee, while expressing the view that delegated legislation was inevitable and, with proper safeguards, desirable, was equally of the opinion that there were defects in the system that ought to be remedied and dangerous tendencies that ought to be guarded against. It recom-

10 Various features of delegated legislation are severely criticized by Lord Hewart in *The New Despotism*, chapters I, V, VI and by Sir John A. R. Marriott in *The Crisis of English Liberty*, Prologue.

mended, accordingly, a number of specific reforms in existing practice, among others, that legislative powers conferred by statute should always be clearly defined, that "the Henry VIII clause" and provisions intended to prevent the courts from inquiring into the legality of delegated legislation should be abandoned "in all but the most exceptional cases," that apart from exceptional cases there should be nothing in the words of the delegating statute "even to suggest a doubt as to the right and duty of the Courts of Law to decide in any particular case whether the Minister has acted within the limits of his power," that the Rules Publication Act should be amended so as to provide that *all* delegated legislation required to be laid before parliament should receive antecedent publicity, and that a standing committee of each house of parliament should be appointed at the beginning of each session to report on every bill conferring legislative power on a minister and also on every regulation made by a minister in the exercise of delegated legislative power. The duty of the proposed committees would be to report not on the merits of such bills and regulations but only on their form, with a view to disclosing whether they contained any provisions of an exceptional character. The purpose of this recommendation was to prevent the delegation of legislative powers by parliament without knowledge on the part of members of what was being done, and to insure that regulations laid before parliament should be effectively scrutinized.

Administrative justice, or "administrative law," as it is often called, is a feature of recent English constitutional development as striking and significant as administrative legislation.[11] Like the latter, it has come about chiefly in consequence of the enlargement of the sphere of govern-

11 The term "administrative law," which is employed in various senses, is used here, to designate "the jurisdiction of a judicial nature exercised by administrative agencies over the rights and property of citizens and corporate bodies." See William A. Robson, *Justice and Administrative Law*, 31. For other meanings of the term see Carleton Kemp Allen, *Bureaucracy Triumphant*, 47–56.

mental regulation and control, it has grown up in a haphazard, planless manner, and it exhibits serious inconsistencies and defects.

In a considerable number of statutes, beginning about 1870, parliament has given to ministers of the crown and to official tribunals, more or less closely connected with executive departments and outside the structure of the regular judiciary, the power to make decisions in disputes involving administrative authorities, and in many cases has provided that such decisions shall be final and conclusive, without appeal to the courts of law. In this piecemeal conferring of judicial power upon the executive parliament has not been guided by any general constitutional principle, but it has clearly intended to remove various kinds of controversies from the jurisdiction of the law courts. Administrative justice, like administrative legislation, was greatly stimulated during the war, when it was found necessary or convenient to set up a number of new administrative tribunals. Reference to a few instances in which judicial power has been entrusted to administrative authorities will serve for illustration.

By the Public Health Act, 1875, extensive powers were given to local sanitary authorities, and it was provided that persons aggrieved by the decisions of such authorities in a wide range of sanitary matters might appeal to the local government board. The act empowered the local authority, in various specified cases, to require the owner of a dwelling-house, at his own expense, to make improvements or repairs in the interest of sanitation, and, in the event of his refusal, to have the work done and to recover the expenses from him. It provided that persons who deemed themselves aggrieved by the decision of the local authority might appeal to the local government board, which was authorized to make such an order in the matter as seemed equitable, the order to be "binding and conclusive on all parties." Very extensive judicial authority in matters affecting the rights of

owners of slum property and workingmen's dwelling-houses has been given to the minister of health, and he has power to decide many questions arising under the National Health Insurance Acts, for example, the question of whether a particular kind of employment is "employment" in the meaning of the law. In some instances an appeal is permitted on questions of law from the decision of the minister to a judge of the high court. The Unemployment Insurance Acts have conferred wide judicial powers upon the minister of labor, and questions arising in connection with claims for unemployment benefits are determined by a hierarchy of administrative tribunals more or less under his influence and entirely outside the ordinary judicial system of the country, tribunals from whose decisions there is no appeal to the courts. By a number of Education Acts the board of education has been given extensive judicial and quasi-judicial authority, and its decisions are binding and conclusive on all parties. For instance, it determines, in case of dispute, whether or not a school is necessary in a particular community, it settles controversies between local education authorities and teachers over questions relating to teachers' retirement allowances, and between those authorities and parents as to whether a child is mentally defective or not.

In some cases parliament has conferred powers of a judicial nature upon ministers individually, in some cases upon departments, in some cases upon persons or bodies appointed by ministers. In France, and in many other countries, there is a uniform system of administrative courts, but in England this is not the case. Disputes between citizens and officials are normally decided by the ordinary courts, not by administrative courts, as in France, but parliament has given jurisdiction over many particular kinds of disputes to a variety of administrative authorities and tribunals. The term "administrative tribunal" refers to tribunals which do not conform to normal English judicial standards. These stand-

ards require that courts of law be composed of persons trained in law, that such persons be independent and not subject to external pressure or influence, that both parties be given a hearing, that proceedings be public, that evidence be given in open court and in the presence of the parties, that witnesses be subject to cross-examination, and that the person giving the decision be known. It is obvious that where judicial powers have been conferred upon ministers or departments or persons who are under ministerial influence the tribunal is unlike a court of law in its make-up, and it has been laid down by the house of lords, the highest judicial authority in England, that administrative tribunals are not under obligation to follow the procedure of ordinary courts.

In *Board of Education* v. *Rice*, which came before the house of lords on appeal in 1911, the court was called upon to interpret a provision of the Education Act, 1902, which empowered the board of education to decide questions that might arise between local education authorities and managers of private schools. In the course of his opinion the lord chancellor, Lord Loreburn, said:

> Comparatively recent Statutes have extended, if they have not originated, the practice of imposing upon departments or officers of state the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law . . . but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty which lies upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial . . . a Court of Law has no jurisdiction to hear appeals from the determination [of the board of education] either upon law or upon facts.

It was thus declared judicially by the highest court that an executive department, in deciding a dispute over which parliament had given it jurisdiction, need not conform in its procedure to a court of law, and that it had power to make a final and conclusive judgment, without appeal to the courts, on questions of law as well as of fact.

Of even greater importance is the case of *Local Government Board* v. *Arlidge*, which was decided by the house of lords in 1915. A borough council, acting under a provision of the Housing and Town Planning Act, 1909, made a closing order with respect to a house on the ground that it was not fit for human habitation. The owner, a man named Arlidge, after having some repairs made, applied to the borough council to terminate the order. The council refused to do so, and Arlidge, by virtue of another provision of the same act, appealed to the local government board. The board, after holding a public local inquiry, as required by the act, dismissed the appeal. By writ of certiorari Arlidge brought the order of the board dismissing the appeal before the king's bench division of the high court to be quashed on the ground that the appeal had not been determined in the manner provided by the law. The principal grounds of his complaint were that the order of the board did not disclose who had decided the appeal, that the procedure adopted by the board was contrary to natural justice in that he had not been given the opportunity of an oral hearing before the board, and that he was not permitted to see the report of the inspector who had conducted the inquiry. The king's bench division thought that the board had acted legally, that there had been no violation of natural justice in its procedure, and refused to quash the order. Arlidge appealed to the court of appeal, which reversed the decision of the king's bench division, two of the three justices giving opinions to the effect that the procedure of the board was contrary to natural justice. The case finally came before the house of lords, which reversed the judgment of the court of appeal and restored that

of the king's bench division. In giving judgment the lord chancellor, Lord Haldane, said:

My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. . . . The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. . . . In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organization with executive functions. . . . When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently. . . . In the case of the Local Government Board it is not doubtful what this procedure is. The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. . . . When, therefore, the Board is directed to dispose of an appeal, that does not mean that any particular official of the Board is to dispose of it. . . . Provided the work is done judicially and fairly . . . the only authority that can review what has been done is the Parliament to which the Minister in charge is responsible. . . . It is said that the report of the inspector should have been disclosed. It might or might not have been useful to disclose this report, but I do not

think that the Board was bound to do so. . . . I do not think the Board was bound to hear the respondent orally, provided it gave him the opportunities he actually had.[12]

It is generally agreed that no tribunal, however much its procedure may differ from that of a court of law, ought to violate "natural justice," a term that has figured prominently in discussions of administrative law. The expression "natural justice" is a survival from times when men's attitude toward law was different from that which now prevails, when judges and lawyers believed in the existence of a higher law, paramount and immutable, and regarded any man-made law, even an act of parliament, as void and invalid if it was contrary to this higher law, which was thought of as inherent in nature or directly prescribed by God. The doctrine of higher law has ceased to be held, but the term "natural justice," though lacking in precision, is still used by judges. It refers to a few elementary principles or maxims of English jurisprudence. One of these is that a man may not be a judge in his own cause; and on this ground judicial acts have been set aside when the judge had an interest in the case, pecuniary or other, which might reasonably be supposed to have given him a bias in favor of one of the parties. Another principle of natural justice is that no person ought to be condemned unheard, though this does not necessarily imply the right to an oral hearing.

It is useful to distinguish between judicial and quasi-judicial powers, though not all writers who have discussed the subject of administrative justice have done so. It is evident, for example, that there is a difference in character between a decision as to whether a certain employment is or is not employment in the meaning of a health insurance act and a decision as to whether a school is necessary in a given locality or not. In both cases there is a dispute, and there are facts to be ascertained by means of evidence. But in the

[12] D. L. Keir and F. H. Lawson, *Cases in Constitutional Law*, 205 ff.

former case the decision is a purely judicial one; it is reached by applying the law, as interpreted by the adjudicating authority, to the facts ascertained, and considerations of policy are not supposed to enter into it. In the latter case it is the business of the authority making the decision, after ascertaining the facts relevant to the dispute and weighing the arguments on all sides, to exercise discretion in the light of public policy; such a decision is said to be quasi-judicial. In the words of the report of the committee on ministers' powers, to which reference has been made, "a quasi-judicial decision involves considerations of public policy, and in the last resort the decision is not a decision as to the respective legal rights and obligations of the parties, but a decision as to what it is in the public interest to do."

The various administrative authorities which exercise judicial or quasi-judicial powers exhibit no uniformity of structure. In some cases powers have been given to definitely constituted tribunals, in some cases to ministers, in some cases to executive departments. Little can be said about the procedure of these authorities. Their proceedings are not public, most of them do not give reasons for their decisions or publish reports of decided cases. Even those who believe that it is desirable for administrative authorities to decide certain kinds of disputes admit that administrative justice, as it exists in Great Britain, is seriously defective and ought to be reformed. It is undoubtedly a departure from that "rule of law" which has been cherished as an essential and beneficent principle of the English constitution, and as such it has been severely attacked by members of the legal profession, notably by Lord Hewart, who condemns it as no better than "administrative lawlessness."

Various proposals for reform have been made. The committee on ministers' powers, which investigated the subject of administrative justice as well as delegated legislation, concluded that there was nothing radically wrong about administrative justice, but that safeguards ought to be adopted

in the interest of liberty and the rule of law. The committee recommended, among other things, that judicial, as distinct from quasi-judicial, powers ought normally to be entrusted to the ordinary courts, to ministerial tribunals only in exceptional cases, and to ministers themselves only for very special reasons; that quasi-judicial powers, on the other hand, should normally be entrusted to ministers; that ministers and ministerial tribunals should give reasoned decisions available to the parties to the dispute and publish epitomes of leading cases; that there should be an appeal on questions of law from the decision of a minister or ministerial tribunal; and that the power of the high court to compel ministers and ministerial tribunals to keep within their legal powers should be vigilantly maintained.

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