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PREFATORY NOTE

THE subject of modern Local Government is such a complex one that in a short Constitutional History, such as this is, it is impossible to deal with it adequately. I have thought it better therefore to omit altogether a separate account of it. Besides, there are several easily accessible books dealing with such matters as Poor Law administration, County Councils and County Courts.

My thanks are due to Mr. Armstrong of Queen's College, Oxford, for his advice and help, and to Miss Burrows of St. Hilda's Hall, Oxford, who has kindly read through the manuscript for me.

A. M. C.

July, 1909

NOTE TO SECOND EDITION

A list of "Books of Reference" has been added to this edition, and also a short Appendix, dealing with two phases of Local Government, Poor Relief, and Municipal Self-government, hitherto only referred to incidentally.

A. M. C.

March, 1911

NOTE TO FOURTH EDITION

Since this book was first published certain modifications have taken place in Parliamentary and Cabinet procedure. The outbreak of war and the formation of a Coalition Ministry have resulted in the partial obliteration of party distinctions in Parliament, and there is no longer an organised Opposition whose main business it is to criticise the Government of the day. As a consequence of this the collective responsibility of the Cabinet is less definitely insisted upon and there is a growing tendency to hold each individual minister responsible for the administration of his department.

Whether or no these changes will leave any permanent impress on our Constitution it is impossible to say, but procedure is at present largely determined by the needs of the moment. In these circumstances it seems unwise to make any addition to the chapter dealing with Parliament and the Cabinet.

A. M. C.

June, 1916

NOTE TO FIFTH EDITION

The present edition has been brought up to date as far as possible by means of footnotes. The near future may see a revolution in our forms of government, since Home Rule for Ireland and possibly even the question of a system of Federalism for the British Isles and the formation of an Imperial Constitution have come within the sphere of practical politics.

A. M. C.

May, 1918

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A SHORT CONSTITUTIONAL HISTORY OF ENGLAND

CHAPTER I

THE ORIGIN OF THE CONSTITUTION

The Characteristics of the English Constitution

DE TOCQUEVILLE once said of the English Constitution "elle n'existe point," and there is much reason in the paradox. The Constitution is to be found in no document as a compact whole; no particular period, no one body of men is responsible for it. Instead, our system of government is the result of centuries of construction and reconstruction and all kinds of material have gone to its making. Customs and laws, judicial decisions and promiscuous regulations have been massed together impartially and by many different hands, upon foundations which lie buried deep down in early economic and social history. One stone has been added to another with an eye to immediate convenience rather than to ultimate symmetry, while some parts of the structure itself have been left to crumble away; others have been put to uses very unlike those for which they were originally intended; the whole is still added to, modified and reconstructed by each generation, according to its needs. A history of the English Constitution seems to consist of chapters of accidents, and it is this apparently haphazard formation which distinguishes it from all other parliamentary systems

of government, for though the majority of them were made after the English model, they came complete from the hands of the modeller. They are written, and so rigid constitutions; the English Constitution is unwritten and in consequence flexible and adjustable. Fundamental changes can be made in its structure by the process of ordinary legislation; its constituent and legislative assemblies are identical, and it can add several millions of voters to the electorate by the same machinery as it uses to change the vaccination laws or to insist upon the muzzling of dogs. But in a rigid constitution laws known as fundamental laws cannot be changed in the same manner as ordinary laws; they can only be altered by a constituent assembly, which upon occasion can be called into being but which ordinarily is a mere possibility. In consequence, a rigid constitution, though capable of change, is not likely to be changed and any alteration partakes inevitably of the nature of a revolution, while except upon the rare occasions when a constituent assembly is called, the written constitution is itself the supreme power, the "final court of appeal," in the state.

The word "constitutional" therefore, changes its meaning accordingly as it is applied to anything under a rigid or under a flexible constitution. Under the former, it means that the matter forms part of the articles of the constitution; under the latter, the term is used in a vaguer way and implies that something is according to the "spirit" of the constitution: it is rarely applicable to any English statute as giving a definite description of its character. Many things are unconstitutional with us which are by no means illegal, and which are not punishable therefore, in the courts of law. But under a rigid constitution all things unconstitutional are inevitably illegal, and are either punishable by law under the written articles of the constitution or are void, as beyond the competence of the persons or the assembly responsible for them.

The English distinction between illegal and uncon-

stitutional, the fact that the latter covers a wider area than the former, is due to the two-fold basis of the Constitution. It is founded not only on the Law of the land, but on certain understandings, which are commonly known as the Conventions of the Constitution. With these the Law Courts have no immediate concern ; yet they are as well understood and as effectual as the written law itself. They mostly resolve themselves into informal regulations concerning the use of that discretionary power which still remains to the Executive. Thus it is now a custom of the Constitution that the right of the Crown to refuse its assent to a measure which has passed both Houses, shall not be exercised. It is likewise an understood thing that the Executive must not make any treaty or declare peace or war without the approval of Parliament. No law demands that a ministry shall resign office when it has been defeated on an important vote in the Lower House, or that Parliament shall meet at least once a year for the discharge of public business: yet these customs are as binding as the numerous provisions against unparliamentary taxation.

At first sight it seems as if the only guarantee for the maintenance of these conventions is to be found in the coercive possibilities of public opinion and that if a minister likes to defy public opinion, he can do so with impunity until the next general election brings him face to face with the electorate. But in reality it is not possible to violate the conventions of the Constitution without coming into collision with the law of the Constitution. If Parliament does not meet at least once a year, the Mutiny Act, whereby the discipline of the army is maintained, expires ; while though much of the Revenue can be collected, none of it can be spent, since without an Appropriation Bill, the expenditure of public money is illegal. In consequence, against the ministry which defies the wishes of the Commons the remedy is in the hands of the House itself. Ultimately therefore, the Law Courts defend the custom of the Constitution, though no direct

appeal to the Courts against any breach of them is possible.

English constitutional history is largely concerned with the differentiation of the functions of government. Other existing parliamentary constitutions were created at a time when modern ideas as to the duties of the state were more or less formulated and when therefore, it was possible to provide for their execution. But English governmental machinery was built up as the state, in adding to its responsibilities, found the old machinery inadequate. The duties of the modern state are generally recognised as being protective, administrative, legislative and punitive. It is the business of the Executive to regulate the general policy of the nation, as well as to put into force the laws passed by the Legislature. The Judicature punishes every breach of those rules, upon the observance of which the stability of the state depends, while the state's duty of protecting its members includes not only that of guarding them from the attacks of fellow citizens and foreign foes, but of actively providing for their welfare. The modern state is not only equipped with army, navy and police force, but with the means of dealing with the poor and the impotent, of protecting the health of the nation, of regulating its trade and its industries, and of procuring at least an elementary education for its children.

The primitive state bore no such burden. The earliest of its functions was probably the protection of its members. Aristotle says that man is by nature a political animal and that he associates himself instinctively with his fellow men for the sake of greater security and greater independence. In the earliest of political associations, its members were coerced into order by customs which age had consecrated and which they regarded in consequence with superstitious awe. But customs are essentially rigid and since they exact unreasoning obedience, they arrest progress and stifle originality. Gradually it came to be recognised that the functions of the state are constructive

as well as defensive, that if "the state was formed to make life possible, so it exists to make life good." It was when the state began to legislate that the old bonds of custom were broken: constitutional progress became possible, with the advent of government by discussion.

The development of the English idea of good government and its translation into an efficient system of administration has been curiously unsystematic. It has been marked by few of those declarations of abstract principles which were so much in favour on the Continent during the eighteenth and nineteenth centuries. The few documents which are amongst the bases of the English Constitution are remedial in character, rather than constructive. Magna Carta, the Petition of Right, the Habeas Corpus act of 1679, the Bill of Rights, are extraordinarily matter of fact. They were drawn up, not by theorists, but by men whose conception of good government had been formed by bitter personal experience of what bad government meant. They were content to state their grievances and to stipulate that they should have no further ground for complaint: their most extreme precaution was to declare certain things illegal: extraordinary remedies were never deliberately provided.

The moderation of successive reformers was in part due to the belief that seems to have inspired them, that they were only asking for their own again. They went forward by looking backward, and most efforts to extend the liberties of the country assumed the form of a demand for the confirmation of preexisting rights. The few documents in which some of these rights received official recognition became to future ages the embodiments of national aspirations, irrespective of their actual contents. At the same time, innovations were introduced in an equally conservative manner. A new superstructure was often reared on an old foundation, while, when new methods were introduced, the old ones were suffered to live on side by side with them until they were gradually superseded by their stronger rivals. Trial by ordeal had

given place to trial by jury centuries before the former was officially extinguished. The old local courts of justice were slowly done to death by the Common Law Courts, though theoretically, in many cases their competence was unimpaired until, during the nineteenth century, they were reorganised in some cases and done away with in others.

Moreover, many constitutional changes originated in small alterations made for the sake of administrative convenience. It was in this way that the Common Law Courts and the Court of Chancery began, and that the principles of election and representation were developed in local governmental machinery. It was for convenience' sake that the king assessed the amount owed him by his subjects by means of a local jury, and instead of negotiating with each shire and with each borough for a contribution towards the relief of his necessities, summoned to Westminster those who could declare the opinion of the country-side. Ultimately he had to concede to them the control of the national purse, but no one in the twelfth century could possibly have foretold that this would be the outcome of using a local jury for the assessment of taxation. Finally, many a constitutional advance was the result of demands which were unquestionably inspired by wholly selfish motives. The barons of 1215 were no disinterested band of patriots, and more than one writer is of opinion that the few privileges which Magna Carta secured for the common folk, were demanded for the sole purpose of breaking the old alliance of king and people against baronial aggressions. There are those who accuse Earl Simon of being a political opportunist, while, incongruously enough, Richard III abolished benevolences, though respect for his subjects' goods could hardly be reckoned among his merits.

To insist that many things in our present system of government are the outcome of accident or expediency: to urge that at least some of those who withstood royal encroachments or initiated reforms were prompted largely

by selfish considerations may seem superfluous. But these rather obvious truths must be emphasised because similar results had to be consciously sought after by the constitution makers in America and on the continent. There, they were not evolved semi-accidentally out of a whole series of experiments, and the difference in origin and development has left its stamp upon the result. It is to the manner of its growth that the peculiar characteristics of the English Constitution are due.

The Beginning of English Constitutional History

England from the first was the resort of many wanderers. Celts, Romans, Saxons, Danes and Normans in turn pitched their tents here and in turn became the dominant race. The Danes and their Norman kinsfolk caused no cataclysm: they moderated and invigorated, but in few cases did they destroy existing institutions. About their predecessors the verdict is less certain and at one time historians held very conflicting opinions on the subject. The questions at issue were whether the Teutonic element which now predominates in English institutions was also the fountain-head of English organisation, or whether we owe our economic and constitutional life to the Great Mother of States—Rome—and can therefore claim that our history has been one of continuous development from the very first. Were the Saxons new modelling clay or a new mould? To what extent, if at all, did the Romanised Celts survive the conquest of the island by Angles, Saxons and Jutes? Did the Teutonic tribes settle here in those free villages which most interpretations of Cæsar and Tacitus represent as the basis of their organisation in the lands whence they came, or did they accept the system of villa estates which the Romans had established in Britain? Did he who was the mediæval lord of the manor exist from the first, as the owner of the soil and the lord of those that tilled it, or was he a late imposition on what had once been a settlement of freemen? Did

English history begin with the freedom or the serfdom of the masses of the people?

Upon these questions the views of two schools of historians were diametrically opposed. In England, the chief representatives of the old Teutonic school were Mr. Kemble, Professor Freeman and Dr. Stubbs, and of the Romano-Celtic school Mr. Coote, Professor Ashley and Mr. Seebohm. The new Teutonic school, under the leadership of Professor Maitland and Professor Vinogradoff, though it accepts the general conclusions of Professor Freeman and Bishop Stubbs, criticises the hypotheses on which these conclusions are based. Professor Vinogradoff however, allows greater weight to the influence of Romano-Celtic traditions on Saxon organisation than does Professor Maitland, and at the same time, he deals somewhat less severely with some of the favourite theories of the old Teutonic school.

Theories of the old Teutonic school.

The old Teutonic school maintained that the English people and their institutions were essentially Teutonic in origin. They based their arguments upon the exceptional character of the Anglo-Saxon conquest. Professor Freeman, the great exponent of the continuity of English History, believed that in this one case the old order of things was entirely swept away and that the barbarian invaders "wiped out everything Celtic and everything Roman." "There is every reason to believe," he said, "that the Celtic inhabitants of those parts of Britain which had become English at the end of the sixth century, had been as nearly extirpated as a nation can be." This saving clause Professor Freeman explained by suggesting that very probably the Celtic women were spared and that a few of the men may have lived on in a condition of slavery: the rest were driven out or killed. Dr. Stubbs added that towards the West many Britons must have survived in a servile or semi-servile condition and that possibly some few of the great men made terms for themselves. On the whole however, Dr. Stubbs agreed with Professor Freeman that there was practically no

mixture of race and no mixture of institutions. The German tribes brought with them their wives and their children, their cattle and their slaves and Bede recorded that in his day the original home of the Angles was still desolate. Centuries after the Conquest the Briton by extraction was distinguished by his wergild from his Saxon neighbours. The language of the conquerors, though a few Celtic words crept in, retained its essentially low Dutch character down to the great infusion of Romance words which was a result of the Norman Conquest, while the Art, the Religion and the laws of Rome perished as utterly as did its language. Everywhere else the invaders gradually adopted the language of the conquered—they learnt to speak some form, however corrupt, of the language of Rome: they respected its Religion, its Law and its Art: they adopted its towns, its territorial divisions and its local nomenclature. That the barbarians did not do so in Britain was due to its imperfect Romanisation: "they did not find that perfect and striking fabric of Roman Laws, manners and arts, which elsewhere changed them from destroyers into disciples." On the other hand, they encountered a more stubborn, because a more truly national resistance in Britain than their Teutonic kinsmen met elsewhere. This resulted in a piece-meal conquest, which favoured complete, instead of partial displacement. We know that the Celts withdrew to Strathclyde, Wales, Cornwall and Brittany, while only in the West was the characteristically Celtic settlement, the hamlet, frequently found. The peculiarities of the conquest of Britain were largely due to the length of time it occupied. In this respect it contrasted forcibly with that of Gaul: it was a hundred and fifty years before the German tribes made good their hold on Britain: the Frankish conquest of Gaul, with the exception of the North West, was accomplished in one generation, under the leadership of one man.

According to the old Teutonic school therefore, the German tribes when they settled in Britain, started

their new life at the point at which the old had been broken off. Every one of the old conditions was not necessarily reproduced, but "the framework of the older custom must have been the framework of the new." Such changes as were effected by the migration and the settlement touched the political rather than the social and economic organisation of the tribes and the old Teutonic school maintained that in England, as in Germany, the root of their social system was the "mark," a division of land held jointly by a number of kindred freemen for the purpose of cultivation, mutual defence and help. The idea of a "mark system," with its common kinship, common cultivation and common ownership is, says Dr. Stubbs, "an especially inviting one and furnishes a basis on which a large proportion of the institutions of later constitutional life may theoretically be imposed."

Theories of the Romano-Celtic school.

The Romano-Celtic school not only asserted that England was as thoroughly Romanised as other parts of the Empire, but maintained that the Anglo-Saxon conquest, though a change of the highest moment, did not break up society: it only added a new element to what it found. The Celts adopted Teutonic ways and customs with the same ease as they had formerly adopted those of Rome, while the Saxon state itself "was built upon the ruins of the past." The Roman "territorium" became the English "shire," the "municipium" the "borough," the "collegium" the "guild," while the Roman "villa" survived as the English "manor." Roman law formed the basis of the Saxon family system and of the laws of property, Roman local names were preserved, while many hundreds of common words relating specially to government, to agriculture, to household life and service owe their place in the English language to the survival of the Romanised Celts and of many of their institutions. They did not maintain, of course, that the whole fabric of Roman social and political machinery survived the Anglo-Saxon conquest but they did deny the exceptional character of that conquest and claimed that its history was but an abridg-

ment of the history of the conquest of the rest of the Roman Empire by the barbarians, while the very fact that it extended over a century and a half led them to the conclusion that there must have been many intervals between the attacks of the barbarians during which the Saxons and Celts probably amalgamated.

The most treasured weapon in the armoury of the Romano-Celtic school was the fact that the mediæval manor had all the characteristics of the Roman villa. Mr. Seebohm worked out in great detail the similarity between the two institutions, showing that there is a close parallel between the relations of lord and dependent under the English and the Roman systems and showing too, that the same parallel can be traced between the relationship of the Roman lords of villas to the Emperor and that of the English manor owners to the King. Because of this similarity, the continuity of the two institutions was asserted, and the School, fortified by continental analogies, claimed that in Saxon as in Roman times, the typical form of social organisation in England was a villa-estate, owned by a lord and cultivated by his serfs, and that the Angles, Saxon and Jutes stepped into the shoes of the Romanised Celts as the lords of dependent villages. Their object, like that of their kinsfolk on the continent was "not to settle in a desert but to live at ease as an aristocracy of soldiers." These aspirations Mr. Seebohm attributed to the fact that manorial tendencies were rapidly developing amongst the tribes in Germany According to his interpretation of Tacitus, the freeman who chose his domain by wood or stream was a forerunner of the manorial lord, while the tribesmen, who are described as not dwelling in streets, he regarded as a servile community, cultivating the lands of their lords. Thus the manorially inclined Teuton settled readily into the villa-estate of the Romanised Celt and the conquest of Britain was followed, not by a social revolution, but by a change of lords, the actual work of cultivation being carried on by the conquered Celts together with what few German serfs the tribes brought with them.

The new Teutonic school's criticisms of the theories (1) of the Romano-Celtic school.

Professor Maitland has subjected the theories of the Romano-Celtic school to the most rigorous criticism. He points out that there is no historic foundation for the belief of Mr. Seebohm and his colleagues that the Roman villa was the typical form of social organisation in Britain The remains of villas are not scattered broadcast over the land and all the evidence we possess points to the conclusion that they were usually built in the neighbourhood of the towns and military camps of the Romans. Moreover, though the mediæval manor possessed many of the characteristics of the Roman villa, its most essential characteristic, the right to hold a court, was not possessed by the villa, which was a purely economic institution. Whence too, comes the system of strip-holding which was characteristic of the mediæval manor? It certainly was not invented by the Celts, for they lived in hamlets and each homestead was surrounded by its own fields. It certainly was not invented by the lords of the manor for such a clumsy and uneconomic division of land would have been purposeless if the lands under cultivation were the property of one man, with ploughing teams of his own. On the other hand, its advantages are obvious if the lands were owned by freemen who contributed such oxen as they possessed to the common team. This supposition is further borne out by the fact that the lord himself had his land in strips scattered over the three open fields which comprised the arable lands of the manor—a state of affairs only likely to have been brought about by a lord being superimposed upon a free village community. Further suggestions of the primitive freedom of the cultivators of the soil may be found in the rights which the manorial tenants maintained as against their lords and in the fact that the suitors were as essential a factor of the manorial court as the lord himself. Mr. Seebohm argues that because the open field system is often coincident with villainage it is also its shell, and asserts that, without a lord to maintain it, the system of strip-holding could

never have survived for any length of time. Professor Maitland points out that the open field system was originally the home of freedom, and even with regard to its maintenance, as apart from its origin, the iron bonds of custom were a very sufficient substitute for the tyranny of the lord of the manor.

Nor is this all. The Romano-Celtic theory does not account for the presence of freeholders on the mediæval manor, nor does it explain the account given in Domesday Book of England in the eleventh century. The amount of freedom it depicts in the Eastern shires cannot be credited entirely to the Danes. At the same time, since the Domesday inquisitors were to ascertain the condition of affairs in King Edward's day, on the day when King Edward was alive and dead, and at the time of the inquest, if the theory that the nation was slowly working its way to freedom from primitive serfdom were true, these three accounts ought to show an increasing, instead of a decreasing amount of freedom amongst the cultivators of the soil. Again, can it logically be regarded as likely that every Saxon of the conquering host was a lord in his own country and settled down as such in the land he had helped to conquer? The numbers, had this been the case, would have been wholly insufficient to have carried on the lengthy wars of the Conquest, while the conquered inhabitants, whom the lords apparently enslaved, would have been in such an overwhelming majority, that no theories, however extreme, of the enervating effects of the Roman occupation, could account for the success of the Saxons in reducing them to serfdom.

(2) Of the old Teutonic school

But the theories of the old Teutonic school have been subjected to no less drastic criticisms and with regard to the most cherished of them,—the so-called "mark-system," the new Teutonic school unites with the Romano-Celtic school to denounce it as a "figment of the Teutonic imagination." Its very name is shown to be undeserved for "mark" means not village, but marsh or borderland.

Only one of its characteristics is whole-heartedly acknowledged to have been a characteristic of early Anglo-Saxon society, and this one, co-operative cultivation, is recognised by the historians of both schools as common to most primitive agricultural communities. With regard to common kinship, Professor Maitland repudiates the idea that the inhabitants of the separate villages were bound together by any such tie and he points out that the bond, if it existed at all, must have been of an extremely vague nature, for relationships were reckoned on the mother's side as well as on the father's, so that a man's nearest relations very possibly lived in a distant village. Professor Vinogradoff points out, however, that in spite of this fact there must have been much common kinship in the villages. Such a conclusion is favoured by the frequency of the termination "ing" in place names and by the almost absurd degree of equality which existed amongst the members of the villages. In support of it Professor Vinogradoff re-emphasises the fact that Tacitus records that men fought in families and clans, while Anglo-Saxon laws made the kindred responsible for the evil-doings of its individual members and the blood-feud was held sacred as late as the tenth century.

Professor Maitland further argues against the corporate ownership of land by village communities. Dr. Stubbs maintains that the freeman's only title to absolute ownership was merged in the general title of the tribe, and he argues that this common ownership would only disappear as the growing interest in agriculture made the villagers dissatisfied with anything short of complete individual ownership. In answer to this Professor Maitland questions whether common ownership ever existed to give place to individual ownership and he points out that the idea of corporate possession was far too complex for primitive man to grasp. It is absurd to suppose that a fictitious person owned lands before an individual: the mistaken supposition possibly arose from a confusion of the terms "dominium" and "imperium"—ownership and sovereign

control. Possibly the village had some control over the lands of the village, in that it regulated its cultivation—but this was not ownership. He asserts that there was undoubtedly "a solid core of individualism" in the German village: it is difficult to imagine a time when each man did not hold his share in the arable in individual ownership. With regard to the meadows and pasture lands, a definite right of user was attached to ownership of houses and arable strips. Probably the question as to who owned the meadows and waste lands was not asked for a long while; land was too plentiful for any quarrel to arise between two adjoining communities as to the possession of a certain piece of land. Hence the test of ownership was unnecessary and it was not applied. Had it been applied and could the result have been expressed in modern legal phraseology, it would probably have been assigned to the villagers as a body of co-owners rather than to the village as a community. If an outsider appropriated any of the waste lands of the village, it would be one of the individual co-owners who would object because his own rights were being injured—the village as a body would take no action—in all probability it was too loosely knit together to be capable of common action and still less of common ownership.

Theories of the new Teutonic school.

Out of the remnants of the theories of the old Teutonic school and with the help of much of the material collected by the Romano-Celtic school, the new Teutonic school has constructed a more moderate theory of Teutonic predominance in early English history than that advanced by its earliest exponents. In the first place they maintain that the Conquest was probably less rigorous than is generally believed. True, the old English chronicle says that at the taking of Anderida the invaders "slew all that were therein." True, many of the ruins of the Roman villas show traces of having been destroyed by fire. But the sack of towns, where resistance would inevitably concentrate, proves little with regard to the open country, while the traces of fire and destruction may be due to the

civil wars of the fourth century. The survival of some place names and of Celtic words connected with the work of artisans, domestics and country folk, the fact that in lands conquered after 600 A.D. the Celts were unquestionably allowed to live on amongst their conquerors, favours the belief that in the lands subdued between 450 A.D. and 600 A.D. scattered elements survived. On the other hand the disappearance of Christianity and of Roman Law, the disappearance too of Roman institutions and territorial divisions proves conclusively that it was as a remnant and not as an organised people that the Celts survived.

Moreover the question whether primitive England was a land of free or of dependent villages creates a false dilemma. Both types unquestionably existed from the first and recent writers have detected the two in the "Germania." According to their interpretation of Tacitus, though the ordinary freemen dwelt in free villages and by their own labour tilled their own lands, those who were "principes" were the lords of dependent villages in which lived the remnants of the indigenous conquered population. Hence the villa estates presented no unknown peculiarities to the invaders and they probably appropriated them readily enough when they found them. At the same time the solidarity and compactness often assigned to the early free village has evaporated with the mark system and from the first there were outside influences hostile to it. It was the super-imposition of a lord with rights of jurisdiction which eventually drew the villagers together. In this way the free village was gradually assimilated to the dependent village, both of which the invaders brought with them and the latter of which they found already existing and often took over.

The great question which has to be solved therefore, is which type of village predominated in Anglo-Saxon England, the free or the dependent. The undeniably democratic character of Anglo-Saxon institutions appears to be in favour of the former. The political freedom to which the shire and hundred organisation testify, would scarcely have been possible without economic freedom.

CHAPTER II

SAXON ORGANISATION

SAXON organisation is not easy to reconstruct. Between the account given by Tacitus of those German tribes with whom he came in contact and the mass of information which can be gleaned from Domesday Book, there is little literature which contains aught but chance references to the manners and customs of the time. These were matters of common knowledge, needing no explanation, and as a rule they were only referred to, in chronicle or biography, when they differed from those of the writer's own locality. Laws were few and far between, though since they were more often statements of existing custom than measures of reform, they contain much valuable material and they make it possible to build a bridge, though an imperfect one, between the "Germania" of Tacitus and Domesday Book. This much however must be remembered: it is the organisation of Wessex which is usually described in accounts of pre-Conquest England, partly because Wessex was the best organised of the kingdoms and partly because, when it successfully asserted its supremacy, it became the model for united England. But what is true of Wessex is rarely true of all districts; in some places, older organisations left their stamp indelibly on the new: in others, the new organisation entirely superseded the old. Few localities were exposed to exactly similar influences or developed along exactly parallel lines, while in the eleventh century, all organisation was perpetually in the melting-pot.

The German Tribes at home.

When, in the first century, Tacitus wrote the "Germania," the German tribes had outgrown the semi-nomadic state in which Cæsar knew them and possessed settled homes of their own. The land over which they were scattered consisted of vast tracts of forest and plain. They did not dwell in cities, but settled where wood or water or pasture-land pleased them. Their houses they built so that they should not touch and this they did either for fear of fire or because they were bad builders. The pasture-land and woodlands were not apportioned; but each village, acting as one, took up land for purposes of cultivation in proportion to the number of its cultivators. These lands they partitioned amongst their members, as they deemed each worthy. The arable land they shifted every year and there was enough and to spare; but their system of agriculture was wasteful, for the only tribute they levied of the land was corn: the chief wealth of the tribes was in their flocks and herds. Much of the cultivation on the large estates was done by the dispossessed indigenous population, the unfree "servi," who also had lands of their own, for which they paid rent in kind.

Above the village, or "vicus," came the "pagus": an aggregation of pagi made up the "civitas" or tribe. Each pagus nominally sent a hundred warriors to the host, but by the time of Tacitus what was once a number had become a title. In both vicus and pagus, a "princeps," elected in the general assembly, administered justice with the help of a hundred assessors. Many offences could be wiped out by the payment of compensation. Even homicide was wiped out by a fixed amount of cattle and sheep, so that feuds were not inexpiable, though they were obligatory on the whole kindred till atonement was made. When the general assembly was called together, the principes prepared the business which was to be placed before it and themselves decided all matters of small importance. The central assembly was held at new or full moon. To it came all the freemen of the tribe, fully armed. But they displayed their independence by arriving

after the day appointed. Once they were all assembled, the priests commanded and enforced silence. Then the king spoke or a princeps, or any others entitled to command attention, because of their age, their military reputation or their noble birth. The multitude signified disapproval by hissing and assent by shaking their spears or by clashing them on their shields. This great council was the supreme court of justice. It heard complaints and dealt with capital offences, such as treachery or desertion. Moreover it decided questions of peace and war. There it was that the magistrates or principes were elected, as well as the "duces" who led the host to battle. There too the young men of the tribe were armed with spear and shield by father or kinsman or one of the principes, and were thus made members of the host and of the state, whereas before they had only been members of the family.

Though political equality was characteristic of the Germans, social inequality was not unknown. Not a few tribes had kings, who represented descent from Woden and who, though possessed of little political power, symbolised the unity of the tribe. Moreover there were the "nobiles" as opposed to the "ingenui,"-the descendants of the great men of the nation as compared with the ordinary freemen. Princeps and dux were entitled to a "comitatus" or band of warlike companions. Each "comes" was given a war horse and arms by his chief and was entitled to feast at his board, but he received no other wage. The chief place in the comitatus was an object of great ambition and each princeps tried to secure the largest and bravest following. In war the princeps fought for victory, but the comites fought for their chief, whom they were pledged to protect and to whose honour and glory their own mighty deeds were attributed. It was a great dishonour for the prowess of the chief to be surpassed by that of his comites, or for the comites to survive the death of their chief in battle.

Little save these elementary facts can be ascertained of

The Migration and Settlement.

the manners and customs of the Teutonic tribes in the land of their birth. We have already seen that whereas the Romano-Celtic school claims that they adopted the organisation which they found existing in Britain and for which their life at home had prepared them, the old Teutonic school asserts that the barbarians came over as whole tribes, bringing with them their wives and their children, their waggons and their oxen, and that, in a land swept clear of villa and of town, they replanted the free villages of their native land. The truth lies half way between the two theories. Often the Saxon chieftain must have taken over the Romano-Celtic villa estate, with its slaves and its half-free cultivators, or "coloni," who had once known freedom. But not every Saxon freeman can have been metamorphosed into the lord of an estate, and many free villages must have been founded under the political chieftainship of the dux who had headed the successful expedition.

The villa-estate.

The hamlet.

Beside the Roman villas the barbarians found free Celtic communities in Britain. Except in the West, these were swept away and the towns were probably destroyed as centres of resistance. In place of the Celtic hamlet of scattered homesteads, each standing in the midst of its own fields and pasture lands, was planted the Teutonic village. In it the houses were built along one high road or round a village green, in the midst of the village fields. The arable land consisted of three fields, one sown with corn and one with a spring crop, while one field was allowed to lie fallow. In these fields each villager had a definite share allotted to him, but in many separate and scattered strips. Cultivation was carried on by means of co-operative ploughing, each contributing his ox, or his yoke of oxen to the common plough team of eight. The portioning out of the land into strips made this common cultivation absolutely fair; it also ensured that no man should hold all the richest lands in the settlement. The pasture lands and the woods were the undivided property of the villagers:

The village.

the meadows were partitioned amongst them till the hay was cut, when they became part of the pasture lands of the village. The number of cattle each man was allowed to put to pasture in the common fields and the number of pigs he might turn into the forest, was in strict proportion to the size of his arable holding.

With the increase of population, strip-holding found its way into the hamlets of the West. Sometimes, of course, new farms would be made in unoccupied country. Sometimes the original farms were split up into smaller, but compact homesteads. But often, in order to equalise the advantages and disadvantages of the soil, the land was apportioned in scattered strips and the hamlets became like the villages, strip-holding communities. There was however this difference: in the villages the ploughlands were massed together, in the hamlets they were scattered, much as the ploughlands of the original, compact homesteads were scattered.

Saxon Tenures.

Land was held by various customary rights, that is by the local "tradition of the folk"; so all land was "folkland," including the estates of the king himself. Sometimes by means of a charter or book, the king gave away portions of his own private property or of the waste lands of the kingdom. Sometimes the king "booked" lands to himself: that is he turned his folkland into bookland, because though the former estates had to descend in the family, according to the custom of the folk, bookland could be willed away as the holder wished. More often the king, in the land-books, gave away a superiority over land and over the freemen living on it, together with the profits of jurisdiction and the sustenance or "feorm" which all contributed towards the support of the head of the tribe. A third form of tenure was by loan "Laenland" was let out to free cultivators, to freed men and to hereditary dependents in return for rent and services. The grantors, who were often great ecclesiastics, tried to protect these loans from becoming permanent, by limiting them to three lives. But tenure for three lives gave

(a) Folkland.

(b) Bookland.

(c) Laenland.

a grip on the land, which it was not easy to loosen and from an early period, there was a marked tendency towards the building up of a pyramid of tenures, the great man having land booked to him by the king and loaning it out again to cultivators of the soil.

Saxon Ranks. (1) The unfree.

Amongst the people, the primary distinction was between the free and the unfree. The "theows" or slaves and the "laets" or serfs of seventh-century documents were many of them captive Britons. But some were Saxons who had lost their freedom through misfortune or crime, and who had become the bondmen of the wealthier freemen to save themselves from starvation, or had accepted slavery as the alternative to capital punishment. The influence of the Church did much to mitigate the lot of the slave and as early as the laws of Ini a man was forbidden to sell his countrymen beyond the sea, while a slave was entitled to two loaves a day and all holy-days: his savings he was allowed to keep and he might purchase his freedom, while his life was protected by a small "wergild" or fine. The theows must have done much of the cultivation of the land, even in the free villages, for it is supposed that the "hide," the normal holding of the free villager, consisted originally of about 120 acres in the South, though as population increased it must soon have been subdivided.

(2) The free. (a) eorls, (b) ceorls, (c) gesiths,

The freemen consisted of an hereditary noble caste of "eorls" and a mass of non-noble freemen or "ceorls": these were the "nobiles" and "ingenui" of Tacitus. The "eorls" seem soon to have been blotted out: the "ceorls" sank rapidly in the social scale. The "gesiths" were the earliest English equivalent of the comites of Tacitus. The Conquest changed the successful dux into a king and his comites attained to far greater dignity and importance than they had known before: they became his guard and his private council and were usually admitted to the Witan. Many of them must have been amongst the first to be endowed with lands and though as yet military tenure was unknown, the gift of lands for services faithfully rendered seems to have carried with it

an obligation to continue those services. Thus, by the laws of Ini, if a "gesith-cund man," owning land neglected the "fyrd," he was to pay 120/- and forfeit his land: he who had no land only paid a "fyrd-wite" of 60/-.

The gesiths formed a semi-professional army and seem to have carried on most of the fighting between 600 A.D., when the conquest of England was complete and the beginning of the ninth century when the national army or "fyrd" was revived to meet the Danish invasions. Later we find the "thegn" replacing the earlier gesith. Mr. (d) thegns. Little tentatively contrasts the origin of the thegn, with that of the gesith, suggesting that whereas the latter was the companion of the king, the former was originally a minister or servant in the royal household. Be this as it may, gesith and thegn soon became members of a territorial nobility, and as the old characteristic of personal relationship disappeared, the newer class entirely blotted out the older one. At the same time the thegn class widened, to include perhaps as many in its ranks as did the class of knights after the Conquest. The greatest of the thegns rose to be "Ealdormen" or "earls"; amongst the least were the "medial" or "under-thegns." The normal, minimum holding for a thegn was five hides: this was sufficient to keep up his dignity and to give him such a stake in the welfare of the community, as would justify the higher wergild and the more weighty oath, which thegn-ship conferred on him. The merchant who throve so that he fared thrice over the wide sea by his own means became henceforth "of thegn-right worthy." So too did the scholar who "through learning throve so that he had holy orders" and could celebrate mass. The ceorl who added to his lands at the expense of his neighbours so that they became his dependents was of thegn-right worthy, if he possessed as well as his five hides, a church, a kitchen, where his dependents baked their bread, a bell-house and a burh-gate and seat and special duty in the king's hall. This last qualification seems to have fallen into abeyance after the reign of Alfred.

Saxon Courts. (a) The Witenagemot.

Saxon organisation slowly became more efficient and more complicated during the centuries which preceded the Norman Conquest It is only possible to give the general results of this gradual development. Supreme authority was vested in the king and the Witenagemot, but much of the work of government and particularly the administration of justice, was carried out in the courts of the hundred and the shire. The village, as such, probably had no court for judicial purposes, though possibly some sort of meeting was held to regulate its common field husbandry and to choose the four men who with priest and reeve, could in the lord's absence, represent it in the national courts. Often, and particularly in the land of hamlets, and scattered homesteads, several small settlements were artificially combined as a "tun" or as it was termed officially, a "vill," for purposes of administration and police but there was no court of justice The courts of the hundred and the shire were both competent to declare folk right in every suit The suitors or freemen who attended the court were the judges, they declared the manner of trial No man might carry his complaint to the shire, until the hundred had three times given no answer to his demand for justice If both shire and hundred failed, then the complaint could be carried to the king In the shire court, the bishop and the ealdorman presided and declared the spiritual and the secular law: the sheriff was there, as representative of the king's interests and to collect the royal share of the profits of jurisdiction, while he it was who called the court together for its six-monthly meetings. In the hundred court, which met every month, a deputy of the sheriff was the constituting officer Sometimes we find the hundred court practically transferred to private hands, because of the privileges conferred by the landbooks and about a hundred and fifty years before the Conquest, we find the boroughs, as centres of defence and of commerce, with courts of their own, closely modelled on the hundred courts.

(b) The shire court.

(c) The hundred court.

(d) The borough court.

Saxon crimes.

The chief crimes in Saxon times were theft, wounding and man-slaying. So prevalent was cattle-lifting that all

selling and buying was carried on at specified places and before specially appointed witnesses—this minimised, but it by no means stopped the traffic in stolen cattle. For wounding or man-slaying, an elaborate tariff of compensations existed The "wergild," or price of a man, varied according to his rank and his nationality. The wer of a ceorl was 200/-, that of a thegn was 1200/-: if the murdered man were a Celt, his price was half that of a Saxon of the same rank. The value of a man's oath was determined by the amount of his wergild. From very early times, treason to the king or to one's lord was "botless" and the charge could only be repudiated by a large number of oath helpers.

Saxon police.

There seems to have been much difficulty in enforcing obedience to the law. He who would not obey the summons of the courts to answer a charge brought against him or who refused to pay "bot" to the injured man and "wite" to the king, could only be put outside the protection of the law, unless the offence were bad enough to call for a special expedition against him, by the men of the hundred. The difficulty of bringing offenders to justice was increased by the fact that often they were harboured by great men. This accounts for the severity of early law against the oft-accused. He whose reputation was evil was already half condemned as guilty of any charge which might be brought against him, while evasion of trial was taken as a practical proof of guilt.

(1) Responsibility of the kin;

The kindred were primarily responsible for bringing the accused man to justice: they were responsible too, for the fines imposed on the guilty and they received the wergild if one of the kindred were slain. When the ties of kindred, which at first bound together the dwellers in each vill, were weakened as the settlement grew and as property changed hands, an elaborate system of surety-ship was slowly created. The guild-brethren of Alfred's law, who were to receive half the wer if a kinless man were slain and who were to pay half the wer of a man whom he slew, were possibly an artificial kindred, closely associated with the later "tithing." By the law of Athelstan, the

man who ignored the summons to the gemot and who failed to pay the "oferhyrnes" or fine for contempt of the royal order, was put in "borh"; that is, a surety was found for him, who would produce him when necessary. Edmund provided that all suspects were to be brought "sub plegio." After the time of Edgar, every man was to have a borh and if a man did wrong and then ran away, his surety was responsible for the fine imposed on the guilty man. A law made by Cnut has been interpreted as constituting the mutual responsibility of ten men, for the earlier individual surety system. By the time of the Conquest the group responsibility of the tithing was established and William I made this collective suretyship compulsory on all who wished to be looked upon as freemen. Later the "frithborh" or peace-pledge, by a curious mistranslation, was known as the frank-pledge and eventually it became the badge, not of freedom but of dependence.

(a) of sureties;

(3) of groups

(4) of the lord.

The lord was responsible for his household and for his dependents, for the serfs who cultivated his estates, for his hired free labourers and often for the tenants to whom he had loaned his lands. From the very first, there was a tendency in Saxon society for the freemen to separate into lords and dependents, for the weaker landowner to seek the aid of his stronger neighbour. Nor was there any bar save custom to the concentration of many of the original holdings into the hands of one man: there was nothing to protect the free village communities against powerful individualities. Perhaps on the analogy of the old comitatus some of the small landowners commended themselves to a lord to whom they swore fealty and under whose banner they fought and who, in return protected them against all rivals. Such a practice was made doubly attractive by the fact that the life of the great man's man was protected not only by a wergild, but by a "man-bot," paid to the lord and varying in amount with the rank of the lord. Moreover the lord, whose oath was a weighty one, would often come

forward as his man's compurgator or by swearing to his good character would procure his trial by single, instead of threefold ordeal.

This practice of commendation probably found favour in the eyes of the state as a means of enforcing order and justice. By the time of Athelstan, the lordless man who was not of sufficient standing to have no lord but the king, was regarded as a suspicious character, if not a dangerous one, and the kindred were commanded to find him a lord. If, as Professor Maitland suggests, the manor was the geld-paying unit, and the lord, the geld collector, the institution of Danegeld must have still further increased the dependence of the free cultivator. The lord who paid his man's geld would certainly repay himself by demanding services in return. More than this, although in the Eastern counties, the Danes, coming from a land of free-holders, probably arrested the manorialising process in the districts which they occupied, yet they undoubtedly hastened it elsewhere, for the presence of a powerful enemy must have suggested to many the advisability of putting themselves under the protection of a great man. The growth of Feudalism.

This however, must always be remembered: the commended man was no villain, nor does the growth of seignorial jurisdiction imply the growth of villainage. The lord's responsibility for the payment of the geld and the exaction, by the holder of bookland, of the feorm which the king had made over to him was far more likely to create unfreedom, especially when, as often happened, instead of the feorm, the lord demanded that the men who owed it should labour on his lands. At the same time, commendation and seignorial jurisdiction led inevitably to a state of society in which all relationships were based upon land tenure and feudalism without villainage is not conceivable—the landowner's coercive powers were too undeniable.

It has been said that the Norman Conquest introduced feudalism into England. But partly by state action,

partly by voluntary commendation and by the concentration of holdings, England on the eve of the Conquest was rapidly becoming a land of great landowners and of dependent villages. From above and from below a manorial system was closing in on the old free village communities and by the time Domesday Book was compiled, few of the characteristics of feudalism were lacking. Seignorial jurisdiction was so well developed that the Normans eagerly sought grants of the old Saxon "sake and soke," as conveying powers wider than the Norman "basse, moyenne et haute justice"; while so freely had the kings made grants of jurisdictional powers by means of land books that few of the greater landowners were without courts of their own. We find curious cross relationships in the England of the eleventh century because of the old free Saxon traditions which lay beneath this growing feudalism. Thus in the eastern counties we find freemen paying rent for their lands to one lord and commending themselves to another, while, though later, lawyers held that the commended man was necessarily subject to his lord's jurisdiction, at the time of the Domesday inquest, in the East of England free men were commended to one lord and subject to the jurisdiction of another. Occasionally a freeman seems to have been able to carry not only his personal fealty and the commendation of his lands, but also the right of jurisdiction over it, to what lord he would.

Mr. Round holds that military tenure, the most prominent feature of historic feudalism, was introduced by the Conquest and that lands were then portioned out amongst William's Norman followers, who in return pledged themselves to supply a certain number of knights for the feudal levy. But though we do not find the definite feudal idea that military service is the tenant's return to the lord for the gift of lands in pre-Conquest England, we find that military service was becoming a distinctly territorial burden. Once military service became identified with the landholder, rather than with

the freeman or the personal follower, then genuine military tenure followed as a matter of course. We have already seen that gesith and thegn, though they hardly held their lands by military tenure, lost them if they neglected the summons to the fyrd. The fyrd itself was undergoing the same territorialising process, for though the king undoubtedly could still call on all free landowners to defend their homes, the fyrd was no longer the nation in arms. The heads of households, the landowners alone had the wherewithal to provide themselves with that equipment which was necessary to meet the altered requirements of the art of war.

On ordinary occasions, for the king's expeditions, a select army of picked men gradually replaced the old national levy. For as the distaste for labour which characterised the primitive Saxons died out, and as agriculture instead of war became the main business of life, the freemen were loth to obey the king's call to arms for any cause less vital than the defence of their own homesteads Consequently the freemen seem to have clubbed together to provide men to serve on the king's expeditions and the evidence of Domesday confirms this supposition. In Berkshire one man was sent from every five hides and each hide paid 4/- to support him during two months' service and this was probably the custom in many places. Moreover, to secure a prompt response to the royal summons, one person, to whom the name "thegn" was often given, would inevitably become responsible for each unit (5 hides) of military service: every man's holding being such a unit, or the fraction of one, or a multiple of units. More than this, the king, as we learn from Worcestershire, often insisted that the lord was responsible for the services from lands over which he held dominion. If a tenant made default, the lord sent a substitute to the fyrd and repaid himself at the expense of his tenant. The military requirements of the state were amongst the forces which deprived the freeman of his freedom.

Ranks in the eleventh century.

Thus by the eleventh century the class of ceorls or non-noble freemen had split up into a variety of ranks. To these later Anglo-Saxon documents and Domesday Book give the key. But it must be remembered that the key is necessarily an imperfect one. There were doubtless many descendants of the ceorls, who fitted exactly into none of the classes of freemen and dependents which have come down to us. Probably too, the Norman-Latin expressions which became common after the Conquest were often not exact equivalents of the older Saxon phrases. The common ancestry of the free and dependent Saxon peasantry is shown by the fact that they all still had the same wergild of 200/-. In the North-East, the land of Danish settlements, we find a large number of "sochemanni": these were all personally free, but they held their lands differently. The freest of the sokemen, who were probably the same as the "liberi-homines" of Domesday, could sell their lands and could escape from their lord's soke altogether. Probably the only tie between themselves and their lord was the voluntary one of commendation. The next class of sokemen could sell their lands, but the land remained commended to the lord and in the lord's soke. Possibly the jurisdictional rights were fixed, because this class of sokemen had settled on lands booked to some great landowner. The lowest of the sochemanni held their lands by customs of an unfree character, such as ploughing, reaping and carting and their sheep had to lie in their lord's fold and often their corn had to be ground at his mill.

The sokemen.

The villains.

In the South-West we find much villainage, though the "villanus" was by no means confined to this district. By the time of Henry II all villains were tied to the soil, but we have no positive proof that this was the case in the eleventh century. In fact it is difficult to say what differentiated the lowest of the sochemanni from the highest of the villains at the time of the Domesday inquest, unless we accept Professor Maitland's suggestion

that the lord's responsibility for the geld marked off the one class from the other. The fact that the Normans probably wrote down "villain" when the Saxon jurors had said "tunesman," emphasises the heterogeneous character of the class to which the two names were applied. The later equivalent "copyholder" was of equally varied application and the Domesday inquisition seems to have assumed that many were villains, who were in no sense unfree.

The villains were not all cast in one mould and in the eleventh century the different classes of villains had specific titles, many of which afterwards disappeared. The "geneat" paid rent or "gafol" for his land: he was the "ceorl setting on gafol land," and he owed certain services to his lord, such as riding and carrying and occasional agricultural work. That he should possess a horse, so that he might go on his lord's errands was the characteristic trait of the geneat, who originally was the fellow or companion of his lord. To him the name "villanus," in the specific sense, was applied by Domesday Book. The "cottagers," whom the Norman lawyers wrote down as "cotarii" and "bordarii" paid no gafol for their lands, which were rarely more than five acres in extent, but they did one day's work for their lord every week and possibly worked as hired labourers at other times, either for their lords or for such freemen as could afford to pay wages. The "geburs," the "coliberti" of Domesday Book owed more week-work than the cottagers and also paid gafol and did a certain amount of ploughing. Their services were burdensome, because they owed their entire outfit, including household utensils, the seed for seven acres, two oxen, one cow and six sheep to their landlord. When the gebur died, the outfit was supposed to return to the giver. Many of these geburs must have been freed men, for the class of "theows" was rapidly dying out and though we find 25,000 "servi" in Domesday, they were apparently soon merged amongst the lowest of the villains.

Geneats.

Cottagers.

Geburs

Feudalism, "an arrangement of society on local lines, under the guidance of a landowning aristocracy," was thus rapidly developing in England and was the inevitable outcome of free Saxon organisation. It is necessary to insist on the fact that feudalism was evolved naturally and inevitably out of Saxon institutions, because there is a tendency to look upon it as a plant of foreign growth, which became rooted in English soil owing to the self-seeking of the Norman invaders. It was a necessary stage in national development: it had a work to do, and did it excellently, for in the days when the central government was weak and when communication between different parts of the kingdom was difficult, it provided a good working system of local government and of local economic self-sufficiency. It is wise to insist on its serviceableness as a prelude, rather than as a conclusion, to an account of feudalism, for it is often regarded as a cankerous growth and not as a normal and healthy development; and this, because it is judged, not by what it was when at its best, but by what it was in the years of its decay, when the old order was giving place reluctantly to the new. More especially perhaps, is it judged by the light of the inveterate, but erroneous ideas of the social and economic condition of France, prior to the French Revolution.

CHAPTER III

FEUDAL ORGANISATION

Effect of the Norman Conquest on English Feudalism

FEUDALISM, or feudo-vassalism, a scheme of society based upon conditional land tenure, was rapidly developing in England, when the peculiar circumstances of the Conquest checked its growth in some directions and precipitated it in others. In Saxon society the personal tie was still strong, in Norman society this persisted, but services were owed and jurisdiction claimed primarily because of the territorial tie between lord and tenant. The fundamental idea of feudalism, that all land is held mediately or immediately of the king, was realised in the conquered England of William I's reign with a force unknown in Saxon times, for the Conquest had delivered the whole country into the king's hands and lands were held henceforth by reason of his specific or implied grant. The tie between landlord and tenant became universal and obligatory. The king alone held his lands in absolute ownership: below him came those who held immediately of him, the king's tenants-in-chief: they in their turn had their tenants and so on down the rungs of the feudal ladder, until we come to the semi-servile cultivators of the soil. They were tenants, but not lords; the king was a lord, but no tenant. Between the two extremes every man was the tenant of some one who stood above him and the lord of some of those in the

rank below. The Domesday inquest helped to make this symmetrical and universal. The inquisitors collected their information from the old divisions of shire, hundred and vill: they recast it under the headings of tenants-in-chief. For them there was "nulle terre sans seigneur" and he who had no other lord held in chief of the king. Moreover, a large number of small free landholders who had formerly paid rent to one man, been commended to a second and under the jurisdiction of a third, were added to the larger, but not necessarily royal manors, and their tenurial, personal and jurisdictional ties were henceforth amalgamated. But they did not, because of this, necessarily cease to be either freeholders or freemen.

Feudo-vassalism was characterised not only by the social relationship of lord and tenant but by the political tie of lord and man. The man owed fealty and homage to his immediate lord, he owed nothing to his lord's lord. Thus the tenants and the tenant's tenants of a tenant-in-chief were justified in adhering to their immediate lord even though he should break his faith to the king. It was in this respect that the Conquest lessened the height and widened the base of the feudal pyramid. The political insecurity which had harassed William as Duke of Normandy, he determined to eliminate from his conquered realm. By the oath on Salisbury Plain those holding their lands by military tenure, no matter whose men they were, swore allegiance to the king and this was to take precedence over the fealty which was sworn to the lord.

Moreover, William suppressed the disruptive tendencies of feudalism: he had unique opportunities for doing so. The great ealdormanries of the tenth and eleventh centuries, which were rapidly becoming semi-dependent principalities, were broken up by the Conqueror. The piece-meal conquest and the consequent parcelling out of England in comparatively small estates amongst the Norman knights, was unfavourable to the creation of

those vast, compact fiefs which for long made the king of France barely "first amongst his equals" and which were so characteristic a feature of continental feudalism. A lord whose lands were scattered over a score of counties was less dangerous than one who held half his total number of acres as one large estate. The successful suppression of rebellions and the subsequent confiscation and redistribution of lands, increased the patch-work character of the holdings of the tenants-in-chief. Hence it was that the Norman kings were able to suppress two of the worst features of continental feudalism, private war and private coinage, while private justice was only known in a modified form in England. Though the feudal adage "fief and justice make but one" held good here as on the continent, crimes whose punishment involved loss of life or limb were reserved for the king's court, save in the Palatine Earldoms. These had exceptional powers, but so closely did William I watch over his own authority, that he secured the non-hereditary character of the palatinates of Kent and Durham by granting them to ecclesiastics and he planted all the palatinates in the uttermost corners of his kingdom, where they could be useful without being dangerous.

Thus the Conquest, though it accelerated the development of feudalism as a system governing social relationships, checked its evolution as a basis of political organisation. It was to this end that William I maintained the old Saxon machinery of hundred and shire. Feudal England was a curious patch-work of private and of national institutions. Beside the feudal levy we find the Saxon fyrd. Behind the manor was always the vill, the hundred and the shire: often their boundaries cut across each other and one manor comprised several vills, or one vill several manors and parts of manors, while for purposes such as the presentation of suspects, the pursuit of criminals and the holding of inquests, where the limits of manor and vill did not

coincide, the ancient unity of the vill triumphed over the newer unity of the manor.

Feudalism was inevitably weakened as a strong central government came into being. At one time only did unbridled continental feudalism hold sway in England and that was during the reign of Stephen. The history of his reign was not such as to make its repetition desirable and Henry II was able to check the feudal anarchy which he found because of the anti-feudal policy of Stephen's predecessors. The ultimate elimination of feudalism from political life was ensured when the Commune Concilium of tenants-in-chief, gave place to a national Parliament, made up of those who, irrespective of tenure, had received the royal summons. Its elimination from the social and economic life of the nation was a much more gradual process. Feudalism permeated English society for well-nigh six hundred years, and feudal ideas still colour national life, so that any description of it is necessarily imperfect and must give general characteristics rather than a specific and detailed account of any particular period.

Feudal Tenures

All land was held mediately or immediately of the king. All lords below the king were "mesne lords." The immediate lord of any man was his "capitalis dominus," and the immediate tenant, his lord's tenant-in-chief, until the latter term was restricted to those holding immediately of the Crown. Every one who had any interest in any particular estate was said to have "seisin" or possession of it. Now it was usual for several to be seised of the same plot of ground and each might hold it by a different "tenure," or collection of services to be rendered in return for the land. As far as they were exacted from free-holders, these services were spiritual, military, serviential, or free, but not to be classified under any of these heads. He who held an estate to use or abuse as he

The capitalis dominus and the tenant-in-chief.

Seisin.

Tenure.

would, who was its owner, as far as feudalism would recognise any ownership save that of the king, were said to be seised of the estate in demesne. All others who had any interest in it, were said to be seised of it in service.

It was possible, not only to add new steps at the top or at the bottom, but to insert them in the middle of the feudal ladder, which sometimes we find consisting of as many as nine rungs. Between each lord and his immediate tenant a special bargain was made and that tenant was in nowise concerned with the terms by which his lord held of the lord next above him: if the superior lord seized the tenant's holding because the immediate lord had failed in his services, the tenant had a remedy, the "action of mesne" against his own lord, who was bound to hold him harmless Thus an estate might be burdened with many more services than was any one of its tenants.[1]

Service was at first inevitably bound up to a large degree with the "status" or personal rank of the tenant. But soon tenure and status were divorced and the former became all important, while the services owed by the tenant became so far identified with the tenement, that we find hides and acres pledged to reap or plough the land of their lords and on one occasion we hear of two half-hides, which were bound to carry the king's writs, whenever they came into the county. The inevitable result of this was that the actual status of the lord and the tenant came to be unimportant: great lords thought nothing of holding lands of mesne lords, far below them in the social scale and did not shrink even from the uncertain liabilities of tenure in villainage. At the same

Status.

[1] The services incumbent upon an estate while in the lord's hands were known as "forinsec" services, because they were foreign to, or outside of the particular bargain made by each lord with his tenant. The services owed by the tenant to his lord were "intrinsec" services and might include part of and possibly all the forinsec services. In any case the terms were relative, for services which were intrinsec between lord and superior lord, were forinsec between lord and tenant.

time one man could hold his lands of many lords and by a great variety of tenures. Y, of whom X held Blackacre by knight service, might hold lands in villainage of Z, who held lands by servientıal tenure of X. And ıt was by no means impossible for M to hold A of N and for N to hold B of M. Imaginary feudal knots might be tied without number: there would be small danger of their intrıcacy surpassing that of the realıty, for lordship was a relative, not a positive dignity and unless this is borne in mind the apparent simplicity of feudal tenures masks the real complexity of feudal relationships.

Frankalmoin.

The tenure known as "libera elemosyna" or "frankalmoin" at first included all lands given as free alms and ıts name denoted rather the motive of the gift than the form of the tenure. But the name came to be specially applied to lands given to the Church without any stipulation for certain services in return. The tenant ın frankalmoin owed no fealty to his lord and if he failed to do those general spiritual services which the donor expected of him, no weapon could be used against him save ecclesiastical censures. But if the land was burdened in the donor's hand with secular services, it passed thus burdened into the hands of the donee and it was possible that donor and donee between them, might arrange that the latter should discharge part of these services. Sometimes too, we find suggestions that between donor and donee, occasional secular services were demanded, so that it seems questionable whether immunity from worldly duties is a satisfactory test of elemosinary tenure.

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A clause in the Customs of Clarendon suggests that another characteristic lay at the root of tenure in frankalmoin. It provides that should any dispute arise between a cleric and a layman, concerning a tenement, the king's court should hold a preliminary inquiry to decide whether or no (utrum) the land in question was held in free alms. If the decision went in favour of the Church the dispute was carried to the ecclesiastical courts. Hence freedom

from secular jurisdiction, rather than freedom from secular service, appears to have been the core of spiritual tenure. At the same time the lawyers narrowed the competence of the Courts Christian over lands given as free alms to jurisdiction over consecrated soil, so that by the end of the thirteenth century other land held in "pure free and perpetual alms" was for all practical purposes a lay fee.

Knight service

Military tenure in its simplest form meant that the tenant, in return for his land, was bound to serve his lord in the field for a certain time each year and at his own expense. No legal limits restricted either the time or the place of service, but custom fixed the former at forty days. The king could and did demand longer service and was within his rights if he tendered wages or called out only a fractional part of the total levy. The place of service became a bitter question as the ties connecting England and Normandy slackened. The lay barons claimed that they were only bound to follow the king while the ecclesiastics asserted that they need only supply knights for home defence and at other times could pay "scutage." The question was still unsettled when military tenures ceased to be really military and the feudal levy gave place to a paid army.

The knight's fee.

The land which supplied one knight to the feudal levy was called a "knight's fee." But it was not necessarily of any particular size. Sometimes we find that as many as twenty-four ploughlands or hides went to one fee, at others that a knight's fee consisted of only one or two ploughlands. The large knights' fees were characteristic of the free North, where often they seem to have been taken over by entire communities of sokemen. The origin of the knight's fee is obscure, but there is evidence that would lead us to believe that, in return for the wide lands which the Conqueror bestowed upon his followers, he laid upon each of them the duty of supplying a fixed number of knights when he called out the feudal levy and that the number required of each lord was based upon a

unit of five knights and was in no way dictated by size of the estate. Each estate, therefore, was regai as consisting of the same number of knights' fees as lord owed knights and each acre in the estate burdened, in the king's eyes, with the full numbe knights due from the whole, no matter how the might have parcelled it out amongst his tenants military tenant-in-chief had to go to the wars in pe and if he owed fifty knights, had to bring under banner forty-nine fully equipped.

But though the tenant-in-chief was personally res sible for the production of the full quota of knights from his estate, many of them and sometimes al them, would be enfeoffed upon his lands Those kn which he owed and had not enfeoffed were said tc chargeable upon the lord's demesne and when royal summons came he had to hire soldiers to n up his "servitium debitum" if he had not a suffic number of knights living in his household. In Eng the position of the military tenant holding of a m lord differed considerably from that of his fellow the continent. For though the sub-tenant was bc to his immediate lord and came at his summons served under his banner, he was only compelled to f in the king's army and in the king's cause Those owed to their lords the duty of "castle guard" also this service for the king, who regarded all castles as own if he chose to claim them and who allowed non be built without his special permission English feuda offered few facilities for private warfare. But during first century after the Conquest, we do find that, in in tion of continental practice, many of the greater ten enfeoffed more knights than they owed to the k The superfluous knights were a source of consider profit: the Abbot of St. Edmund's owed to the king services of forty knights: he enfeoffed fifty-two: he on every scutage taken at 20/- for each knight's fee made a clear profit of £12. Henry II in 1166 n

inquiries as to the number of knights actually enfeoffed and raised the "servitium debitum" on those estates where more were enfeoffed than were actually owed to the higher number. we do not know whether he was able to keep it there.

Scutage.

The development of scutage turned a personal into a pecuniary burden. At the same time it facilitated the breaking up of knights' fees and the imposition, on new tenants, of obligations in addition to the discharge of military service. The tenant who held one-twentieth or some other fraction of a knight's fee which existed nowhere as an integral whole, was really charged with a capricious money rent amounting to an equivalent fraction of the sum levied as scutage on each knight's fee. The smallest payment of scutage made the payer a tenant by military service; he rapidly became a tenant by scutage or "escuage" and was hardly to be distinguished from a socage tenant, from whom, socially, he differed not at all

In the latter half of the thirteenth century, we find the number of knights due from the tenants-in-chief enormously reduced. The debt of the Bishop of Ely fell from forty, to six knights, that of the Abbot of Peterborough from sixty, to five. The king accepted this reduction of the "servitium debitum" and raised the rate of scutage, so as to more than compensate himself. The Bishop of Ely paid 240 marks as shield money for six knights' fees. Who originated this change or why it was made, we do not know, but by 1300 genuine military service and the payment of scutage were alike obsolete. Those who held by knight-service had practically ceased either to supply the fighting force of the kingdom or to furnish its pay, though the tenants-in-chief continued to serve in person, and though the feudal levy was summoned as late as the war with Scotland in 1640. Henceforth military tenants were valuable to their lords because the latter had the right to control the marriage of their heirs and to exercise wardship over them: this they continued to

do until military tenures were destroyed at the Restoration.

The barony. A "barony" was only an aggregate of knights' fees. There seems no reason for believing with some writers that it consisted properly of thirteen and a third: the assumption was based on the idea that the barony was to the knight's fee, what the mark was to the shilling: this somewhat fantastic equation being founded on the fact that a barony paid a relief of a hundred marks and a knight's fee paid 100/-. As a matter of fact baronies existed long before reliefs were fixed. The barony was much the same as an "honour," but the latter term was never applied to the estates of ecclesiastical tenants and the inferior limit of both was indefinite. Once formed both were indivisible wholes, nor could they lose their identity by being united with other baronies or honours: the payments due from the holder had to be made separately for each. Yet the barony had not necessarily any geographical unity, though one particular manor was usually taken as its head and the whole barony was often counted as lying, for administrative purposes, in the same county as its head.

Tenure by barony. A tenant not only held a barony, but he held by barony: the amount of relief due alone separated tenure by barony, from tenure by knight service. Its chief importance lies in the division which it gradually produced amongst the tenants-in-chief of the Crown. Those who held by barony soon separated from the simple tenants by knight service. How or upon what principle the dividing line was drawn we do not know but in financial and military matters, the majores and minores received different treatment: they were summoned differently to the Great Council and ultimately, when the majores became members of the House of Lords, the minores joined the ranks of those who elected the knights of the shire and who sat in the Commons as representatives of county and borough. These facts testify to the existence of a difference, they do not explain it and the only possible definition of a

barony seems to be that it was "a mass of lands which from of old had been held by a single title."

"Serjeanty" is not easily to be distinguished from knight-service on the one hand and socage tenure on the other. The essence of all feudal tenures was service, but the name "servientes," or serjeants, came to denote a special class of tenants, whose relations with their lords were more personal than those of other tenants. They could not alienate their lands, nor, without their lord's permission, create a tenancy of any kind, while the feudal dues exacted from serjeants remained arbitrary long after those taken from all other tenants had become fixed in amount. The services which the king's serjeants owed were often connected with the king's household: the king's carver, his steward and his butler were serjeants, and the offices, which soon became hereditary, were coveted by the mightiest of the king's vassals, though they soon ceased to do their services in person. The constable and the marshal held by serjeanty: so too, did the various officials of the forests, the king's messengers and those who were charged with keeping the royal palaces in repair, for serviential tenure was restricted to no particular class. Serjeanty.

Moreover, the tenants of a mesne lord could hold by serjeanty. They might carry his letters or feed his hounds or spread his table. They might be bound to look after his woods, to ride with him wherever he willed or to act as president of his court. Amongst the serjeants, including those who held both of the king and of mesne lords, were those who were bound to provide baggage horses or munitions of war for their lord's use when the feudal levy was summoned. Sometimes they had to go themselves, or send a substitute, armed in a prescribed manner, to serve under their lord's banner. This provided the king with an array of lightly armed soldiers, but their tenure differed from tenure by knight service because the idea at the root of the military serjeanties was that the "serviens" went to attend on his

lord or to carry his shield or his lance, and usually he went at his lord's expense. The essence of serjeanty was servantship, rather than service, which is a wider term and includes the former. It was evolved from the relationship of master and servant, rather than from that of lord and man, or lord and tenant.

In course of time, a line was drawn between grand and petty serjeanties. The latter became indistinguishable from socage tenure and involved the annual delivery to the lord of some small offering which served as an acknowledgment of his lordship. The grand serjeants did service to the king in person and over the heirs of any one holding any fraction of his lands by grand serjeanty, the king claimed the right of prerogative wardship. Tenure by the honorary service of grand serjeanty survived the abolition of feudal tenures at the Restoration, but was freed from all burdens incident thereto.

Other free tenures.

Fee farm.

Free tenures, which were neither servential, spiritual nor military, gradually came to be known as free socage tenures, though at first the lands were said to be held in "fee farm," that is they were held heritably or perpetually, at a rent. The rent varied: it might be merely the yearly gift of a rose, a sparrow hawk, a pound of pepper or a pair of gloves. Such nominal rents were not uncommon; it was an easy way of providing for daughters, for younger sons or for old retainers Or the land thus held might really have been bought by the tenant for a substantial sum and a nominal rent was paid because, for some reason or another, it was undesirable to put the purchaser in the vendor's place, with regard to the lord of the latter. Of course the majority of tenants in free socage paid a substantial rent: often they were required to pay "the best rent that could reasonably be gotten." Tenants-in-chief of the king held their lands in this manner, and many men held lands of the Church at a rent, with tenants below them paying rents in their turn. Moreover the tenant might also do a certain amount of ploughing and reaping, though if he were a great man, he

would simply supply reapers and ploughmen to labour on his lord's lands. That it was accounted no indignity to be liable to agricultural services testifies to the complete separation of tenure from status.

Socage. The humblest of those who held in free socage owed certain money dues and a fixed quantity of agricultural service. Often their tenures were very old and sometimes they had no charter recording the terms made by them with their lords. Probably these were the heirs of the sochemanni of Domesday Book. We find them most often on the Ancient Demesne of the Crown, where pre-Conquest freedom survived longest. Sometimes they were called "free sokemen" in contrast to the "villain sokemen" or privileged villains, but there is little to distinguish them from the free tenants in villainage amongst whom they dwelt and with whom they laboured on their lord's lands.

With the exception of this class of customary freeholders, the tenant in socage was not a sokeman. The latter term did not share the promotion of its companion and the word socager we do not find till the fourteenth century. But socage tenure is not to be defined by any save negative characteristics: it was not spiritual, it was not military, it was not serviential. The land was free from the burdens of wardship and marriage and it paid no scutage. Because of these immunities, great men were eager to prove that they held in socage, while if the land paid a substantial rent, the lord was not anxious to contradict them. Thus socage became the normal and typical free tenure and when the commutation of burdensome services became frequent, it tended to become simply tenure at a money rent. Burgage was for all practical purposes the same as socage tenure, but with this difference—the tenant in burgage was essentially one of a community and bore its burdens—the tenant in socage was an individual only. Burgage.

Homage, Fealty and Allegiance

Homage. It was the right and duty of the free tenant, and particularly of the military tenant, to do "homage" to his lord and to swear "fealty" to him. Swordless, with head uncovered, and kneeling on both knees, the tenant put both his hands between his lord's hands and swore to become his man, for the lands which he held of him and to bear faith to him "of life and member and earthly worship" against all folk, saving only the faith which was owed to the lord the king. This symbolic act of homage was definitely connected with the bestowal of land. The

Fealty. oath of fealty, sworn on the Gospels was less solemn and could be exacted in cases where homage was not exigible; by the assize of Northampton it was even taken from "rustici," while the significant words "I become your man of the tenement that I hold of you" were omitted.

Save only reverence, the lord owed as much to his tenant, as the tenant to his lord. Every man might aid and obey his lord in all things lawful. The lord was bound to help his man with counsel and practical assistance: above all he warranted his seisin of his lands against "all men who could live or die." This guarantee of the tenant's title is in itself a sufficient explanation not only of the development of commendation but of the whole feudal system. In the days when land was almost the sole form of wealth and when Might triumphed oftener than Right, it was worth while to endure untold inconveniences in order to have a powerful lord at one's back.

Allegiance. The word "liege" at first meant unconditional. He who held of one lord only could do unconditional homage, but if he held other lands of other lords, the homage that he did for each fief was conditional, he had to save the faith which he owed to his other lords. Originally the liege lord of a man having several lords was he of whom he held either his dwelling-place, or the oldest of his tenements. Liege homage was not necessarily

due to the king, even if he were amongst the several lords of the tenant in question. But in England from the days of Alfred and Edmund the king insisted, with increasing success, that between himself and every subject there was a personal bond and occasionally from each he exacted an oath of fealty, while he secured the insertion of a saving clause in the oaths which the man swore to his lord: the king of France tried to do the same thing and for a time had to abandon the attempt. William I not only secured an oath of fealty but an act of homage from his men's men. Slowly the idea gained ground that liege homage could be done to the sovereign alone and the oath of fealty sworn to the king "to bear faith and loyalty of life and limb, of body and chattels and earthly honour" was so unconditional that it became known as the oath of "ligeance" or "allegiance." It was due from every man to the king, irrespective of the lords to whom fealty had been sworn and homage had been done. Thus it became the bond between sovereign and subject, as compared with that between lord and vassal, but in origin, allegiance was a feudal and not a national obligation.

Feudal Incidents

In addition to the services and rents which the feudal tenants owed to their lords were certain payments, which were known as "feudal incidents," because they were inseparably incident to tenure by knight-service, the most characteristic of the feudal tenures. In reality they were by no means restricted to the tenants in chivalry and many of them were known in England long before the Conquest, though at that time—like many another characteristic of feudalism—they were crystallised and simplified, so that their exaction became a comparatively easy matter. They comprised the lord's right to certain occasional payments such as aids and reliefs, as well as his right to the wardship and marriage of the heir or heiress and to the

escheat or forfeiture of the estate, should heirs fail, or the tenant, through felony, forfeit his land.

Relief

"Relief," or "relevium," was paid by the heir when he took up again the land of his ancestors. For if we trace back the word "fee" or "feodum," we find that formerly the word "beneficium" and before that the word "precarium," was used in its stead. A precarium was, as its name signifies, a gift which was bestowed for no fixed time. The tenure of a beneficium was less precarious, usually it was given for life or perhaps for three lives. In the latter case the great-grandson of the original recipient would have to strike a new bargain with the lord if he wished to inherit the land. But apparently the lord was not free on his side to refuse to renew the tenancy, though the succession of the heir took somewhat the form of a new grant and involved a gift of money. This was the origin of the Norman "relief." [1]

At first the sum taken as relief was not fixed. William II demanded such extortionate payments that it was said that he desired to be every man's heir and that he compelled his tenants to buy back their lands. Henry I promised that reliefs should be just and lawful. Magna Carta legally fixed the relief for a knight's fee at 100/-,

[1] To the Norman lawyer the Saxon "heriot" was the same thing as the relief under a different name But in origin the heriot was quite distinct from the relief in the days when the lord provided his follower with war-horse and armour, this "heregeatu" or military apparel returned, on the death of the warrior, to the lord who gave it Thus, heriot was the debt of the dead man to his chief, while his son succeeded to his lands by folk-right relief was paid by the heir on his own behalf, in order to obtain his father's lands. But long before William I landed in England, the lord had ceased to arm his warriors: he gave them lands instead and the war-horses and the mail and the money came to be regarded as paid by the heir for the lands, so that it was easy for relief and heriot to amalgamate. Still in the days of Glanvill, every freeman who bequeathed his chattels by will, had to "recognise" his lord with the best thing that he had and with his second best possession he recognised the Church. Amongst the unfree population a heriot of the best beast was long demanded by the lord.

and that of an earl's barony at £100, while a baron's barony at first paid £100 and subsequently a hundred marks. The relief paid by other tenants was usually one year's rent, but that paid for serjeanties was left to the discretion of the lord. In early days a relief seems to have been demanded when a new lord entered into possession: the death of the lord, no less than the death of the tenant, putting an end to the bargain. When St. Wulfstan, Bishop of Worcester died, William II chose to declare himself the bishop's heir and he demanded a relief from the tenants on the estate. But as a rule, the only suggestion we find in England of this custom is an occasional hint that the new lord, especially if he were a churchman, expected to be "recognised" with a gift by his tenants. Every lord, was entitled to a relief from the heir of a free tenement, but he was not entitled to keep the land in his own hands until the relief was paid and if the heir were forthcoming, he obtained immediate seisin. But if one of the tenants-in-chief died, the king had the prerogative right of "primer seism"; the king's escheator seized the lands and the heir could not obtain possession till his rights had been established by inquest, homage had been done and security given for the payment of the relief.

"Auxilium," or "aid," was demanded by the lord, of his tenants, when he found himself in pecuniary difficulties of any kind. In the reign of John, we find the Prior of St Swithun's taking an aid from all his tenants, villain and free, in order to pay his debts. The Earl of Salisbury took an aid to stock his lands and the Abbot of Peterborough secured funds to pay a fine to the king by the same means. It was obviously to the tenants' advantage to limit the occasions when the lord could use their purses as his own. In Henry II's day the legal aids were limited to three; one was to help the lord pay the relief he owed to his overlord, another he might take for the knighting of his eldest son and the third was collected for the marriage of his eldest daughter. Aids.

Magna Carta sanctioned the two latter and added a third, for the ransoming of the lord from captivity. The clause was dropped from subsequent editions of the Charter, for the barons did not wish to limit their own rights. All the same, these three aids became the regular feudal aids and all others disappeared. The amount taken to ransom a lord from captivity must have depended upon circumstances: Richard I's ransom was an enormous sum. The Statute of Westminster I fixed the other two aids at 20/- for each knight's fee and for every £20 worth of socage land held of a mesne lord and in 1351 this limitation was extended to lands held of the king. Henry VII took an aid for marrying his daughter Margaret to James of Scotland, though the feudal privilege had not been exercised for a century and a half. The last time the aid "pur fille marier" was collected was when the ill-fated Princess Elizabeth married the Elector Palatine. The last aid "pur faire filz chivalier" was taken in 1609 on behalf of Prince Henry.

Wardship. "Wardship," or "custodia," the right of the lord to the guardianship of the heir and his lands, seems, like the relief, to point back to the days when the tenant's hold on his land was uncertain, for during the years when the heir was a minor the lord entered again into the profits of the estate. Of these he gave no account to the heir when he came of age, but the latter paid no relief in consideration of this fact. Magna Carta provided that guardians should not waste the lands of their wards and in the case of socage tenants, the Provisions of Westminster stipulated that the guardian should give an account of his administration of the estate when the heir came of age. If the dead man held of several mesne lords, to each belonged the wardship of the tenement held of them. The lord from whom the most ancient of the military tenements was derived had the care of the person of the heir. But if the king were amongst the heir's lords, then he had the prerogative right of wardship over the heir

and all his lands. Magna Carta limited this prerogative wardship to tenure by grand serjeanty and knight-service. In the case of socage tenements, the guardian was the next-of-kin amongst those who could not inherit and this most commonly was the mother. When military tenures were abolished at the Restoration, the responsibility of the guardian to the heir for his administration of the estate was extended to all holdings and a statute gave the choice of guardians to the father.

Marriage.

"Maritagium," or the right to regulate the marriage of a ward, was originally most important in connection with an heiress, since upon her husband fell the duty of administering the fief and discharging the services due from it. The right was soon extended to the marriage of heirs and Magna Carta only stipulated that a ward should not be forced into a disparaging union. Probably the lord would often waive his rights on the payment of a substantial fine. In any case both wardship and marriage were so profitable that the feudal lords maintained their rights long after the feudal levy, and with it any legitimate pretext for the exaction of them, had sunk into oblivion.

Forfeiture and escheat.

Through "forfeiture" and "escheat," it was always possible that lands might return into the hands of the giver: the lord's suzerainty was ever ready to become full ownership. The basis of feudal relationship was that the tenant, in return for his lands, should render certain services to his lord. Theoretically if the tenant failed to keep his part of the bargain, he forfeited his lands, but the lord soon lost the power of evicting a free tenant for the non-performance of services. At the same time the tenant could not institute an heir and if he died without legal heirs, the land returned to the lord. The lands of a felon or an outlaw the king had the ancient right to waste for a year and a day, after which they escheated to the lord. The lands of a traitor, no matter who was his lord, were forfeited to the king.

Much of the importance of the feudal dues lies in the fact that their arbitrary exaction by the king often prompted the barons to assume the position of constitutional opponents to the irresponsibility of the Crown. They were exacted spasmodically by the king long after they had been suffered to lapse by the mesne lords. They vanished when military tenures were abolished at the Restoration and the Crown was compensated by the gift of the hereditary excise.

Inheritance and Alienation

Primogenitary inheritance.

It was in the interests of military service that the custom of primogeniture developed. Under the Anglo-Saxon system the ordinary freemen divided their lands amongst their sons. But if the thegn divided his holding, it often meant that his successors would not have the wherewithal to perform their military duties. From the entries in Domesday Book, it seems possible that occasionally the sons of a thegn held his lands undivided, as co-heirs, the senior being responsible to the king for the services due from the estate. But it is questionable whether, even by the time of the Conquest, the hereditary character of the thegns' holdings had been fully established and the Norman barons in assuming that their English fiefs were hereditary, were perhaps transporting to England the newest of the feudal ideas current in Normandy. The Conquest, when it tied military service to the tenure of land, made it impossible that the fiefs should be split into fractional parts, for the military service would suffer from any disintegrating process and would make precarious the payment of those feudal dues which were bound up with the military fiefs One out of a number of co-heirs would inevitably be regarded as answerable for services and dues and would be held so by the royal courts. The easiest and most obvious thing was to put the whole responsibility on the eldest son, and

it would seem that primogeniture was at first enforced from above.

Established in one class, and that including those of the highest social rank, primogenitary succession spread from the military tenants to all other classes. The practice was found convenient even on small holdings, where any division of the oxen used for agricultural purposes meant serious agricultural difficulties. Moreover the spread of impartible succession among the lower ranks of freemen was largely facilitated by its previous existence amongst the holders of villain tenements. To these sometimes the oldest son succeeded; sometimes the land went to the youngest son, a custom to which the name of "Borough English" was accidentally given. The succession of either the eldest or the youngest son to an undivided inheritance was protected amongst the tenants in villainage by the manorial courts, against all but the lord.

Inheritance and alienation.

A son inherited his father's lands by the terms of the original gift. Lands were given to B and to his heirs after him: he had no voice as to the disposal of the fief after his death: he could not make a will and so alienate his lands "post-mortem."(1) During his lifetime, the tenant had the right to give or sell his lands, but subject to certain restraints, because either of the two ways in which he could alienate his lands might prove injurious to his lord.(2) He could substitute another tenant for himself, the new tenant holding either a part or the whole of the alienor's land, of the alienor's lord. In this case the lord might get an uncongenial or an incapable tenant, or if the holding were split up, he might suffer because the services due from the whole tenement were divided. On the other hand the tenant could subinfeudate a portion of his estate: that is he could give lands to be held of himself. In such a case, the first lord might suffer in the event of wardship or escheat: for if B held Blackacre of A by knight-service and alienated it to C for a nominal rent, when

Alienation by substitution.

Alienation by subinfeudation.

A had the wardship of B's lands, instead of enjoying the land itself until B's heir was of age, or if the land escheated, instead of entering into full possession of it, A had to be content with the nominal rent which C had agreed to pay to B.

Restraints on alienation.

In consequence, the lord had a vague right to prevent alienations, if either by substitution or subinfeudation his interests were threatened: in recognition of this, we often find a lord sanctioning the transfer of land and occasionally receiving a large payment for so doing.

1217. The 1217 reissue of the Charter provided that no freeman should give or sell so much of his land that, out of the remainder, he had not enough to do to his

1290. lord the services due from the fee, while in 1290 the Statute of Quia Emptores provided that every creation of a new manor should place the tenant in the same relation to the lord's lord as was held by the lord who enfeoffed him. That is, alienation was henceforth to be by way of substitution alone. The act did not protect the lord's interests as much as was expected, for the tenant was perfectly free to substitute many tenants for himself and the consequent splitting up of tenements made the collection of feudal dues increasingly difficult. At the same time it was made impossible for new rungs to be added to the feudal ladder and consequently escheats carried the lands back more quickly into the hands of the overlord, and ultimately into those

Alienation of lands held of the king in chief.

of the king. Somewhat earlier, in 1256, the king had declared that it was an intolerable invasion of royal rights that men should, without his consent, enter by way of purchase into the baronies and fees held of him in chief and he declared that if alienated without the royal consent, they should be forfeited to the Crown. This threat was never carried out, but from the end of the thirteenth century, the king profited largely from licences to alienate, which he sold to his tenants-in-chief, and from the fines which he exacted when they failed to secure these licences.

When lands were alienated to the Church, the lord's rights were very seriously impaired, for a religious house was a corporation and never died. There was never a new tenant from whom the lord could exact a relief, there were no children over whom he could claim wardship and marriage, yet heirs never failed, so that the lands did not escheat to him, nor was the religious house likely to forfeit its lands through felony or treason. The hand of the Church was a dead hand, which never let go its hold: in consequence we find a whole series of Mortmain laws, restricting the alienation of lands to religious houses. Somewhat vague clauses in the Constitutions of Clarendon and in the Charter of 1217, and an unsuccessful attempt in the Provisions of Westminster to prevent men of religion entering into a fee without the licence of the lord were enlarged and defined by the act, De Viris Religiosis of 1279. By it no religious persons were to acquire land: if they did, the lord might claim the land as forfeited and if he failed to take advantage of his rights the land went to the lord next above him and ultimately to the king. Of course lands could still be given to the Church, for the lords concerned, from the king downwards, might pledge themselves not to take advantage of the statute. Besides this, the would-be alienor of Blackacre might arrange with the ecclesiastics that they should bring an action against him for the "recovery" of Blackacre, which they would assert was their own. If the occupier failed to appear, the judgment would go against him by default and the fee would be adjudged to the Church: the considerations which induced the occupant of Blackacre to disappear in no way concerned the Law Courts.

Alienation to the Church.

The Statute of Mortmain 1279.

Because of this method of evading the law, the Statute of Westminster II made the right of the claimant liable to investigation by a jury and in the event of its disallowance the land was forfeited to the overlord, whose rights had been imperilled. But this check proved ineffectual and

failing all other methods of giving lands to the Church it was always possible to enfeoff a layman with an estate for the "use" or profit of a religious house. The
1391. Mortmain statute of 1391 absolutely forbade the acquisition of lands by corporations, whether lay or ecclesiastical without the licence of the king or of the mesne lord.
1695-6. But an act of 1695–6 removed the necessity of the consent of the latter and by statute certain corporations, such as the Universities of Oxford and Cambridge, the British Museum and eventually most religious, educational and charitable bodies have been exempted from the
Mortmain Laws of the nineteenth century. operation of the act. Finally, at the close of the nineteenth century, successive acts sanctioned the leaving of lands for charitable uses provided that they are sold within a year of the testator's death. Amongst other considerations, the death duties still make it undesirable that estates should be given permanently into a dead hand.

Forms of alienation. But these checks on alienation only operated in given cases or prescribed the method of alienation. Apart from them, the right of the tenant to give or sell his lands was unchecked and only under very exceptional circumstances could the feoffor's tenants object to being given to a new lord. By the form of his gift the alienor could regulate the future devolution of the land. Usually
The fee simple absolute a "fee simple absolute" was given: this was created by the gift of lands to a man and his heirs. At first it was held that the tenant of such lands could not alienate without the consent of the heir at law. But early in the thirteenth century such consent ceased to be necessary and it was held that a man's "heirs" included any to whom he chose to sell or give his lands.
The conditional fief. In consequence of these prevarications, a second form of gift became common; lands were given to a man and "the heirs of his body." But this too the lawyers evaded and the words of the grant were taken to mean that the land belonged to the man and his heirs, if he had an heir of his body. Once this condition was ful-

filled, the estate became a fee simple absolute and the donee could dispose of it as he wished. The donors, and particularly the great lords disapproved strongly of the legal subtlety by which the terms of the original grant were evaded, for it materially lessened the chance of the land escheating to them. The barons in 1258 complained of the practice and in 1285 the Statute of Westminster II contained a section known as De Donis Conditionalibus, which enacted that if a conditional fief had been alienated, the heir, when he entered into possession could recover the fief from the person to whom it had been alienated, while if there were no heirs living, the original grantor of the conditional fee could recover the estate from the holder, as if an heir had never been born.

1285.

The estate thus created was called a "fee tail" because it was "taillé" or cut off from the fee simple and from the freedom to alienate, which was characteristic of that tenure: it was entailed on the heirs of the original grantee and nothing could bar their claim. The holder of a conditional gift had therefore, only a life interest in the estate. Whatever he had done with it during his lifetime, on his death it passed, as the original grantor had given it, into the hands of the grantee's direct heir.

The fee tail.

De Donis pleased the great landowners, but it pleased no one else. It made the titles of tenants insecure, in that an old entail might be proved and no time could bar it. Treason could no longer be punished by the forfeiture of the estate to the king, while the small landowners were often over-burdened by the lands which they could not alienate: the poor man was condemned to perpetual poverty, while, could he have sold a portion of his estate, he would have secured the wherewithal to cultivate the remainder. Here again the ingenuity of the lawyers provided a way of escape for the holders of conditional gifts. To do so they made use of existing customs. It was a very ancient practice for a purchaser

Evasion of restraints on alienation through :—

(1) Warranty.

whose possession was disputed to "vouch to warranty," the vendor of the article, who had either to make good the title of the purchaser or to compensate him for his loss, if the article were taken from him. Thus the donor of lands had to defend the title of the donee and his heirs. Now the grantee had the freehold of an entailed estate for life: if he chose to alienate during his lifetime, no one could gainsay him, but on his death, the alienated lands could be claimed by his heir. Nevertheless the heir had to prove his title by process of law; and if the alienor had covenated that he and his heirs would warrant the title of the new tenant and of his heirs after him, the very person who claimed to set aside his ancestor's donation as illegal, found himself pledged by that same ancestor's action to defend the title of the person to whom the lands had been alienated, and in case of eviction, to compensate him. Under the circumstances, it was wisest for the heir to let things be, and thus it was possible "for the actual possesser of land to give to a purchaser a better title than he had himself."

(2) Common recovery.

During the fifteenth century a completely effectual method of barring the entail, that is of breaking down the statutory restraints on the alienation of land, was devised. The process, which was known as a "common recovery" was very elaborate. In outline, it amounted to this:—The tenant in tail would induce a friend to claim that he was the real owner of an entailed estate: this friend would strengthen his claim by vouching to warranty a second friend, who would impersonate the original donor of the estate and who would straightway disappear. Judgment would go against him by default and the first friend would be adjudged the real owner of the estate. After this, if he gave the fee simple to the former tenant in tail, or if he kept the land to which the judgment of the court gave him full title and any money changed hands in consequence, it was no one's concern but that of the two parties engaged in the

transaction. The heirs of the tenant in tail could claim compensation against the impersonator of the donor of the estate, who presumably had transferred the land to their ancestor, when he had already given away the freehold of the estate to the claimant of the fee simple, and who in consequence was bound to compensate them. This was a serious liability, but it became usual to choose the crier of the court to play the part required: of course he had no lands wherewith to make recompense, but in Blackstone's time he received fourpence for each recovery: in consequence he cheerfully lived "in perpetual contempt of the Court of Common Pleas and liability to be fined at the king's discretion." The honesty of the first friend was originally without legal guarantee, but before the latter end of the fifteenth century, the Chancellor had ample means of enforcing the fulfilment of the undertaking according to its intention.

An act of 1833 abolished "recoveries" and allowed a tenant in tail to make himself or any one else, a tenant in fee simple, by enrolment of a deed in Chancery. But by the complicated process known as the "strict" or "family settlement," which was perfected during the latter half of the seventeenth century, it is still possible to make property inalienable until the heir of the last tenant for life named in the will, is of full age. The Family settlement.

A further attempt on the part of the great landowners to preserve their estates inviolable and free from legal liabilities was made in the development of a system of double ownership. Land was left to a man and his heirs, for the use of some one else and his heirs. The right of the beneficial owner rested at first solely on the honour of the legal owner, and such protection was hardly satisfactory. The growth of the equitable jurisdiction of the Chancellor gave legal support to the claims of the beneficial owner and compelled the "feoffee to uses" to carry out the lawful wishes of "cestui qui use." The statute of 1391 checked the creation of "uses" as a means of evading the Statute of Mortmain, while one (3) Uses

of 1376 had already forbidden the transference of land with intent to defraud. But the separation of beneficial and legal ownership often cheated the lord of his dues and made precarious and unsatisfactory the position of the beneficial owner, while the legal owner was liable for all the services due from the land and had none of the pleasures or profits of ownership. The only remedy was to make the legal position of "cestui qui use" the same as that of the "feoffee to uses" An act of 1483 made valid the dispositions of the former without the consent of the latter and five years later the lord was given wardship over the heir of "cestui qui use." The Statute of Uses and Wills of 1535 definitely converted the beneficial into the legal owner and then made him responsible to the lord for all feudal services and dues. The land no longer recognised the feoffee to uses, but before this he alone had been noticed by the Common Law Courts. This put an end to the disposing of interests in lands by will, and no post-mortem alienation of land was possible. But again the lawyers came to the rescue of the would-be testator. The "trusts" of modern law are hardly to be distinguished from the old uses, while so unpopular was the restriction put by the statute of 1535 upon the testamentary powers of the landowners that an act of 1540 enabled tenants in fee simple to dispose by will of two-thirds of their lands held by military tenure and the whole of those held in socage With the abolition of military tenures it became possible to dispose by will of all estates held in fee simple.

Trusts.

Wills.

Feudal Justice

Attached to the lord's house in each manor was usually a hall where the lord's court was held. Before the Conquest, when there was no seignorial jurisdiction apart from special grant, it seems probable that a lord of the manor, who had no judicial powers, often held a meeting of his tenants in the hall to regulate the agricultural

affairs of the estate. By the thirteenth century the most characteristic feature of a manor was its court, but some manors were so small, consisting as they did of a few villain holdings, that it must have been extremely difficult for the lord to hold a court of any kind. In other cases the lord's court exercised jurisdiction over a wider area and possessed extensive powers. The seignorial courts, both those which originated from the relations of lord and tenant and those which exercised more extensive powers on the strength of royal grants, will be dealt with later. But the peculiar feature of private jurisdiction in England was the absence of a hierachy of seignorial courts. Henry II and his successors insisted that appeal from the court of the manor lay direct to the national or royal courts and not to the court of the overlord.

THE MANOR

The name "manor" is distinctly Norman in origin: but the estate to which it applied existed in England long before the Conquest and the Norman compilers of Domesday Book, misled by preconceived notions and by the manorialism which they found, supposed manors everywhere in England. In consequence of this, Professor Maitland defined the manor of Domesday Book as the house against which the geld was charged, no matter what its size. But Mr. Round asserts that the geld was charged against the hundreds and was apportioned amongst the constituent parts of each hundred according to a scheme of artificial hidation. Each vill was a part of, or an accumulation of geld-paying units, each of which units, irrespective of its real area, consisted of five fiscal hides apiece. Professor Vinogradoff has therefore defined the manors of Domesday Book as estates, "units of possession and administration," the word manor being as colourless as its equivalent, "terra." These estates, Professor Vinogradoff has sorted into five characteristic types

The manors of Domesday Book.

In the first place there was the manor as an economic organisation. The peasant's holdings centred round the lord's house and they supported him and the home farm by tribute and labour. Here perhaps was often the direct descendant of the Romano-Celtic villa. A second type of manor was a unit for administrative purposes but consisted of scattered and more or less independent settlements. The tie between lord and men was frequently that of commendation: the lord giving protection, the men tribute and services. The home farm, if there was one, was often small and little more than a counting-house. Then there was the manor as the centre of an extensive soke, in reality the hundred jurisdiction, or part of it, in private hands. There might be a home farm which was supported by peasant labour, but the chief characteristic of this type of manor was the jurisdictional authority of the lord, which had been conferred on him by special royal grant, and his right to the feorm which ordinarily would have gone to the king. A fourth kind, the royal manors, comprised all other varieties, but had special characteristics of its own. On few of the royal manors was there any home farm and the tenants often held on exceptionally favourable terms. Those manors which had belonged to the king in the days of Edward the Confessor and which were subsequently reckoned as the "Ancient Demesne" of the Crown were immune from ordinary taxation; they paid no tolls and they did not attend the courts of the hundred and the shire, for they were subject to very heavy food rents and nothing was suffered to interfere with their duty of tilling the king's lands. Finally the smaller Domesday manors were the estates of the freemen and sokemen, which were either worked entirely by their owners or with the help of one or two villains, who, in return, had a small portion of the land for their own use.

These small freeholders, most of whom, for purposes of justice and administration should only have come in touch with the national divisions of hundred and shire, were

added in many cases to the larger manors after the Conquest, and jurisdictional subjection to a lord often led to economic subjection. Villainage seems frequently to have been assumed on the strength of the assumption that customary tenure, burdened with agricultural services, was essentially villain tenure. The greater Saxon landowners redeemed some of their lands; the smaller men were left to the mercy of their new lords: according to the "Dialogus de Scaccario" many of those who kept their holdings, were deprived of the right to hand them on to their children and were thus stamped as unfree. Domesday Book testifies to the rapid decline of the free classes and thus the complex mediæval manor—which, in the most typical cases, was the Saxon tun or township under new conditions—was created, a manorial organisation being built upon the original basis of the tun, which in spite of the feudal superstructure, still showed traces of the older foundations and sent as vill its reeve and four men to the courts of the hundred and the shire, when the manorial lord himself could not attend.

On the normal manor we find both freeholders and villains, but though the presence of both classes was usual, it was not essential, and we find manors composed entirely of either one class or the other. An aristocratic lord might be placed over freeholders but this was more common in Saxon times than in later days. On the ordinary manors villains were essential, since they it was who cultivated the lord's demesne or home farm, which often included strips, scattered like those of his tenants, over the open fields of the village. Used in the wider sense, and in the sense in which the king's officials would use it, the demesne included the villenagium, or the lands of the villains on the estate, as opposed to those of the freeholding tenants.

The typical manor.

(1) The demesne.

(2) The villenagium. (3) The freeholders' lands.

Manorial officials. Reeve.

The affairs of the demesne and of the whole manor were regulated by officers with fixed duties. The "reeve" or "præpositus" was nominated from amongst the peasants of each manor, often at their own choice. It

was his duty to direct all the details of husbandry, and to see that the villains performed their services properly. But though the reeve looked after the lord's interests, he also stood between the villains and the lord, and he had to know the "custom of the folk," which largely regulated the amount of services owed by the villains, and which had been handed down by word of mouth from time immemorial. Besides the reeve, there was a "bailiff" or "beadle" in each manor. He was usually an outsider, chosen by the lord to watch over his interests and to collect the numerous dues and rents owed to him. The bailiff was also responsible for selling the produce of the manor at the neighbouring market and for buying the stock wanted for the home farm. Over all the manors of a lord would be set a "seneschal" or "steward" who exercised a general supervision over their administration and who presided or acted as judge in the manorial courts, and where an honour existed, in the court of the honour.

Bailiff.

Seneschal.

VILLAINAGE

One of the most complex questions in history is the exact position of the unfree cultivators of the soil under the feudal system. The Saxon ceorl we know as a free man and a free owner of lands by customary right, or a free holder of lands by customary tenure. The Saxon theow we know as the chattel of his lord. After the Conquest the latter disappeared; the former, in the majority of cases, became the unfree "villanus." In Domesday Book it is not easy to see in what way the villain or townsman is unfree and Norman documents are not communicative on the subject. A hundred years later, when with the advent of legal literature and of royal writs, information about the "villanus" becomes more plentiful, we are confronted by extraordinary discrepancies between the legal theories of the lawyers and the actual facts as we find them in manorial records.

In the first place the lawyers divided villains into two classes. They distinguished between "villains regardant" who were attached to land, and "villains in gross" who were attached to the person of their lord, the former representing freemen who had lost their own land, the latter representing the survivors of the ancient theows or slaves. This distinction has been proved baseless. The two terms were applicable to the same villain in different connections. A lord might claim that E was his villain regardant to his manor of Blackacre, when he was bent on proving his claims to E's services; his claim he based on the ground that E was connected with one of his manors; the reference to the manor was simply a means of proving the lord's right over the villain in question. A villain in gross was a villain without any further qualification. The two terms came up in connection with fourteenth century modes of pleading: and they throw no light upon the different classes of villains. Legal theory of villainage.

In the eyes of the lawyers the villain was his lord's chattel, and providing that he was injured neither in life nor limb, he might be sold by his lord or transferred to another of his lord's manors or deprived of the whole or of part of his holding. Whatever was acquired by a villain was acquired on his lord's behalf, for the villain had no chattels of his own and when he died, the lord was his villain's heir. Against the lord the king's court gave no remedy to the villain tenant: "the man is my villain" was a sufficient answer to any action. If the lord seized his villain's lands or his goods or increased his services, he was only doing what he would with his own. By no action of his own could the villain escape from his bondage: he had nothing wherewith to purchase his freedom: he was tied to the soil and could only be moved with his lord's permission.

In reality the position of the villain was very different. Even the lawyers acknowledged that by various indirect means he could gain freedom. Apart from direct manumission by a charter given by the lord, together with the Means by which the villain could attain freedom.

lance and the sword of a freeman, openly and before witnesses, the villain could be freed by dwelling for a year and a day in a chartered town or on the royal demesne. Moreover, in the time of Bracton, if the lord did not recapture the fleeing villain within four days, he could not take him at all, unless during the year and the day which had to elapse before he was a free man, he revisited his "villain nest." Even when recaptured, the fugitive was held to be free until he had been proved otherwise: in the king's court he had the right of asserting his freedom and that before lawyers who were favourable to freedom, perhaps because of the gloomy view which they took of villainage.

Besides this, if the lord gave land to his villain and his villain's heirs the villain straightway was accounted a free man. The same thing resulted if a villain entered the Church or if he was produced as a champion or compurgator. Moreover, though the serf could not buy his own freedom, a third person could do so with the serf's own money: for in spite of all provisions to the contrary, the villain had goods of his own. The serf might even get lands from a third person and hold them by free tenure: the lord might seize them if he chose, and go blameless, but until he did so, the serf was the free tenant of that land and all save his lord were bound to treat him as such. In theory too, the lord was his villain's heir, but as a matter of fact the lord contented himself with a heriot: he took the best horse or the best cow from the stock of the villain and the rest of his possessions went to his children. Even the arbitrary sale and transfer of villains, though legal, was rare. Economically there were many ties binding the serf to his holding and it must be remembered that a villain was a precious possession, for on him, and not on the freeholder, hinged the well-being of the manor. Nor was this all: the law gave no protection to the villain against his lord, but the lord had to reckon with the "custom of the manor," and however little he may have regarded this

Limitations to the legal theory of Villainage.

as binding on his conscience, his position was hardly enviable if he went against it. This he was not very likely to do, for villainage existed in an age which saw little difference between law and custom. Finally, villainage was relative: it implied the relation of serf and lord, but towards third persons the serf was free and although, in civil actions, the lord's court alone took congnisance of those who were not freeholders, in criminal matters, the law recognised little difference between bond and free, while by the beginning of the thirteenth century, each was liable to the same punishment and each could secure the same remedies.

In many ways the law recognised the villain as a member of the commonwealth. Magna Carta for the sake of the lord, protected the villain's goods when it exempted him from being extortionately fined by the king. Earlier than this, the Dialogus recorded that if a lord's possessions were seized because he had not paid scutage, the chattels of the villains were only to be confiscated after those of the lord. In 1237 the members of the Commune Concilium assented to a tax, on behalf of themselves and their villains, while the Assize of Arms of 1252 provided that villains should be armed, if they were rich enough: Henry II had only contemplated the arming of freemen. Moreover, though a villain could not declare judgment against a freeman, nor act as a juror in civil cases, we find him representing the vill and presenting criminals in the local courts, and acting on juries of assessment. The king, when he wished to ascertain the opinion of the countryside as to his royal rights, did not hesitate to accept villain testimony.

Thus, the lawyers, from Glanvill to Blackstone give a wholly false impression of villainage. Actual fact and legal theory are irreconcilable. The cause of the discrepancy must be sought partly in the fact that villainage was largely regulated by customs, which the Common Law did not recognise, but chiefly in the efforts of the lawyers to force English villainage into the mould of

Roman slavery; a mould into which the Saxon theow had not fitted badly. They were inspired by the lawyer's desire for symmetry, for generality, for simplicity. English villainage was not symmetrical, it was not simple; no general terms could explain its infinite varieties. Bracton, living in the thirteenth century, accepted to the full, the Roman dilemma "Omnes homines aut liberi sunt aut servi." But in England men were not thus easily divided into two classes: such a classification is wholly artificial. As we shall see when we come to examine the tests of villain status and of villain tenure, it is extremely difficult to say what exactly it was which made either tenure or status free or servile and that between the definitely free and the definitely unfree was a large class of peasantry which could hardly be called either the one or the other, but which with any small derangement of the existing state of affairs would be speedily precipitated into either freedom or servitude. The heterogeneous character of the unfree English peasantry can only be explained by the variety of influences which had united to bind the free Saxon ceorl with personal, with tenurial and with jurisdictional bonds. None of these ties necessitated servitude, but add to their servile propensities the depressing effect of the imposition of foreign lords—who had every intention of making the most of their new estates—and the transformation of the customary freeholders into a class of more or less unfree peasantry is explained. The degree of unfreedom varied because the pressure from above varied in intensity upon different estates, while former traditions must have exercised considerable influence.

Obligations of manorial tenants:

The agricultural obligations of the tenants of the manor were of three kinds: "gafol" or tribute, "boon-work" and "week-work." Many of these obligations were imposed alike on the free and on the unfree, but some were characteristic of villainage alone. Gafol consisted mainly of a great number of small payments: there was the "tithing penny" based on the lord's right of jurisdiction:

(1) gafol.

there was the "fish-silver" and the "wood-silver," which represented the lord's rights over water and waste lands. There were occasional fines, such as "merchet," which the villain paid on the marriage of his daughter and the fines which he paid when he sold ox or horse or let his tenement fall into disrepair. Besides this, the villain often had to grind his corn at his lord's mill and bake his bread in his oven and pay for the privilege of doing so, while for the "gafol-earth" the villain had to provide a certain amount of seed from his own store.

(2) boon-work.

Boon-work, that is occasional work, was required at certain seasons of the year, such as seed-time and harvest. The amount which constituted a "work" was in many cases fixed by custom, and by the same rule was fixed the quantity and quality of the food and drink which the lord had to provide on these occasions for his labourers.

(3) week-work.

Week-work or labour on the lord's lands for a certain number of days in each week, was due from the villain all the year round, though in the busy seasons the number of days required was often greater than in the winter. The week-work consisted of ploughing and harrowing and sowing, the cutting of ditches and the draining of marshy lands, the making of roads and bridges and the repair of the manor house and barn: in fact every kind of work which was needed on the estate.

Tests of unfree status and tenure.

The payment of "merchet," of fines for selling ox or horse, and the duty of serving as reeve were looked upon as unmistakable badges of villain status. But even these tests were not infallible. In reality, the question of tenure soon became a much more important matter than that of status, though anything which stamped the tenant as unfree inevitably contaminated the tenure. The most reliable test of unfree tenure seems to have been whether or no the king's court would give protection to the tenant. A tenant in villainage had no remedy against his lord, if he chose to disseise him. At the same

time, this was the consequence rather than the cause of villain tenure and the judges, in granting or refusing the protection of the royal courts, were guided apparently by the certainty or uncertainty of the kind of work the tenant performed on certain days. Bracton said the villain tenant knew not to-day what services would be asked of him on the morrow. This test is hardly satisfactory and it condemns as unfree most of those tenures which implied agricultural services, since the kind of work done was often, of necessity, at the will of the lord and at the mercy of the weather. As a matter of fact, subject to these restrictions, the tenant, free or unfree, nearly always did know what services would be required of him. And even if he were required to do ditching instead of the carting which he had expected to do, he knew just how much ditching went to the day's work. Nevertheless, behind this real certainty, there was often theoretic uncertainty and if the question was brought before the courts, villain tenure seems to have been assumed unless the man could prove that random work could not be required of him, while if the lord chose to defy the custom of the manor and exact heavier services there was no remedy for the villain save in that lord's court.

The different modes of conveying land were significant of the difference between free and unfree tenants: the latter changed hands by surrender and admittance, the former by feoffment and charter. Originally the tenant in villainage had no proof of his right to his holding save in the memories of those who witnessed his admittance. But as soon as the manorial courts began to keep records wherein the lord's dealings with his tenants were written down, the position of the tenant in villainage became much more secure. It was extremely difficult for the lord to violate his own written and witnessed agreement with his tenant, and he who once held by the "custom of the manor" soon came the hold "by copy of court roll." He was no longer a "customer,

Origin of copyhold.

but a "copyholder" and he could appeal in the manorial courts to its records even against his lord.

Villainage on the Ancient Demesne.

The dwellers on the Ancient Demesne manors, even when these had passed into private hands, had their villain tenements protected by two special remedies. If the lord disseised a tenant in villainage of his holding, the tenant could obtain "a little writ of right close" which ordered the bailiff of the manor to see that full right was done to the plaintiff according to the custom of the manor, in the manor court. While by the writ of "monstraverunt," the tenants of these manors were protected against any increase in the services which they owed to their lord. These privileged villains or villain sokemen, as they were called, though they were unfree in every other respect, held their lands by certain services and their tenure was protected against their lords.

Hundredors

There were others of the unfree peasantry who were more or less independent of their lord's commands. For example, the duty of representing the vill in the courts of the hundred and the shire, soon became attached to certain tenements, and the "hundredors" holding them, though unquestionably villains, were exempt from all other duties. Here again was the apparent anomaly of villain tenure side by side with certain and fixed services. Moreover the rent-paying tenant in villainage, the "molman," is often hardly to be distinguished from the freeman and the freeholder, though he was neither the one nor the other. The commutation of personal services for money rents pleased both lord and tenant. The latter was left free to labour on his own lands and no longer had to give up most of his time to his lord at those very seasons when he could least spare it. The former was left free to hire labourers from amongst the younger sons of the villains and the small freeholders, while he would often create new holdings on his demesne lands or on the waste lands of the manor in order to secure a resident population which could be hired as

Molmen.

Commutation of services.

labourers. At first when personal services were commuted for money payments, the lord often stipulated that he could insist on services instead of rent, if he needed them. But this provision soon disappeared from the agreements and since originally, the rent-paying tenant was a freeholder, those villains who paid rents because they had commuted their services, were in many cases hardly to be distinguished from the free customary tenants.

The Decay of Manorial Organisation

By the beginning of the fourteenth century the unfree classes were gradually drifting towards emancipation. The vitality of feudalism was exhausted, and as a social and economic force it was rapidly passing away, when towards the close of the year 1348 the great pestilence which was devastating most of Europe, made its appearance at Melcombe Regis in Dorset. Thence it spread rapidly to East and West and in the course of a year swept away half the population of England. Such a catastrophe could not but produce an enormous change in every phase of national life; while its advent must have been particularly overwhelming and disastrous appearing, as it did, when England was still rejoicing over its triumphs in France.

Effects of the Black Death.

The Black Death has been called the central fact in the economic history of mediæval England. Some few historians, including Mr. Green and Dr. Stubbs, gives it but casual attention and maintain that feudalism died a natural death, which was neither materially precipitated nor retarded by the great pestilence. But the majority of writers hold that its influences were far-reaching and all-important, though they differ as to the relative strength of these various influences. The pestilence seems to have attacked the men, particularly those of the lower classes, and to have touched more lightly the women and children. From the manorial records it appears that

at most, only half of the male population survived the "great murrain." Such an enormous diminution in the labouring force available naturally put labour at a premium. We find the labourers demanding extortionate wages, the villains demanding commutation of their services and reduction of their rents and threatening, if this concession is not made, to leave their lands on the hands of their already over-burdened lords. In fact the landowners had more lands than they could get cultivated and the lower classes were the masters of the situation.

On the other hand, Parliament was essentially an assembly of landlords and successive attempts were made to regulate both wages and prices and to prevent the migration of labour from one parish to another. As was inevitable, they proved futile and so attempts were apparently made to revive the old labour rents and feudal services. The result was that capital and labour were ranged against each other: disorder and discontent increased: the peasants formed "alliances, congregations, chapters, ordinances and oaths" to secure those large wages which legally were denied to them and eventually social disorders culminated in the Peasant Revolt of 1381.

Such were the immediate results of the Black Death: as to its ultimate results, opinions differ. Mr. Corbett believes that the progress of the labouring classes was arrested and that for the time being the fate of the villain hung in the balance. Other writers, including Dr. Cunningham and Professor Thorold Rogers, seem to take a more logical view of the situation, when they urge that existing tendencies were accelerated and that the Black Death heralded the dawn of a new era; the "golden age of the British labourer." They acknowledge that the glitter of the gold was somewhat dimmed by the extortionate prices which were demanded for the necessities of life, which materially reduced the real value of the large nominal wages received

Moreover, the "lack of governance" of the fifteenth century was essentially unfavourable to agricultural prosperity, while the development of sheep farming, though profitable in many respects, was nevertheless productive of much misery when population began to increase and before it had adjusted itself to the new conditions.

The landlord of the fifteenth century found himself on the horns of a dilemma: his tenants were exterminated or paying smaller rents: labour was oppressively dear and he had more land than he knew what to do with. Two ways out of the difficulty were found. Arable land was replaced by pasture, so that the need for labour was reduced and the system of tenant farming on leases, begun in the thirteenth century, was largely extended. The landlords ceased to be cultivators and became rent receivers, while such lands as they kept in their own hands they cultivated by means of hired labourers By the close of Richard III's reign villainage was practically extinct, though it possibly dragged on in out-of-the-way places, till the abolition of feudal tenures. In place of the tenants in villainage we find copyholders and leaseholders supplemented by a large class of landless labourers, while the small freeholders of the feudal manor practically became the yeomen of Tudor times. Roughly speaking the limits of this class were the 40/- freeholders, and those with a tenement of the yearly value of £20. For three centuries they were popularly regarded as the mainstay of the country. In the fifteenth century, Sir John Fortescue was one of their most enthusiastic eulogists and they were the backbone of the Puritan party in the Civil War. But they took no part in the Revolution of 1688: their political initiative was exhausted and during the eighteenth century, with the new methods of agriculture which came into vogue then and which they were too poor or too ignorant to adopt, the yeoman class rapidly died out. Their holdings were bought up

Copyholders, leaseholders and hired labourers replace villains.

Yeomen freeholders.

by the great Whig landowners and by the wealthy mercantile classes which owed their prosperity to the industrial revolution of the latter half of the eighteenth century.

The common lands and the open fields of the manors slowly disappeared with the disappearance of the economic system of which they were characteristic. The lands over which freeholders and villains alike had rights of common were the waste lands of the manor and the meadows, after the hay harvest was gathered in. These latter were called "Lammas lands" because it was on Lammas day that the enclosures were removed. According to mediæval legal theories all the lands of the manor belonged to the lord and it was by his permission that the cattle of his tenants were turned out to graze on the waste lands. But once this permission was given the freeholders could enforce their rights by the "assize of Common" though the villains were only protected by the custom of the manor. The Statute of Merton, 1236, gave the lord of the manor the right to enclose certain of the common lands, so long as he left enough for the needs of his tenants and this power was enlarged by the Statute of Westminster II. The Tudors found it necessary to check the enclosure of common lands, but the practice was revived in the eighteenth century and in the early years of the nineteenth, only to be again curtailed.

Common lands.

1285.

Not only did the lords enclose the common lands of the manor, they enclosed the open fields of the village, for the sheep farming of the fifteenth and sixteenth centuries necessitated compact estates; the old scattered holdings were useless for such purposes. These enclosures resulted frequently in the eviction of the remaining tenants in villainage and their successors, the copyholding tenants. No legal penalty resulted during the fifteenth century from the eviction of copyholders and during the early years of the next century the customary tenant who could produce no copy of

Enclosures

court roll, had no remedy if his lord chose to deprive him of his holding. Not till the middle of the sixteenth century did the law begin to recognise the legal rights of copyholders. The enclosure of the common lands and of the open fields of the village blotted out most of the surviving characteristics of the old feudal manor. The grass balks separating the scattered acres of its strip-holding community gradually disappeared and England, chiefly in the interests of the sheep farmer, became a land of hedges and small fields. Nevertheless to this day, a few of the old open fields survive and so do many of the old rights of common, while traces of the older order are still found in the different customs of inheritance which prevail on different manors, in the food and labour rents which in a few places are paid to this day, and in the old manorial courts, some of which still exist to deal with matters of purely manorial interest.

CHAPTER IV

THE KING

The King's Title

KINGSHIP was the product of the migration. Some few of the tribes described by Tacitus had adopted royalty, but the king of the "Germania" was little save a figure-head, symbolising, as the descendant of Woden, the sacred unity of the tribe. His actual position was somewhat equivocal: in the Folkmoot, in common with the principes, the king had to win for himself a hearing, either by his eloquence, his age or his reputation. A portion of the fines of justice fell to his share, but he did not appoint the judges; these were elected like himself, by the Folk: while in time of war the tribe was led by a "dux" chosen for his personal prowess. "War begat the king" and the successful dux of the migration made for himself a permanent position, combining the practical authority of the successful leader, with the theoretic sovereignty of the sons of Woden.

The elective title.

The mythological descent of the earliest kings probably accounts for the restriction of the choice of the Saxon Witan to the members of one family. Theoretically, the eldest son of the late king was preferred, and it is curious how rarely in Saxon history father was succeeded by son and how, in spite of this fact, the idea of hereditary succession gained strength. Nevertheless, the elective character of the early kingship was unquestionable and it was sometimes emphasised by the deposition of a wrong-doer. In 755 Sigebert of Wessex was deprived

of all his kingdom save Hampshire by Cynewulf and the Witan "for his unjust doings," and in 1013, the whole kingdom renounced Ethelred the Unready, while the troubled history of Northumbria records several instances of depositions which were not wholly due to political rivals forcing the hand of the Witan.

Later, the Norman conquerors sought election at the hands of the national council. At their coronation the people confirmed the election by acclamation, while the great men did homage and promised fealty and allegiance. The kings on their side promised equity, peace and justice in both Church and State, and, till the days of Richard I, issued a charter of liberties to their people. Nation and king were parties to a solemn compact.

Influences in favour of the hereditary title.

The spread of feudalism, the tendency to put everything upon a territorial, rather than a personal basis, the easy analogy of the kingdom to an ordinary fief, the growing practice of primogeniture, emphasised the hereditary at the expense of the elective title, while the influence of the clergy and lawyers, by exalting the theory of kingship, worked in the same direction. It was significant that Richard I and John did not issue the customary charter of liberties. John Lackland assumed the title of "king of England" in lieu of the ancient "king of the English." Henry III succeeded at the age of nine, though the presence of a foreign invader made an efficient leader essential. Edward I, when absent on Crusade, was proclaimed king by hereditary right and the will of the magnates and his peace enjoined three days after his father's funeral, though his coronation, with the forms of election and acceptance, did not take place till nearly two years later. Richard II as well as Arthur of Brittany had powerful and ambitious uncles, and, but for the strength of the hereditary claim the example of John Lackland might have been followed by John of Gaunt.

Its practical recognition

Alternation of hereditary and elective titles.

For the next two hundred years, the changes were rung between the two titles: hereditary right had the strongest

hold on the popular imagination, but force of circumstances often gave the victory to the elective title, now expressed in Parliament. Archbishop Sudbury had declared that Richard II succeeded by hereditary right and not by election. Then came the Lancastrians with their essentially parliamentary title, yet their tale, which nobody believed, that Edmund Crouchback was Edward I's elder brother. They were followed however by the Yorkists, the old legitimate line, and with Edward IV came the theory that the king never dies, as well as the belief in the indefeasibility of hereditary right. The triumph of the hereditary principle was not for long: though Henry VII might claim by "just right of inheritance," he reigned by right of conquest and parliamentary recognition, and he thought it wise to lull uneasy consciences by his marriage with the Yorkist heiress, and to prevent intrigues by protecting from the penalty of treason those who obeyed a "de facto" king. Henry VIII united the hereditary and elective titles, but he was given statutory powers to modify the succession to suit his various marriages, and even, in the last resort, to name his successor. Then in 1603 James Stuart came to the throne unopposed, though Henry VIII's will had expressly excluded the Scottish line and though, in 1571, Parliament had declared it treason to say the law could not limit the succession.

Triumph of the hereditary title.

The hereditary title survived the Great Rebellion, but the rival theories fought their last fight in the case of James II. When William III landed, James fled and the Convention Parliament declared that he had abdicated, that the throne was thereby vacant and offered the crown to William and Mary. This was the death-blow to the purely hereditary title, for James II had a son and even if his flight were equivalent to abdication, it did not disqualify his son from filling the vacant throne.

By the Bill of Rights the crown was to pass to the heirs of Mary, then to the heirs of Anne, and of William. In 1701 when Mary was dead, William III dying, and Anne had outlived her children, Sophia, Electress of Hanover

The parliamentary title.

and her heirs were placed next in the line of succession and it is under this settlement that the crown is at present held, subject to the limitation that the sovereign must be a member of the Established Church.

This leaves the honours of war with the parliamentary title. But curious relics of the struggle between the contending theories have survived. The coronation oath is in substance the same as in the days of Edgar: the proclamation of the new king by the "lords spiritual and temporal and others" recalls the choice by Witan and Commune Concilium: the "vivat rex" of the Westminster School boys is the people's confirmation of that choice. Yet within the limits of the Act of Settlement the succession is strictly hereditary; there is no interregnum, which is the badge of elective kingship and the House of Brunswick claims descent from Cerdic.

The King's Powers

The history of the powers of the Crown is a long record of prohibitions. In theory, the king may do everything except what he has specially promised not to do: his prerogative or discretionary power is limited only by statutes to which he himself has given his consent. But besides this, there is in reality another and sterner, if less defined, limitation to the prerogative in the Conventions of the Constitution and it is these conventions, perhaps more than the statutory restrictions on royal power, which make the government of England a "dominium regale et politicum."

Early Saxon kingship.

In the early days, when the king was the representative of the people, there was no need to limit the king's powers. He led the folk to battle, he was their judge in the last resort and the warden of their peace: if need were, he declared the custom of the folk. The description which Fortescue gives of the kingly office might well have been given of the Saxon instead of the Lancastrian kings: "a kynges office stondeth in ij thynges, on to defende his

reaume ayen thair enemyes outwarde bi the swerde; ai other that he defende his peple ayenst wronge doers inwarde bi justice."

Growth of royal powers.

The pretensions of the Crown grew when we come, in the seventh century, to the period of the supremacies, and though to be accepted as "father and lord" meant even in the case of Wessex, only nominal suzerainty, this, together with the influence of the Church and the necessity of organised opposition to the Danish invader, gave a great impetus to both the theory and practice of kingship. In the days of Alfred we find the germ of the law of Treason and under Edmund the first oath of fealty was imposed: all were to swear to love that which he loved, to shun that which he shunned without any debate or reservation. The king's "wergild" which, under Ini, was the same as the bishop's, was now much higher and, in addition, a "cynebot," or compensation, was to be paid to the people. By the days of Athelstan, if a man failed to obey the summons to a gemot he paid the king's "oferhyrnes"; and under Ethelred, to leave the fyrd in which the king was, imperilled life and land. This looks as if the king were already becoming the fountain of Justice and the lord of the land. At the same time the king enlarged his own sphere of work. Alfred gathered together the laws of Wessex, Kent and Mercia and rejected those which did not seem good to him and his Witan. Edward urged his Witan to search out how their peace might be better kept—there was no universal king's peace as yet Edgar had to restrain the number of appeals made to him and Ethelred enjoined that the armaments of the people should receive diligent attention.

Their decrease under Ethelred II and Edward the Confessor.

After the death of Edgar the powers of the Crown decreased in reality, if not in theory. This was in part due to the fact that much depended on the personality of the king; Ethelred the Unready and Edward the Confessor were ill-qualified to cope with the great ealdormen who had been too strong for Edgar and whom even Cnut could hardly check. Moreover, when the king of the

moment failed, there was no permanent official class to hold up the fabric of kingship, till a stronger took his place. Finally the Crown was getting out of touch with the people, for feudalism was eating its way into every sphere of national life.

Of the "infinitely divided sovereignty" which feudalism made inevitable, William of Normandy had had bitter experience. Though he had been first amongst his equals as long as it was a case of man to man, he had been greatly inferior to them whenever they chose to combine against him, and his early life had been one perpetual struggle against such combinations This is why William and his successors set their faces steadily against the introduction of the feudal principle into the government. By the Sarum oath of 1086, those holding by military tenure, "whose soever men they were" swore fealty to the king. The national courts of the Saxons were maintained as a check on the disruptive tendencies of feudal justice and the fyrd lived on, side by side with the feudal levy. When the king delegated powers it was to royal officials, justiciar, treasurer, chancellor, sheriff, dependent for their offices on the Crown, or to bishops who could not make the office hereditary, while between central and local government a close connection was maintained.

Norman absolutism.

The Norman kings were practically absolute. There were, it is true, checks on their irresponsibility in their coronation oath, in the liability of their ministers to punishment by law and in the feudal council of tenants-in-chief. But oaths sat lightly on the sons of the Conqueror and they could get new servants, if they did not care to protect the old ones from punishment. The feudal council or Commune Concilium, meeting only at long intervals, cared little about the details of administration. If individual nobles resented the restraining hand of the Crown, they were dealt with separately and efficiently, while the good peace which the king kept enlisted the sympathy of the nation on his side.

Feudal opposition.

The barons ruined their own cause in the reign of

Stephen, by confusing independence with anarchy. Henry II restored and amplified the administrative system of his predecessors. The last and most serious of the feudal revolts was in 1173, and a hundred years after the Conquest the efforts of the baronage to secure local independence were checked. They had failed to limit the powers of the Crown in their own interests. The loss of Normandy precipitated the process which was changing the feudal barons into national leaders. During the thirteenth century the nobles allied themselves with the nation to check the autocracy of the Crown. There is the hint of a gathering storm in 1191, when Longchamp was removed from office by John, the bishops, the barons, and the citizens of London. The storm broke in the struggle for the Charter, for John's tyranny united all classes against him. Yet it would seem as if the Charter has done at least as much to limit the powers of the Crown by what enthusiasts of a later age have read into it, as by what it actually contains. The taxes, for which the consent of the Commune Concilium was to be asked, were essentially feudal taxes; and the promise of freedom from arbitrary arrest and imprisonment was to remain unfulfilled till the Judicature was freed from the control of the Executive and general warrants declared contrary to law. The real sting of the Great Charter lay in Clause 61 which practically sanctioned rebellion should the king infringe its provisions.

National opposition

Yet the desire for righteous dealing between all classes of the community which prompted the stand against the unbridled authority and persistent maladministration of the Crown, would have won victory for the baronage, had not their desire to monopolise all power spoilt their cause. Save when they superseded the royal authority they failed to secure the action of the Crown through the Council or the nomination of the great officers of state either by themselves or by the king; Henry III kept the seals in his own hands. Their plans were too oligarchical for success, and it is still debated whether

Failure of the barons as national leaders.

even Simon de Montfort meant a Parliament, such as he summoned in 1265, to be a permanent factor in the Constitution. The Crown came out of the struggle almost unscathed, despite the faithless incapacity of Henry III and the honest vigour and administrative skill of Earl Simon.

The barons continued to pose as national champions against royal tyranny, but their motives became unpatriotic and selfish. Bohun and Bigod upheld feudal privileges in spite of grave national danger, while though the Lords Ordainers claimed the choice and control of ministers, they ignored the constitutional advance of 1295 and failed to provide for the action of the Commons, an omission which later provided the Despensers with an excuse for the repeal of the Ordinances. Edward II was deposed as "incorrigible and without hope of amendment"; "given to unbecoming labours and occupations" and "negligent of the good of his kingdom," but the characteristics of the reforming barons, though more vigorous, were hardly more desirable.

1297.

1310

Parliament as a check on the powers of the Crown.

To control the Crown, a force quite distinct from the Executive was needed, representative of the united wishes of the community and capable of ultimately enforcing its will. The definition of royal power became possible with the growth of Parliament and of its right to withhold money grants. During the first half of the fourteenth century Parliament had worked out its own constitution; in the second quarter of the century it was strong enough to enter into strife with the Crown, asserting its right to concur in legislation and to control taxation, while its right to criticise the royal ministers was made good in 1376 by the impeachment of Latimer and Lyons. This Parliament, the Good Parliament, summed up and formulated the constitutional progress of the century.

1376.

1397–8 Richard II's attempted absolutism

Richard II in 1397–8 made a desperate bid for absolutism. He sought to destroy the limitations which the past two centuries had imposed on the royal powers: that the Crown had learnt much from the struggle is

evident from the care with which Richard observed constitutional forms. True he had taken care to pack the Lower House, still the repeal of the pardons to the Lords Appellant was with the assent of the Lords temporal and spiritual and "at the request of the Commons." Parliament was not adjourned till members had taken a solemn oath to maintain the acts of the session and this oath was in future to be taken by bishop or baron before he obtained possession of his fief. When Parliament met again at Shrewsbury, 1398, it gave Richard a revenue for life and delegated its powers to a permanent committee of eighteen. In 1398 the Crown stood unfettered, apparently at the petition and with the unanimous consent of the three estates of the realm. The greatness of Richard's triumph was only equalled by the completeness of his overthrow. The wrongs done to Hereford furnished the pretext and in 1399 Richard was compelled to resign. In the articles of accusation against him it was said that he had infringed the Constitution and abused the royal powers: that he had claimed that the laws were in his own mouth and in his own heart and that he alone could change or frame them: that he had asserted the life and goods of his subjects to be his own and that he was "useless, incompetent, altogether insufficient and unworthy."

The Lancastrian experiment

Henry IV. came pledged to rule as a constitutional king: to govern "not by his singular opinion but by common advice, council and consent." His great and continual council was to be nominated in Parliament, while misappropriation of funds was to be guarded against by appropriation of supplies and audit of accounts. Here surely was parliamentary sovereignty: Sir John Fortescue, the great Lancastrian lawyer, formulated the theory of the English constitution at this time. He says that the maxim "What has pleased the prince has the force of law" has no place in English jurisprudence: that the king cannot change the laws and impose taxes without the consent of the whole nation given in Parliament: yet that these limitations are a glory, rather than a shame and the king

exists for the sake of the kingdom, not the kingdom for the sake of the king.

Its failure. Yet we read of the "unquiet time" of Henry IV, and that the kingdom was perishing for "lack of good governance." The king was always being petitioned for "good and abundant governance"; that the sea should be better watched and the marches better kept; that the Lollards should not be suffered to disturb the peace; that the gangs of robbers which infested the country should be put down. Cade complained that "the law seryyth of nowght ellys in thes days but for to do wrong, for nothing is sped but for mede, drede and favour." Everywhere anarchy reigned: the laws were not observed: the peace was not kept: justice was not administered. Even royal letters interfered with the course of justice; Henry IV summoned cases before the Council which were in process of decision, or had already been decided in the Common Law Courts and Henry VI directed the sheriff of Norfolk to secure a jury which would acquit Lord Molines.

The climax was reached in the dynastic struggle of the Wars of the Roses. True, there were other causes for the Wars. There was the amiable incapacity of Henry VI and the national hatred of Margaret of Anjou, with her unpopular ministers and her contempt for the liberties of Parliament and the interests of the nation. There was the long war in France and the ambition of the house of York. There was famine and pestilence and the great poverty of the Crown: even the king's jewels were frequently in pawn and he had to find "exquisite means" of raising supplies. Yet the crux of the whole matter lay in the fact that "constitutional progress had outrun administrative order," that theoretic advances had been made at the expense of efficiency. The country was not ready for parliamentary supremacy: social conditions forbade it: it gave the business of government into the hands of those who were most lawless, the great barons of the Wars of the Roses.

The Tudor dictatorship, with its practical absolutism and extraordinary statutory powers, was the result. It was sanctioned by the nation instinctively, rather than consciously, in order that the utter lawlessness of the aristocracy, of the "over-mighty subjects," with their bands of retainers, their monopoly of local administration and perversion of local justice, might be suppressed. It was in these interests and because of its confidence in the Crown, that Parliament in 1536 and 1543 sanctioned the devising of the Crown by royal will to one of the royal children; that in 1536 it passed a statute authorising a king, at the age of twenty-four, to repeal all statutes made since his accession, presumably at the instigation of an aristocratic Council of Regency, or by nobles strong enough to overshadow the will of a youthful and inexperienced sovereign. It may even have been reasons such as these which persuaded the Parliament of 1539 to pass the statute giving to royal proclamations the force of law, for it has yet to be proved that Tudor Parliaments were either extraordinarily subservient or unusually corrupt. It was certainly for these reasons that the nation tolerated the amplification of the Treason laws, the unbridled use of Attainder and the all-embracing authority of the Council. The Tudor dictatorship

The legislative activity of Parliament continued throughout the period. It was a great statute-making age and the breach with Rome, the establishment of Royal Supremacy, the economic reforms and the systematising of the Poor Law were all effected through the medium of Parliament. It was a period of great executive power, of great executive activity; it was not a period of executive tyranny or irresponsibility. Though elections were sometimes guided and votes secured by creating new constituencies, though Elizabeth would occasionally return to the petitions of the Commons, an "answer answerless" or tell the members they would do well to meddle with no affairs of state but such as should be propounded unto them, yet the debates in the House show that great freedom of criticism was

enjoyed and that those who spoke of the limitations of sovereign power and the acknowledged liberties of the subject, spoke with no uncertain tongue. During the sixteenth century parliamentary privileges were permanently secured and petitions against abuses received speedy and efficient answers. The refusal of money grants was not unknown and their ejection or modification of a bill is notified occasionally, while in Elizabeth's reign the royal command was not sufficient for an issue of the royal treasure.

Hence it is not a paradox to speak of Tudor absolutism and Tudor responsibility. The nation sanctioned the absolutism because the Crown recognised the responsibility. Tudor liberty of action was founded upon the goodwill of the people and Queen Elizabeth realised quite as well as Peter Wentworth that "it was a dangerous thing for a prince to bend herself against her nobility and people."

The struggle between Crown and Parliament.

The power which the Tudors had wielded, the Stuarts tried to formulate. James was not the first English king to believe in Divine Right: but with the exception perhaps of Richard II, he was the first to talk about it. James's pompous loquacity set people thinking, and the Tudor period had developed extraordinarily the political intelligence of the nation, which by now had outgrown the need of executive preponderance. However much Tudor methods may be responsible for the demand for constitutional government, the Stuarts alone are responsible for the fact that it was established by means of a violent catastrophe instead of by a gradual change. Constitutional theories of the fourteenth and fifteenth centuries were brought to light to answer Stuart assertions and once more the battle waged round ministerial responsibility, unparliamentary taxation, unparliamentary legislation.

The impotence of Parliament.

Impeachment was revived in 1621, but it was a very imperfect check on the Crown when the king prorogued Parliament to save his favourites. The absence of legis-

lation did not signify, for the Star Chamber was practically an instrument for unparliamentary law-making since it enforced royal proclamations by fine and imprisonment. More serious still was the attitude of the judges, the authoritative interpreters of the law, towards the Crown. Bacon said of them "let them be lions but lions under the throne, being circumspect that they do not check or oppose any points of sovreignty" and the justices practically left to the Crown the decision as to whether or not the laws should be observed. Stuart lawyers defined royal prerogative as consisting of the king's ordinary power, which he exercised in accordance with the will of Parliament, and his extraordinary power which was a "principal part of the Crown of England, which the king cannot diminish" and "which varieth according to the wisdom of the king for the common good." It was in the interests of the common good that in 1627 the Court of King's Bench decided that king and Council might imprison without cause shown: a right which the Attorney General said was given to the king as soon as the first stone of sovereignty was laid. It must have been in the same interests that the king adopted the decision of the justices in Bate's case to mean that he had power to impose as many indirect taxes as he chose and that he secured, through the question of ship-money, the control of direct taxation. The justices assured Charles that "when the good and safety of the kingdom is concerned and the kingdom in danger your majesty may by writ under the great seal of England, command all your subjects at their charge to provide and furnish such a number of ships and for such time as your majesty shall think fit, and compel the doing thereof and in such case your majesty is the sole judge both of the danger and when and how the same is to be prevented and avoided."

Subservience of the Judges

It is easy to pass a sweeping condemnation against those judges, who headed by Bacon, were as wax in the hands of James and Charles. In their defence, it must be remembered that theories as well as institutions were

running to seed, that the judges had behind them centuries of subordination and the imperialist traditions of the Roman Law, and that their tenure of office during the royal favour emphasised the duty of obedience.

The work of the Long Parliament.

The Petition of Right in 1628, the Grand Remonstrance in 1641, summed up the unconstitutional acts of the Crown. The Long Parliament deprived the Crown of the power of illegal taxation, of arbitrary imprisonment and jurisdiction by the abolition of the Star Chamber, the Court of High Commission, and the Council of the North, by the statutes against ship-money, distraint of knighthood and illegal customs, and by its provisions for triennial Parliaments.

Royal powers:

(1) after the Restoration.

These restrictions remained at the Restoration since they had received the assent of Charles I before he left London in January 1642. But Charles II managed Parliament by corrupting the House of Commons and used the judicial bench to remodel the corporations of parliamentary boroughs in the royal interests. His desire not to be "sent on his travels again" forced him to acquiesce in the severe supervision the Commons exercised over supplies, and in their decision that the royal pardon, which Danby pleaded in 1679, was no bar to impeachment. He consoled himself with accepting heavy bribes from Louis XIV and with playing off one party against another in Parliament.

James II, who was more honest, if less diplomatic than his brother, flew in the face of Providence, when in his desire to secure political power for his co-religionists he procured from the judges a recognition of the power of the Crown to suspend laws and to dispense with them in particular cases. James made matters worse when he collected taxes not granted by Parliament, when he tried to overawe London by camping the troops on Hounslow Heath and when he denied his subjects' right of petition and declared the Seven Bishops guilty of a "false, feigned, malicious, pernicious and seditious libel."

(2) after the Revolution.

The Revolution of 1688 completed the work of the Great Rebellion. The Bill of Rights declared that the

pretended power of suspending the laws by regal authority was illegal: that subjects had a right to petition the Crown: that the levying of money without consent of Parliament and the keeping of a standing army in time of peace were against law: that interference with the due course of justice and the privileges of Parliament were illegal and a violation of the "auntient rights and Liberties of the nation." This was amplified by the Act of Settlement, which gave security of office to the justices "quamdiu bene se gesserint": their removal only being effected at the petition of both Houses. The definition of the limits to the powers of the Crown, the emancipation of the judges from the consequences of royal displeasure, guaranteed that royal officials would be genuinely responsible to the ordinary Law Courts and that boundaries had at last been set to the vast domain of royal discretionary power.

Limitation of the powers of the Crown 1689.

1701.

No legal change has taken place in the position of the Crown since the time of William III. Under George I and George II, party and cabinet government developed and ministerial responsibility to the Legislature for the actions of the Crown became a reality. But George III, brought up on the Commentaries of Blackstone and Bolingbroke's "Patriot king" and with his mother's exhortation "George, be king!" continually ringing in his ears, tried once more to govern as well as reign By free use of patronage and parliamentary corruption, he tried to sap the strength of parties and break up the system of Cabinet government. Burke said the king wished to "disunite every party and every section of a party so that no concerted order or effect could appear in any future opposition" and that the object of all policy was "to secure to the court the unlimited and uncontrolled use of its own vast influence under the sole direction of its own private favour."

Revival of the powers of the Crown under George III

Once again the king was able, with the help of the party known as "the king's friends" to influence general policy according to his personal wishes. George III

insisted on war with the American colonies. He opposed successfully the emancipation of slaves. He made the question of general warrants and of Wilkes' expulsion from the House almost a personal matter, largely because Wilkes had avowed his hostility to Scotchmen, Hanoverians and Hottentots. Conway was deprived of his commission in the army for voting against general warrants in the House. Moreover the king was so hostile to Roman Catholic emancipation that Pitt was forced to resign when our struggle with Napoleon was at a most critical stage. In 1783 George III actually authorised Lord Temple to say that whoever voted for Fox's India Bill would be counted the king's personal enemy, with the result that the Lords rejected the measure; and on the strength of this defeat of the ministry in the Upper House, George immediately demanded its resignation.

This much must be said for George III: in the question of Roman Catholic Emancipation and of the war with the American colonies, he had the nation at his back. Moreover the people looked with considerable sympathy on his efforts to reassert the personal power of the Crown. They appreciated his sterling qualities and agreed with his narrow political outlook. It was because he was a king after the people's own heart that his unconstitutional actions were tolerated. George III's illegal practices naturally ceased when he became too infirm to participate in the government and they were never really renewed, while parliamentary reform has since helped to make such practice impossible.

The change in the position of the Crown during the nineteenth century.

The change which has metamorphosed the position of the Crown during the past century has been summarised by Mr. Gladstone as the "substitution of influence for power." The strength of this influence must depend upon the capacity of the individual monarchs. Queen Victoria and Prince Albert, working together, had a very effective influence upon national policy, and more especially upon the somewhat headstrong foreign policy

of Lord Palmerston. The Queen, in the celebrated memorandum of 1851 to Lord Palmerston, insisted that drafts of dispatches should be submitted to her in sufficient time for her to read them before they were sent off, and that they should not be changed after they had received her sanction. The memorandum sums up admirably the position of the Crown as the guardian of the welfare of the nation.

But the king still summons, prorogues and dissolves Parliaments: he makes and unmakes ministries: he appoints all great officials in Church and State: he authorises the spending of public money and assigns the justices to their respective circuits: he grants charters, confers honours, declares war, makes treaties, signs peace. Yet "by no proceeding known to the law can the king be made personally responsible for any act done by him." The maxim, the "king can do no wrong," is as old as the days of Henry III: the only act for which he can be held responsible is that of submission to the authority of the Pope. Further, no one can plead the orders of the Crown as the justification of any deed otherwise punishable by law. This reads more like oriental despotism than constitutional monarchy. The explanation of the riddle lies in the history of Cabinet government and in the constitutional conventions which have grown with its growth. The king has for centuries only been able to make known his pleasure by certain prescribed forms. He can do so either by an order in Council issued "By and with the advice of his Privy Council": or by an order or warrant under the sign manual, to which is added the counter-signature of a responsible minister: or by Writ, Proclamation, Letters Patent or other document, issued under the Great Seal, which is affixed by the Lord Chancellor. Thus for every action of the king, some minister is legally responsible to Parliament, while the choice of these ministers has been indicated to the king by the majority in the Lower House. It has been said that whereas the king once

governed through his ministers, the ministers now govern through the king.

Mr. Sidney Low has summarised the extraordinary occasions when the king acts wholly on his own responsibility. If the king has reasons for believing the majority in Parliament no longer represents the wishes of the majority of the Electorate, he may require the Prime Minister to seek a fresh mandate from the nation: or he can send for the leader of the Opposition and appeal to the country on his behalf. On the other hand the sovereign may refuse a dissolution. When a new Parliament meets the king decides which of the leaders of the predominant party he will send for and ask to construct a Cabinet; while when a ministry changes, the whole authority of the state returns into the king's hands. Over and above this, the Crown provides that "unity" which is the "soul of government." The king in Council is the Executive, the king in Parliament is the Legislature, the king in his Courts administers justice. Thus the Crown binds together every department in the state, while it is the strongest link which unites the Colonies to the Mother Country. Above all the Crown is permanent while Ministers and Parliaments come and go.

Moreover the king has a very real influence in foreign affairs and in the direction of general policy; in the control of the details of administration; in the choice of Ambassadors, Ministers, Bishops and all important officers of State; in the guiding of public interests and the encouragement of social reforms. The personal wishes of the sovereign carry great weight with the Ministry, with Parliament and with the Nation. Sir William Anson summarises the day by day work of the Crown:—"our Kings and Queens still remain the instrument without whose intervention ministers cannot act; they still remain advisers who have enjoyed unusual opportunities for acquiring the knowledge which makes advice valuable, who may be possessed of more than ordinary experience, whose warnings must be listened to with more than

ordinary courtesy." The sovereign is no mere figure-head : he is not unfrequently the compass of the Ship of State, without which the man at the wheel would steer in vain and the vessel run on to the rocks.

CHAPTER V

THE KING'S COUNCIL

GROWTH OF THE COUNCIL

IN the days of the Saxons, before the functions of government were sufficiently complicated to necessitate their distribution amongst different departments, the whole work of administration centred in the king. He was helped by the "Witenagemot" or assembly of wise men, consisting of the two Archbishops, such bishops, abbots and ealdormen who were able to be present, those thegns who were specially summoned by the king and chief officials of the court. The actual share in the ordinary business of government [illegible] if we include its limited judicial work [illegible] legislation and taxation and witnessed grants of land, while its counsel and consent were usually asked for matters of great national importance. But the king might go his own way, in spite of its advice, or simpler still, he might omit to consult it, while at the best its power was passive and devoid of any initiative.

The Witena-gemot.

With the Conquest came a change. William I was the chief of a large body of feudal nobles; as their feudal superior it was "his right as well as his duty to demand council" of the great feudatories. The Conqueror was determined to establish a strong kingship in England and to eliminate the disruptive tendencies of feudalism from the government and this feudal council was a source of strength rather than of weakness. "A feudatory who,

threw off his sovereign's rule withdrew from his council." Presence at the Council was an acknowledgment of regal authority and a practical pledge of support. This assembly, the "Commune Concilium," was closely allied with the old Witan in powers: it differed in structure, in that qualification for membership was not official wisdom but tenure in chief. The Commune Concilium

William and his successors seem to have consulted not only the Commune Concilium, but a "curia," consisting of the great officials of the court, the two Archbishops, who claimed to sit in all councils, and any one else whom the king chose to summon. This curia was in constant attendance on the king: it shared in all the details of government and when the Commune Concilium met it formed a prominent part of it. There was nothing which the king did in the larger assembly, which he could not do in the smaller, except tax the tenants-in-chief, and it was an age when taxation was rare. The two bodies were not identical, but it is often hard to distinguish between them and it is impossible to separate their spheres of work: it is an anachronism to call one a committee of the other. The fact that they were feudal chiefs in Normandy forced the Commune Concilium on the Norman kings of England. They maintained it partly from necessity, partly as a means of supervising the baronage, but they carried on the daily work of governing by means of a curia, smaller, more amenable and more efficient because more professional. The contrast between the curia and the Commune Concilium is not one of competence nor one of status: it lies in the fact that one was occasional and the other permanent. The Norman "curia"

The history of the Commune Concilium belongs properly to that of the Legislature. Out of the nebulous curia, financial, judicial and executive bodies slowly took form as the increasing business of government necessitated the differentiation of functions and their delegation to different departments.

It was during the minority of Henry III that the curia The Council

first became an administrative, as well as a consultative body. Until Henry was of age, it consisted of all the great officers of state, the judges, some bishops and barons, and it carried on the whole business of government. From 1232 when Henry took the nomination of the Council into his own hands, until the outbreak of the Barons' War, the nobles tried to secure the choice of the king's councillors, hoping thereby to check arbitrary action on the part of the Crown. By the Provisions of Oxford in 1258 a permanent council of fifteen and by the scheme of 1264, a council of nine was to be in constant attendance on the king. There was a revival of the same idea in 1310, when the barons tried to establish an advising and controlling council of Lords Ordainers.

1232. 1258. 1264.

Before this, under the vigorous rule of Edward I all ideas of controlling the Council had disappeared into the background It was made up almost entirely of men "who, in one capacity or another, did the king's work and received the king's pay" and was less feudal in character than the curia of the Norman kings. It seems to have occupied an unusually prominent position; occasionally it was associated with King, Lords and Commons in legislative work, while royal ordinances which had practically the force of statutes, were issued with its advice.

1272–1307.

Efforts of Parliament to control Council under Edward III.

During the reign of Edward III, Parliament, while leaving to the king the choice of his councillors, attempted to control their actions. But Edward was too strong and too unscrupulous for these efforts to be effective. In 1341, it was agreed that ministers were to swear before Parliament that they would keep the laws, and that at the beginning of each Parliament they were to resign their offices into the king's hands and to answer all complaints brought against them. Two years later Edward repealed the measure as granted under compulsion. There were also petitions, which were ineffectual, against the usurped jurisdiction of the Council. The amount of work done by the councillors in the fourteenth century is shown by the appointment of a clerk to the Council during Edward II's

reign, and of auditors of petitions to the Council under Edward III.

The Concilium secretum aut privatum. 1386.

The reign of Richard II marks an epoch in the history of the Council. From 1386 we have records of the proceedings of the "concilium secretum aut privatum" and the uncertainty which previously surrounded the Council disappears. It stands out distinct from the other courts, which had been evolved from the Norman curia, Exchequer, Common Law Courts and Chancery and it has entirely dissociated itself from the old Commune Concilium. The minutes of the Council show that it dealt daily, with an enormous amount of administrative work of all kinds. It had special authority over aliens and matters of trade; it was the guardian of the King's Peace, and, in the event of disturbances, took measures to restore order. It also assisted in the choice of bishops and had jurisdiction over heresy and sorcery. It supervised all expenditure, public and private, of the Crown and negotiated loans. It still acted as a court of final appeal in many cases and as a court of first instance in matters which the Common Law Courts, for one reason or another, could not touch. It also had peculiar powers of initiative in Parliament and occasionally legislated by ordinance. In 1390 we find a petition that the Council shall not, after the closing of Parliament, make ordinances contrary to the Common Law, but Richard rejected the petition as derogatory to his kingly dignity.

Work of the Council

The councillors were bound on oath to keep the king's council secret and to advise him to the best of their powers. They were paid amply for their services but were heavily fined if they were absent from the council board. Under Richard II, councillors held office for one year only, but later the appointment was for life, subject to the king's and their own pleasure. The king himself was not always present at the Council's meetings; the words "in prescencia Regis" being added when the king presided. The regulations provided that His Majesty's pleasure should be ascertained in matters which could not

be decided without his special grace. The Council was *ipso facto* dissolved at the king's death.

Richard II and his Council.

Richard's treatment of his Council is noteworthy. The theory as to the position of the Council at that time is embodied in some advice tendered by certain lords to the king, about the period when he attained his majority. Richard was admonished "to give credence to the statements of the Council" and "to let the councillors execute their duties in the way which might appear to them most advantageous to his service": "to let the Council act in conformance with the law and with his own honour": "to give the councillors ready audience and to appoint sheriffs and judges with their advice." If this was the theory of the relative position of king and councillors, the reality was far otherwise. Richard sometimes refused to meet his councillors because their advice bored him, at others he entered into violent altercation with them. The fines paid for non-attendance he took in the absence of all councillors save the Treasurer, the Chancellor, the Lord Privy Seal and Bushy, Bagot and Green, while in October 1397 writs were issued summoning the councillors on pain of losing life and limb and all possessions. No cause was assigned for the meeting and no excuse was to be accepted for non-appearance.

The Privy Council under the Lancastrians.

Under the Lancastrians, the Council was practically a committee of Parliament. In 1404, in 1406 and again in 1410, Henry IV nominated his Council in Parliament. During Henry VI's minority the Council was chosen by Parliament itself and the Commons, on more than one occasion, expressed their confidence in the king's "Great and Continual Council." The responsibility of the councillors was ensured by injunctions to the clerk that he was to record "What, howe and by whom enything passethe" and by the regulation that everything passed in the Council was to be signed by those consenting to it and that no councillor was to excuse himself for any decision made on the grounds of absence. The Council was exceedingly scrupulous during the king's minority to do

everything in his name. Professor Dicey quotes an extreme example: Henry, at the age of five was made to assure the Chancellor "if we are negligent in learning or commit any fault, we give our cousin (Warwick) full power, authority, licence and direction to chastise us from time to time according to his discretion."

The Privy Council and the Ordinary Council.

It was during this period that an inner circle formed within the Council to which the name "Privy Council" was given, the larger body becoming known as the "King's Ordinary Council." The Council itself was occasionally summoned to advise this inner administrative body, which, while the king was a child, exercised all the prerogatives of royalty. It was really a standing committee of the Great and Continual Council, as well as a Council of Regency with functions executive rather than consultative. After Henry attained his majority, Parliament ceased to exercise any influence over the choice of the Council and failed altogether to control its actions. It became once more an instrument of oppression in the hands of the Crown, while foreigners and favourites were maintained in it, in spite of the continual prayer of Lords and Commons, that the king would name a "Sad and substantial council." Sir John Fortescue urged upon Edward IV that the royal councillors should be chosen for their business capacity, and saw in the reform of the Council a remedy for fifteenth century lack of governance, but his advice fell upon deaf ears.

The Council as an instrument of the king.

Henry VII's parliamentary title seemed to promise a different order of things, but the Baronage which survived the Wars of the Roses was the ghost of its former self. Parliament was satiated with power: the nation craved only peace and security; all classes looked to the Crown to bring order out of chaos. The weapons with which Baronage and Legislature had threatened or coerced the Executive during the past centuries were buried out of sight for a hundred years and the Curia of the Normans and early Plantagenets came to life again in the Privy Council of the Tudors.

The Age of Government by Council

From 1485 to 1640 the Council wielded great administrative, judicial and legislative powers, not as the delegate of Parliament, but as the instrument of the Crown. It was made up of royal servants who did the royal bidding and were answerable to the Crown alone for their actions. They held office during the royal pleasure; they were pledged to give the king "plain and faithful council" at all times, but the sovereign was in nowise bound to consult them. Henry VIII and Elizabeth were their own chief ministers: when consultation was necessary, it was often with individuals rather than with the whole Council that the sovereign conferred. When Dr. Knight was sent on an Embassy to Rome in 1527, even Wolsey was ignorant of his instructions.

Composition of the Tudor Council.

Under the Tudors more than half the councillors were usually commoners. The insurgents in the Pilgrimage of Grace complained of the "base blood" in the Council. Henry VIII's answer was characteristic; "It appertaineth nothing to any of Our subjects to appoint Us Our Council, ne will we take it so at your hands. Wherefore henceforth remember better the duties of subjects to your king and Sovereign Lord and meddle no more of those nor such like things as ye have nothing to do in."

The exact steps by which the Council came to be what it was under the Tudors are not discernible. Between 1435 and 1540 there is a gap in the records of the "Book of the Council" except for a few scattered papers. The ordinance of 1526, for regulating the royal household, made provision for a council which was to be in attendance on the king at ten and two o'clock every day without fail, "not only in case the king's pleasure shall be to commune or confer with them, but also for hearing and direction of poor men's complaints." When in 1540 a clerk was once more appointed to keep the minutes of the Council, the king's Ordinary Council seems to have disappeared as a united body and the Privy Council to

have taken its place for administrative purposes. But members of such bodies as the Council of the North or the Council of Wales were sometimes spoken of as ordinary councillors and were occasionally promoted to the rank of privy councillors. The two royal secretaries were of the number of the privy councillors and were frequently the channel of communication between Crown and Council, so that from this time onwards their position became one of increasing importance. Under Henry VIII the council apparently used to split into two bodies, one going with the king, the other remaining in London to transact such business as had to be transacted there. Between the two halves of the Council constant correspondence was maintained, chiefly for the information of the king, for "William Paget," the new clerk of 1540, kept no record of the Council's proceedings when the king was not present.

Its division into Committees.

Under Edward VI the Council was so pressed with business that it divided into committees to prepare the business for the full meetings, and sometimes to discuss and finally decide the matter in hand. In 1553 we hear of five committees, in 1554 there were ten, in 1558 there were five again and the practice of appointing these committees seems to have continued, though records of them are somewhat spasmodic. Two are specially worthy of note: that "for the State" and that "for considering what law shall be established in this Parliament." The former must be the remotest ancestor of the departments now under the five Secretaries of State: the latter perhaps stands in the same relationship to the meeting called to draw up the Address from the Throne at the opening of Parliament.

Its administrative powers.

The administrative powers of the Tudor Council were so vast that it seems idle to enumerate them. It dealt with foreign affairs, with national defence, with piracy and rebellion. It upheld husbandry and tillage and sent round commissioners to gather information locally. Through the Justices of the Peace it kept local justice and local

administration under its immediate supervision. It intervened in family quarrels and restored peace between husband and wife, master and servant. It dealt with astronomy, necromancy and "fantastical practices." It committed undutiful sons to the Tower "for an example" to the rest of the world and provided the lazy vagabond with work. It knew everybody's business; Cecil had an excellent secret service. Nothing was too great, nothing too insignificant to come under its paternal supervision.

The establishment of local councils.

The administrative efficiency of the Council was increased by the establishment of local councils in outlying parts of the kingdom. Under Edward IV there had been a council to deal with the marches of Wales which superseded largely the old palatine jurisdiction of Chester and of the Duchy of Lancaster. This was reconstituted after the Pilgrimage of Grace, the old palatine authority of Durham. In 1541 the Council of the West was created to hold in check the Somerset, Devon and Cornwall. Calais had long had Council, and Jersey and Guernsey were put under some same form of government by Henry VII when our relations with Brittany made them strategically important. These local boards were keptly strictly in touch with the central authority. Their work was constantly submitted for approval. Their instructions were exhaustive and unceasing. Occasionally special authorities were consulted over their heads: the Wardens of the East, Middle and West Marches were in direct communication with the Privy Council in spite of the Council of the North. Sometimes small districts were removed from the sphere of the local councils: Berwick was given a council of its own, which received instructions direct from headquarters. Sometimes commissioners were sent down for special purposes: to investigate, for example, how the beacons were being maintained, or the musters of the militia attended. Yet as a rule the powers of the local councils

the measure which abolished the prerogative courts, said "the reasons and motive for the erection of the court of Star Chamber do now cease." Professor Dicey has pointed out that this was true of all Tudor methods by 1603. The abolition of the Council of the North, of the High Commission Court and the Court of Star Chamber, the deprivation of the king's Council of the power of arbitrary imprisonment and jurisdiction, the restoration of the whole of the country to the jurisdiction of the Common Law Courts, was perhaps as great a tribute to the efficiency of the work done by the Tudors, as it was to the skill in misapplication shown by the first two Stuarts.

THE GROWTH OF THE CABINET

The Restoration Parliament in spite of its exuberant loyalty, did not restore the extraordinary judicial powers of the Privy Council. The question was actually raised, but it was allowed to come to nothing. Its executive powers were left untouched and no attempt was made to secure parliamentary nomination of ministers. But the Civil War had left this lesson behind :—the king must keep on good terms with the Legislature and to do so, a policy must be followed, and ministers chosen, acceptable to Parliament. This was to mean in the end an executive "definite in composition, uniform in political opinion, collectively responsible for every act of government." It was to be finally secured by Cabinet government, but the Cabinet grew imperceptibly out of the old Privy Council and attained maturity before it was realised that such a growth had begun.

Committees of the Council.

The Tudors had divided the Council into committees for the sake of speed and efficiency. This practice the first two Stuarts elaborated. Until 1640 there seem to have been at least five permanent committees, dealing with Foreign Affairs, Trade, Ireland, Ordnance and War. Special committees were appointed to cope with special emergencies. Thus in 1638, at the time of the Bishops'

War, there was a Scottish committee. This particular committee, Clarendon says, was "enviously" called at Court the "Cabinet" council. The name Cabinet, which was first used in England by Bacon, is also found as a term of reproach in the second remonstrance of the Long Parliament where the Commons complained that the Government was carried on in "Cabinet councils of men unknown and not publicly trusted"

Charles II continued the committee system. We find at various times committees for the Treasury, for Ireland, for Foreign affairs, for Plantations and Trade, and for the Admiralty. It has been thought that in the Foreign committee, which was the Cabal of 1667, lies the germ of the Cabinet. But the work of the Cabinet is advisatory, that of the Foreign committee was administrative, though in this particular case, the Foreign committee was made up of the men who were the king's special advisers.

These develop into departments of the Executive.

It is the different departments of the Executive which have originated from these committees of the Privy Council, not the Cabinet, which is essentially a consultative body, made up of the heads of these various departments.

Origin of the Cabinet.

It seems that the Cabinet grew out of that inner circle of councillors, whom the king chose to consult rather than the entire Privy Council: it was in this way that originally the Privy Council itself had been formed. Amongst those who made up this inner circle there was no necessary agreement of opinion, the members of the Cabal had very varied ideas on religious and foreign policy. Nor could ministers choose their colleagues; Clarendon when in power disapproved strongly of Charles' conferences with Ashley and Arlington. There was no suggestion of collective responsibility, and ministers did not resign if their advice was ignored. Nor did the political opinions of this inner circle necessarily agree with those held by Parliament. Clarendon was impeached. The Test Act broke up the Cabal. Danby was impeached and sent to the Tower, pleading in vain the royal pardon for a foreign policy,

which he hated just as much as the Commons themselves.

At the time of Danby's impeachment matters were very strained between the king and the two Houses. Charles' third Parliament had just met and it was avowedly hostile to the Crown, while the Commons had been further alienated by the king's rejection of the Speaker they had chosen. Sir William Temple, one of the ablest diplomatists of the time, and deservedly popular as the negotiator of the Triple Alliance, was asked by Charles to solve the problem of the relation of the Executive to the Legislature. Temple recurred to Cromwell's idea that Legislature and Executive, to work peacefully together, must have equal and independent powers. He proposed the creation of a large Privy Council of thirty, made up of fifteen councillors chosen by the Crown and fifteen members of Parliament, representing the various interests, such as the Church, Law and Commerce, which were represented in the Houses themselves. The united incomes of the Councillors were to equal the united incomes of the members of the Lower House. All were to be consulted equally and nothing was to be done without their advice. By this means it was hoped to put a buffer between the Crown and Parliament, and so to secure harmony between these antagonistic parts of the Constitution.

Temple's scheme

But Charles prorogued Parliament against the wishes of his new Councillors and then dissolved it without asking their advice. Shaftesbury, the President of the Council, finding himself excluded from the inner circle which Charles still consulted, proceeded to stir up Parliament against the Council. Temple, as a tacit acknowledgment that his council was too large to be efficient, was himself a member of the confidential inner ring and the whole project was abandoned as unworkable.

Its failure

By the end of Charles II's reign, the inner circle of advisers was a recognised institution, In 1683 Lord Guildford recorded that the Cabinet met every Sunday,

The Cabinet a recognised institution.

for the settlement of affairs and that the Privy Council met on Thursdays to give official sanction to decisions made in the Cabinet and worked out in detail by Committees of the Council before the Thursday meeting. The Cabinet he says, was made up of the few great officials and courtiers on whom the king relied. Later in 1687, the East India Company's charter was renewed by the king "in his Cabinet council." In 1692 Wharton complained in the Commons that matters were concerted in the Cabinet and brought to the Privy Council for confirmation: at the same time the king was asked to employ men of known integrity and ability: Sir William Strickland added, "this cannot be while we have a cabinet council." And Trenchard, writing at the end of the century, makes much the same complaint.

Its unpopularity.

This hostility to cabinet councils was expressed officially in the Act of Settlement, which provided that "matters properly cognisable in the Privy Council shall be transacted there." But this was locking the stable door after the steed was stolen. The provision came too late: in 1662 the sale of Dunkirk had been debated at length in the full Council, by the time of the Treaty of Utrecht the Council was only required to ratify a measure which had been fully discussed elsewhere. In 1714, the Council made a last effort at originality. When Anne was dying and the Tories were scheming a Stuart restoration, the Privy Council was called, Shrewsbury's nomination as Treasurer procured and the succession of the Hanoverians ensured. From the accession of George I. must be dated the beginnings of government by the Cabinet. Henceforth it was the motive power, the brain, of the Executive, though the details of its structure and procedure were yet to be evolved.

It takes the place of the Council.

The honorary and the efficient Cabinet.

One curious anomaly persisted in the Cabinet during the eighteenth century and seemed to promise that another council would be evolved out of it, just as the Cabinet had been evolved from the Privy Council. There was both an honorary and an efficient Cabinet, the former

consisting of those who had the right to be consulted, the latter comprising those who did the work of government. William III conferred Cabinet rank on Lord Normanby, for much the same reasons as the office of Privy Councillor is conferred now. Marlborough was a member of George I's first Cabinet, but did not attend its meetings. Walpole rarely consulted more than the two secretaries and the Lord Chancellor. Grenville only consulted five or six of his colleagues. Later, when important State papers were circulated for the information of the Cabinet, only the efficient members received them. In 1766 Hardwicke refused to be Secretary of State, on the plea of ill-health, but wished to join the Cabinet "with the circulation of papers." In 1771 Grenville became Lord Privy Seal on condition that he was not called to the meetings of the inner Cabinet. While until 1782 the Groom of the Stole, the Archbishop of Canterbury, the Master of the Horse and the Lord Chamberlain were *ex officio* members of the Cabinet, though they took no part in the administration of State affairs.

The result of this dual Cabinet was that political opponents of the government were often members of the outer or titular Cabinet and were a source of much annoyance to their colleagues. In 1746 when the Pelhams again took office, after Carteret's failure to form a ministry, they stipulated that Carteret should not remain in the Cabinet. Mansfield, a member of Grenville's administration would not stop in the inner Cabinet under Rockingham because he disapproved of his policy. The titular Cabinet disappeared officially in 1801. Loughborough continued to attend Cabinet meetings after Eldon had succeeded him as Chancellor. Addington therefore wrote to the ex-Chancellor that it was thought desirable "that the number of Cabinet ministers should not exceed that of the persons whose responsible situations in office require their being members of it." In spite of this, the nineteenth century can furnish examples of Cabinet

Disappearance of the honorary Cabinet.

ministers having no office. Wellington was a member of Peel's Cabinet in 1841: the Marquis of Lansdowne was a member of Aberdeen's Cabinet in 1855. Neither held offices entitling them to a seat in the Cabinet.

The Privy Council and the Cabinet.

The Privy Council remains His Majesty's "most honourable Privy Council." At every full meeting the king still presides. Committees of the Privy Council still advise the Crown. There is, for example, the Judicial Committee of the Privy Council which deals with colonial and ecclesiastical appeals. Up to 1899 the education of the country was organised by a committee of the Privy Council. Until 1889 there was a Committee of Agriculture. Committees of the Privy Council are occasionally appointed to collect evidence and give advice on specified subjects. But it is the Cabinet which decides all questions of policy. The Privy Council gives formal effect to its decisions by Orders in Council, unless the matter is one for parliamentary or departmental action.

Thus though the Privy Council has still the powers it possessed under William III, it is really no longer the councillor of the Crown. Its present position is due to the divorce of the deliberative and administrative functions of the Executive. The link between the Cabinet and the Privy Council is, that only as Privy Councillors are members of the Cabinet sworn to secrecy, only as Privy Councillors can they sit in the Cabinet and serve as ministers of the State, only as Privy Councillors can they do what as Cabinet members they have decided shall be done. The Privy Council gives to the Cabinet legal status and executive power.

The Characteristics of the Cabinet

The Cabinet as we know it, is the responsible Executive of the country, working in great secrecy under the leadership of a Prime Minister and made up of councillors who are also heads of departments and members of one

of the two Houses. The Cabinet ministers are drawn from the party which commands a majority in the Lower House and they are collectively responsible to that House for the administration of national affairs and the direction of national policy. On the other hand, the Cabinet can advise the dissolution of the body which practically created it, and appeal from the censure of one Parliament to the judgment of the next.

The formation of political parties.

But the Cabinet in its infancy possessed few of these characteristics. Political parties took definite form in England during the struggle to exclude the Roman Catholic Duke of York from the Throne. Those who petitioned that Parliament should meet even at the risk of the Exclusion Bill passing, ranged themselves against those who abhorred that possibility. The two parties were called Petitioners and Abhorrers: later they became known as Whigs and Tories.

The Cabinet under William III and Anne.

Both William III and Anne realised reluctantly that to draw the Executive from one party would add materially to ministerial efficiency, but William at least, foresaw that it would weaken the controlling power of the Crown. In 1693 Sunderland advised the formation of an Executive drawn entirely from the Whigs. By 1697 all the king's ministers were members of the same political party. But in this sense only was this "Junto" a Cabinet. It had no recognised chief: there was no responsibility of all for the actions of each of its members. Under Anne, Godolphin gradually got rid of all the Tories in the ministry, but later the Queen reinstated them, without consulting him. Like Clarendon, he could not choose his colleagues.

Cabinet characteristics. (1) Political homogeneity.

That the Executive should be drawn from one party became inevitable with the accession of George I. The House of Brunswick owed the throne to Whig support and the Tories were long identified with loyalty to the exiled Stuarts. Walpole organised parties for the practical purpose of controlling Parliament and insisted that those who upheld the main principles of his party should not

vote against him on smaller issues. He bribed members, so he said, to vote for, instead of against their consciences. Carteret was given office in Ireland because he opposed Walpole; Townshend was forced to resign. The principle of party unity within the Cabinet could not be fully
1801. worked out till the titular Cabinet disappeared, but from the days of Walpole, the members of the efficient Cabinet were usually at one on questions of general policy. Occasionally great questions have been left open, which would otherwise have divided the Cabinet into opposing sections. This was the case with Roman Catholic Emancipation between 1812 and 1827. Sometimes too, coalitions between different parties have been formed. In 1763 the Bedford and Grenville sections of the Whigs came into office together. In 1783 was the infamous coalition of Fox and North, of which Fox himself said that nothing but success could justify it. In 1852 Lord Aberdeen made up a coalition ministry of Whigs and Peelites. While Liberal Unionists and Conservatives have coalesced permanently over their joint opposition to Home Rule.

(2) Collective responsibility

The collective responsibility of the Cabinet was not possible till all members of the Cabinet held the same political creed. The Act of Settlement had provided that every councillor should sign all decisions in which he had concurred. But it was realised that on these conditions no man would accept political office, and the clause was repealed in 1705. Yet it was not till long after this repudiation of individual responsibility that collective responsibility was acknowledged. Mansfield denied all responsibility for the Grafton measures which had caused unrest in the Colonies, on the ground that, though a member of the Cabinet at the time, he had ceased to attend the meetings of the efficient Cabinet. Camden, the Chancellor of the same ministry, said he had been an unwilling partner in the government's action with regard to Wilkes and the Middlesex election. Later he repudiated all responsibility for the Tea duties, and Grafton himself said the tax was "no measure of his."

Even as late as 1806, Lord Temple denied the responsibility of the whole Cabinet for the actions of each of its members, but this was apparently the last time that the unity of the ministry before Parliament was questioned.

Differences of opinion within the Cabinet are inevitable, but these are not supposed to penetrate beyond the walls of the council chamber, and it is said to be the custom for the leader of the opposing minority in the Cabinet, to defend the decision of the majority before the House. Each minister acts in his own department as the recognised agent of his colleagues, whose concurrence he assumes. In matters of policy, which inevitably affect other departments, that concurrence must be asked. Sometimes, owing to the pressure of business, when the head of a department brings a question before the Cabinet, a committee is formed to investigate and discuss and occasionally to decide the matter.

There are of course, limits to this collective responsibility. Each minister is individually responsible for the working efficiency of the department of which he is the head, while a minister's actions may be disavowed by his colleagues and his resignation required. Thus in 1851, Lord John Russell required the resignation of Lord Palmerston, because he had exceeded his authority as a secretary of state in his communications with France. The Commons have occasionally broken through the protecting armour of collective responsibility and insisted on that of the individual, thus preventing the resignation of the whole Cabinet. In 1805 the attack on Lord Melville for peculation in the Navy was entirely personal and Pitt did not resign. In 1855 a vote of censure was passed on "the minister in charge of the negotiations at Vienna." This led to the resignation of Lord John Russell but not to that of the Palmerston ministry. Normally however a vote of censure on any one department is regarded as a vote of censure on the whole Cabinet and the Ministry either resigns or appeals to the country.

The idea of collective responsibility also influences

the relations between the Cabinet and the king. The advice which the ministers offer the Crown is their collective opinion. On one occasion, George IV desired the individual opinion of each member of the Cabinet on the recognition of the independence of the South American Republics, a measure of which he disapproved. The answer came back from the Cabinet, "generally and collectively," that there had been differences of opinion, but that it was their unanimous conviction that the policy advised was desirable.

Mr. Hallam inveighs against the manifest injustice of holding all members of the Cabinet responsible for the actions of each. But this must be remembered: the penalty attached to failure is no longer loss of life and lands, but loss of office, and loss of office is no longer a sign of disgrace but of disagreement. Collective responsibility would never be enforced, were one member of the Cabinet guilty of a political crime. Even if we argue that it is absurd to deprive the nation of an excellent Colonial secretary and of an able Home secretary because the foreign policy of the government has been censured, yet the unity of the Cabinet before king and Legislature is one of the greatest safeguards against individual timidity or rashness: it is one of the chief guarantees of ministerial strength.

(3) Secrecy of its meetings.

The secrecy which hedges round meetings of the Cabinet is a necessary corollary to real freedom of discussion and genuine collective responsibility. No record is kept of the proceedings and it is said that even a pencil at a Cabinet council is regarded with suspicion. The informal reports of the meetings which are sent to the king are not available for the use of future ministries and are strictly confidential. Disclosure of Cabinet discussions can only be made with the king's permission and at the request of the Prime Minister and then the extent of the revelations is strictly limited. There is no permanent staff attached to the Cabinet, though committees of the Cabinet gladly avail themselves of the staff

belonging to the department whose affairs they are deciding. There is nothing to help the various ministers to remember the same answer to the same question. Very occasionally officials are called before the Cabinet, to give information or receive instructions, who have taken no oath of secrecy. Sir William Anson records that Mr. McKenna was called informally to Cabinet meetings when educational matters were to be discussed, before he had been admitted to the Privy Council, because he had already accepted the office of President of the Board of Education.

It was the secrecy of Cabinet meetings which so long made the Cabinet unpopular, and it still provokes the wonder of the foreigner. It is this which makes its proceedings so informal and which perhaps accounts for the fact that, with the single exception of an amendment to the Address in 1900, the word "Cabinet" occurs in no official document. Bagehot says that Cabinet meetings are probably like those of a rather disorderly Board of Directors where "many speak, few listen—though no one knows." This is perhaps rather drastic criticism: the conduct of Cabinet councils, like their discussions, is veiled in obscurity, but Peel, Palmerston and Gladstone must have been stern disciplinarians.

(4) Its members are always members of Parliament.

Members of the Cabinet are invariably members of Parliament and each important office is represented in the House of which its political chief is not a member. The rule has no statutory basis. In 1701 the Commons, fearing for their own independence provided that ministers should be excluded from Parliament. It was, however, recognised that their presence there was necessary for purposes of defence and explanation, and that it was the surest guarantee against executive irresponsibility. In 1705 this clause in the Act of Settlement was altered so that holders of the older offices were only required to seek re-election, when nominated to office. To this list of offices which do not exclude their holders from a seat in the Commons, others have been added from time to

time. Gladstone was Colonial secretary for six months in 1846 without a seat in Parliament, but this is the most noteworthy modern example of such a thing on record. Had the provision of 1701 held good, Executive and Legislature would have become co-ordinate and mutually independent powers.

(5) It must command a majority in the Commons.

The Cabinet must command a majority in the Lower House. Disraeli once said that a bill proposed by an Archangel in office would not conciliate an opposition in the majority. If the ministry is defeated on an important question it places its resignation in the hands of the Crown or appeals to the Electorate. This principle did not work freely during the eighteenth century, for the great landowners, by means of their pocket boroughs and the use of parliamentary corruption, could usually secure a majority for or against any ministry or any measure: it was thus that the supremacy of the Whigs during the first fifty years of Hanoverian rule was maintained. But it is said that George III found it so hard to hold a majority together for North in 1782, that he threatened to retire to Hanover.

Practice gradually made the way clear for the theory. William III and Anne had shaped ministries to correspond with Parliamentary majorities. Walpole kept his hold on his majority by a variety of means, making war with Spain in 1739 in order to keep it together. He resigned in 1742 because his defeat over the Chippenham Election question was practically a vote of want of confidence. When the Pelhams resigned in 1746, because George II would not accept Pitt, they had to be recalled and Pitt admitted to office, because no one else could command a majority in the Commons. But George III's ministers went out of office either because of royal opposition, or because the allegiance of some politician, whose support was essential to the Government, could not be won. Between Walpole's resignation in 1742 and the Great Reform bill of 1832 only two ministries resigned because of a defeat in the Commons, Shelburne's in 1783 and Wellington's in 1830.

In 1783, Pitt was made Prime Minister by George III, in spite of an opposition majority of fifty. For several months Pitt held on in defiance of repeated defeats; then, when the opposition majority was reduced to one, he advised a dissolution and was returned with an overwhelming majority. In 1834 William IV made a similar appeal to the country on behalf of Sir Robert Peel. The elections showed a marked decrease in the Whig majority, but they still had a majority and after a desperate struggle and repeated defeats in Parliament, the Conservatives had to resign.

Since the Reform Bill, with one exception, ministries have resigned, either because of an adverse vote in the House over some vital issue, or because of a defeat at a General Election. In 1905 Mr. Balfour resigned, though there was still a government majority of about fifty, because repeated defeats at bye-elections and the growing hostility of public opinion, showed that the Government had lost its hold on the country.

Flexibility of the modern Cabinet

The Cabinet is no mechanical contrivance: it is a living organism, changing constantly and imperceptibly. Old characteristics disappear, new ones insensibly take their place: the Cabinet is so flexible that it is perpetually adapting itself to the changing conditions of political life. Thus the size of the modern Cabinets, which average about twenty members, is tending to make Cabinet meetings few and formal, the Prime Minister deciding vital questions with those colleagues in whom he has special confidence. In 1886 Gladstone introduced his Home Rule Bill after consultation with two or three members of the Cabinet; the others, though hostile to the measure, were called on to support him: they had cherished hopes of modifying the measure in Cabinet discussions. The enormous amount of departmental work, which each minister must attend to individually, often leaves members of the Cabinet in total ignorance of the policy of their colleagues from simple lack of time. This and the growth of an inner Cabinet is a great strain on collective responsibility.

Rigidity of modern political parties.

Moreover, party organisation has been so fully developed since the creation of single-member constituencies, that a defeat in the House is becoming less and less likely. Pulteney once said that the heads of parties, like the heads of snakes, are often carried on by their tails : the organisation of the Electorate has made the tails more amenable. Members are returned to vote with a certain party and are not expected to vote independently and according to their personal opinions on the questions before the House. They may argue against a measure, which has the support of their party; they will rarely carry their opposition as far as the division lobby.

Practical supremacy of the Cabinet in Parliament.

In view of this, how far is it still true that the Cabinet is responsible to Parliament? The Executive with a majority at its back can tax and legislate as much as time will allow, and if the Opposition is too talkative, the closure will always stop debate. Then too, by Orders in Council, the Cabinet can effect fundamental changes in the machinery of government. In 1904 the authority of the Secretary of State for War and of the Commander-in-chief was transferred to the Army Council, without any action on the part of the Legislature. It has been said that the Commons are now responsible to the Executive; certainly the threat of dissolution will usually rally a wavering majority. As Mr. Low has pointed out, the real check on the Executive in no longer the Commons, but the "alternative government" which sits on the Opposition benches and which an unfavourable verdict from the Electorate may put into power. Sooner or later an appeal to the country must be made and the results of bye-elections are more eagerly watched than the parliamentary division lists.

Growing power of the Electorate.

The Head of the Cabinet

The Prime Minister has been called the "keystone of the Cabinet arch." Yet there is no statutory foundation for his power: he receives no salary: he is not recog-

nised by the British Constitution: he only sits in the Cabinet by virtue of some other office, giving Cabinet rank. In two official documents only does the title occur: Beaconsfield described himself as Prime Minister of England in the Treaty of Berlin and in 1905 the Prime Minister was given precedence after the Archbishop of York.

Reluctance to recognise a Prime Minister.

Walpole, after Townshend's resignation in 1729, was the first Prime Minister, in the sense that he was not only the head of the Executive, but also chose his colleagues. The office was regarded with considerable suspicion, and its existence was perpetually denied. Walpole himself repudiated the title. In 1741 the Lords declared the existence of a Prime Minister to be destructive of the liberty of any government. Sandys in the Commons, asserted that "according to the English Constitution we have no sole or prime minister." In 1761 Grenville declared "Prime Minister" to be "an odious title" and Lord North would not even allow his own family to call him by this name. It was long too, before the nominal Prime Minister and the real head of the government were one and the same. It is easy to forget that, during the years of the elder Pitt's greatest successes, Devonshire and then Newcastle were the nominal heads of the ministry, and that the Duke of Portland was the nominal head of the Fox and North coalition.

Relation of the Prime Minister (1) to the Crown, (2) to his colleagues, (3) to Parliament.

The Prime Minister is chosen by the king from amongst the leaders of the party with a majority in the Commons. He is sent for and asked to construct a Cabinet: if he cannot do this, another of the party's leaders is chosen. The Prime Minister chooses his colleagues, subject to the approval of the sovereign. He can also require their resignation, but should the Crown demand capriciously the dismissal of a minister, the Prime Minister can protect his colleague by threatening a resignation of the whole Cabinet. The resignation of the Prime Minister does not necessitate that of the other ministers, so long as the party

keeps its majority, but all offices are supposed to be at the disposal of the new chief. On the other hand, the resignation of a ministry does not necessitate the dissolution of Parliament. In 1846, for example, Sir Robert Peel advised the Queen against a dissolution because he had no grounds for supposing that the verdict of the country would be more favourable to his party than that of the House then sitting. The Prime Minister can choose the time for his appeal to the Electorate. Thus Lord Salisbury advised a dissolution in 1900, though the Parliament was only five years old and secured a large majority on account of the popularity of the Boer War.

In purely departmental matters, no minister, including the Prime Minister, interferes with a colleague and heads of departments may confer with the Crown on questions touching their own work. On the other hand, no question of general policy would be discussed with the king by any minister, unless the Prime Minister had been previously consulted. The Prime Minister arbitrates between different departments and reconciles conflicting opinions within the Cabinet, so that the advice presented to the Crown is unanimous, and the front presented to the enemy in Parliament unbroken. The Prime Minister is supposed to be in close touch with all departments: Peel had an expert knowledge of all departmental questions and enforced his opinions. But this supervision is growing extremely difficult owing to the ever-increasing amount of departmental and parliamentary work to be done, though the Prime Minister usually holds the honorary office of First Lord of the Treasury.

The authority of the Prime Minister depends inevitably on the individuality of the man chosen. The most successful governments have been those when the distance between the premier and his colleagues was widest. Pitt insisted that for the successful conduct of affairs the Prime Minister must be "an avowed and real minister, possessing the chief weight in the cabinet and the principal place in the confidence of the king." Peel, when attacked in 1846

for abandoning the traditions of his party, said "While I am minister of England, I will hold office by no servile tenure. I will hold office unshackled by any other obligation than that of consulting the public interests and providing for the public peace." The tendency nowadays is to exalt the office of the premier far above that of his colleagues; to him is conceded voluntarily, a pre-eminence which the earlier Prime Ministers either secured for themselves or, as figure-heads, never desired.

The King's Ministers

The political servants of the Crown.

At the head of each department of the Executive is a political chief, changing with the changing ministries and receiving office for other than specialist qualifications. These ministers are the First Lord of the Treasury, the Lord President of the Council, the five Secretaries of State, the First Lord of the Admiralty, the Chancellor of the Exchequer, the Lord Privy Seal, the Secretary for Scotland, the Chief Secretary of the Lord Lieutenant of Ireland, the President of the Local Government Board, the Presidents of the Board of Trade, of Education, of Agriculture and Fisheries, the Postmaster General, the Chancellor of the Duchy of Lancaster and the First Commissioner of Works. Of these, the first nine have seats in the Cabinet, the last three occasionally have Cabinet rank, the remainder have a prescriptive right to it. The Lord Lieutenant of Ireland does not usually sit in the Cabinet if his Chief Secretary is there.

To these must be added the law officers of the Crown. The Lord Chancellor always sits in the Cabinet, the Chancellor of Ireland occasionally. The Attorney General and Solicitor General for England, the Lord Advocate and Solicitor General for Scotland, the Attorney General and Solicitor General for Ireland all hold political office. So do the civilian members of the Admiralty Board and the Army Council, the Parliamentary Under-secretaries to the Secretaries of State, the members

of the Treasury Board, the Paymaster General and the Parliamentary secretaries to the Boards of Trade, Agriculture, Education and Works and the Local Government Board.

The Lord Chancellor.

The presence of the Lord Chancellor in the Cabinet is essential, as the keeper of the Great Seal. From the days of Edward the Confessor, when the Chancellor was the king's secretary as well as his chaplain, he was consulted on most matters by the king. Apart from his secretarial duties and the judicial business for which he was becoming responsible he was a great political officer by the time of Henry II, sitting in all Councils, and only second in importance to the Justiciar. With the fall of Hubert de Burgh, the last great Justiciar in 1232, the Chancellor became the king's chief minister, till, in his turn, he was ousted by the Lord Treasurer in the time of the Tudors. Like the Lord Lieutenancy of Ireland, the Chancellorship cannot be held by a Roman Catholic.

The Chancellor is the Speaker of the House of Lords and when joining in debates, which he cannot do however, if he is a commoner, he vacates the Woolsack and stands at the head of the Dukes' bench. He administers certain prerogatives of the Crown and is responsible for a large number of judicial and ecclesiastical appointments. He is responsible too, for the affixing of the Great Seal to all Proclamations, writs, Letters Patent and documents giving power to sign and ratify treaties.

Holders of honorary offices. (1) The Lord Privy Seal.

The office of Lord Privy Seal has been a sinecure since the duties attached to it were abolished in 1884. The work the office involved was never laborious, and it has frequently been held by statesmen precluded either by other duties or by infirmity from accepting a more strenuous post. The Earl of Chatham was Privy Seal when Prime Minister in 1766, so was Lord Salisbury in 1900. The office itself is an ancient one In 1311 a "fit clerk" was appointed to keep the Privy Seal, and under Edward III he became a member of the Council. A warrant under the Privy Seal was required by the Chancellor as

authority to affix the Great Seal after the time of Henry VI. Edward IV was very wroth with a Chancellor who did not consider the king's "own speech" to him, sufficient protection against a capricious denial of such authority having been given. A warrant under the Great or the Privy Seal was also necessary for an issue of royal treasure. The Lord Privy Seal was President of the Court of Requests while that court was in existence.

(2) The Chancellor of the Duchy of Lancaster (3) The Lord President of the Council.

The Chancellorship of the Duchy of Lancaster and the Lord Presidency of the Council are also offices which, though conferring Cabinet rank, are practically sinecures.

The Treasurer

The Treasurer was originally the custodian of the royal hoard at Winchester and the chief working member of the Exchequer, though in dignity he was overshadowed by the Justiciar and the Chancellor. He was responsible for the receipt and issue of the Revenue and kept account of the money due to the king. He became the chief official in the Exchequer, when under Richard I, the Chancellor withdrew and under Henry III the justiciarship became unimportant. The Chancellor's clerk was then appointed Chancellor of the Exchequer, that he might take charge of the seal of the Exchequer, and also act as a check on the Treasurer. Under Edward I the judicial work of the Treasurer was transferred to the Chief Baron of the Exchequer. Both Treasurer and Chancellor of the Exchequer could attend the court of Exchequer when it sat as a court of Equity until it was deprived of its equitable jurisdiction in the nineteenth century.

The Treasurer received in 1539 the title of Lord High Treasurer and after this time he was the chief administrative official of the Crown. By a separate appointment, the office of Treasurer of the Exchequer continued to be bestowed on the Lord High Treasurer. In 1612 the office was put into commission and a Treasury Board created, and since 1714 it has been in commission without exception. The First Lord has a large amount of patronage, but since the middle of the nineteenth

The Treasury board.

century, the Treasury Board has taken no part in the duties of the Treasury. The obduracy of the Lords of the Treasury is a useful fiction when the Chancellor of the Exchequer wishes to curtail expenditure. The First Lord is usually Prime Minister and Leader of the House of Commons. Gladstone preferred to be his own Chancellor of the Exchequer in 1880 and was of course leader of the Lower House at the same time; Lord Salisbury was his own Foreign Secretary in 1885, 1887 and 1895.

(1) The First Lord of the Treasury.

(2) The Junior Lords.

The Junior Lords of the Treasury have been appointed by the First Lord since 1711. They and the Patronage secretary are *ex officio* government whips and have no financial duties. Canning once said the Junior Lords existed "to make a House, keep a House and cheer the Ministers."

(3) The Chancellor of the Exchequer.

The Chancellor of the Exchequer, who is the working member of the Treasury Board, is practically secretary of state for finance. He was unimportant, so long as the Treasury Board was actually working, but the office grew in importance as that of the Board declined. The Chancellor of the Exchequer sanctions the estimates of the different departments before they are submitted to Parliament. In his yearly Budget he submits to the House a scheme for securing the requisite funds for the year. Subordinate departments are responsible for the collection of the Revenue, while the auditing of public accounts and the issue of public money, formerly the work of the Exchequer of Account and its successor the Treasury Board, have passed into the hands of the Auditor and Comptroller General.

The Lord High Admiral.

The office of Lord High Admiral, like that of the Lord High Treasurer, is now in commission. The admiral's office is at least as old as the days of Edward I for in 1306 we hear of three admirals who superintended the coastguards. In 1360 there was one Lord High Admiral and there has been a permanent Navy since the time of Henry VIII. With one exception the office of Lord High Admiral has been in commission since the death

of Prince George of Denmark in 1708. The Admiralty Board, as it was reconstituted in 1904 consists of the First Lord, four Sea Lords, one Civil Lord and a Parliamentary secretary. The First Lord is a member of the Cabinet, and is responsible to king and Parliament for the efficiency of the Navy. The Admiralty Board.

The secretarial work of the Crown was at first done by the Chancellor and his clerks; but his judicial business soon left him little time for such duties. In the reign of Henry III we find a king's secretary, apart from the Chancellor and his staff Henry VI appointed a second secretary, to cope with French affairs and by the end of the fifteenth century the office had become one of some importance. Henry VIII assigned places both in Parliament and in the Council to the secretaries and created them Principal Secretaries by royal warrant. They were each given a signet and were required to keep a record of the warrants which passed through their hands. The secretaries were the medium by which the royal pleasure was expressed and the subjects' petitions made known to the king. The Secretariat. The king's secretary.

During much of Elizabeth's reign there was only one secretary, Sir William Cecil. Later Robert Cecil became the Queen's "Principal secretary of Estate" and his companion was designated "one of Our secretaries." During the seventeenth and eighteenth centuries there were always two secretaries. To these a third was added for Scotland between 1707 and 1746 and for the Colonies between 1768 and 1782. The "Queen's Principal secretary of Estate."

In 1688 the work of the secretaries was divided geographically. One was put over the Northern department, the other over the Southern. The Northern secretary was concerned with all Europe, except those countries whose shores bordered on the Mediterranean. These were in the hands of the Southern secretary, who also had charge of Home affairs, Ireland and the Colonies. Both secretaries were really concerned with Foreign affairs; Ireland had a Parliament of its own and only 1688.

required occasional advice; Home affairs were left largely to their own devices and the Colonies, until about the time when a special colonial secretary was appointed, had always been treated with a happy neglect: it has been said that Grenville lost the Colonies because he would open the despatches In 1782 Foreign affairs were concentrated in the hands of the Northern secretary and the Southern secretary became Secretary of State for Home affairs, Ireland and the Colonies

1782.

1794. During our struggle with France in 1794 a Secretary of State for War was created. Before this the Southern secretary had been responsible for the size of the army maintained, while a Secretary at War had had charge of Army finance, the passing of the Mutiny Bill and the distribution of troops, subject to the approval of the Secretary of State. In 1801, the Secretary of State for War was given charge of the Colonies. These so monopolised his energies during the peaceful years which followed the Napoleonic Wars, that the Crimean War revealed a state bordering on anarchy in army organisation. Consequently in 1854 a fourth secretary of state was appointed, who also took over the duties of the Secretary at War. After the Indian Mutiny, in 1858, a fifth secretary of state took over the powers and duties of the East India Company. In 1904, the powers hitherto exercised by the Secretary of State for War and the Commander-in-chief, were vested in an Army Council, modelled on the Admiralty Board and consisting of the Secretary, as the political chief, with four military members, a parliamentary and a financial secretary. Except where special powers have been conferred by statute on one secretary of state, each of the five secretaries is legally competent to do the work of the whole secretariat. In 1834 after Melbourne's resignation, Wellington actually held the three secretaryships until Sir Robert Peel returned from Rome and formed the new Cabinet.

1801.

1854.

1858.

The Army Council, 1904.

The Chief Secretary to the Lord Lieutenant of Ireland.

The Chief Secretary to the Lord Lieutenant of Ireland has been responsible for Irish affairs in Parliament since

the Act of Union of 1801 and since 1885, Scottish affairs, which had hitherto been administered by the Home Office, the Treasury and the Local Government Board, have been concentrated in the hands of the Secretary for Scotland.

The Postmaster General.

The office of Postmaster General is at least as old as 1516, when we find a royal Master of the Posts. The Post Office dates from Edward IV's reign James I and Charles I reorganised the postal service, for the benefit of the public and under Charles II, postal charges were an important item of the Revenue. In 1710 a Postmaster General was appointed: the office excluded its holder from a seat in the Commons, so it was usually held by a peer till the disability was removed in 1866.

The "Boards"

Each of the five Boards which deal respectively with Trade, Agriculture, Local Government, Education and Public Works is worked by a president, a parliamentary secretary and a large permanent staff. The Boards, consisting in each case of the Lord President of the Council, the five Secretaries of State and others of the Privy Council are wholly ornamental. The Board of Trade dates from 1660 when Committees of the Privy Council were formed for Trade and for Plantations. These were united in 1672, but abolished three years later. In 1695 one committee was again established and this lasted until 1781 as a consultative committee, collecting information for the secretaries of state. It was then abolished as costly and inefficient, its advice having been seldom asked and more seldom taken. In 1782 a Board of Trade was created, the Board being really a committee of the Privy Council. The work of this Board has tended to become more and more administrative, rather than consultative, and it now deals with all questions connected with Trade and Locomotion in which the safety and convenience of the public are concerned.

The Board of Trade.

The Board of Works.

The Board of Works succeeded in 1851 to the control over the royal palaces including the Palace of Westminster, public buildings and works, which, since 1832, had been in the hands of the Commissioners of Woods and Forests.

The president of the Board is known as the First Commissioner of Works.

The Local Government Board.

The Local Government Board, created in 1871, took over the powers of the Privy Council, of the Home Secretary and of the Poor Law Board, in matters concerning public health, Local Government and the administration of the Poor Law. In 1888 many of the Board's powers were delegated to the new County Councils.

The Board of Agriculture and Fisheries.

The Board of Agriculture, created in 1889, concentrated the authority of the Land Commissioners and the Privy Council over tithe redemption, the enclosure of Common Lands, the estates of Universities and Colleges and over agricultural industries into the hands of one department. In 1903, Fisheries were brought under the control of this Board; they had hitherto been supervised by the Board of Trade.

The Board of Education.

The Board of Education was a Committee of the Privy Council until 1899 This committee was appointed in 1839 to supervise the application of the government grant, which had been made in aid of Education since 1834. It was under the presidency of the Lord President of the Council. In 1856 a Vice-President of the committee was appointed. In 1899 Education was put under the control of a Board modelled on the other Boards, but the Lord President of the Council still represents Education in the Upper House, if both the President of the Board and the Parliamentary secretary are in the House of Commons.

Since the Education Bill of 1902, the Board of Education has only exercised a general supervision over educational matters, many of its powers having passed to local authorities.

CHAPTER VI

THE KING'S REVENUE

AMONGST the constitutional watchwords of the Middle Ages, perhaps the most insistent was the cry "que notre seigneur le roi vive de soen" Yet out of the financial necessities of the Crown arose parliamentary government. That there should be no taxation without representation, and that Parliament should control the expenditure of money, given by the nation, became the demands of succeeding generations, and completed the work which was begun when the Great Charter of 1215 prescribed the first formal limitation to unlimited monarchy..

The king's hereditary revenue was at first abundantly sufficient to maintain the royal dignity and support the expenses of administration in time of peace: it was only as the functions of government widened and multiplied that the hereditary revenues proved insufficient to cover ordinary expenditure, and that taxes were levied in order to swell a stationary, and often decreasing revenue.

Yet, until the predominance of Parliament was ensured by the Revolution of 1688, fresh taxation was looked upon as an expedient only to be resorted to with grave misgivings, and only to be justified on the ground of real national danger, while the tendency of all mediæval taxation to become permanent, made it necessary for new sources of taxation to be found to meet fresh emergencies, and added to the distrust with which this means of securing revenue was regarded. With Parliament in the

ascendancy, these misgivings vanished and taxation became a normal means of securing an adequate yearly revenue.

The Hereditary Revenues of the Crown

The ancient hereditary revenues of the Crown were derived from the crown lands, from the feudal dues and from certain fines and dues to which the king was entitled by royal prerogative.

As head of the Tribe, the Saxon king could demand sustenance for himself and his court as he travelled round the country, and on these royal itineraries the king's coming was heralded by the collection of the tribute in kind, or "feorm-fultum," at the place chosen for the royal camp. But this method of consuming the royal revenue was obviously inconvenient and not unfrequently must have caused superabundance one day and insufficiency the next. With the object of securing a permanent revenue and also of facilitating its collection, the feorm-fultum was commuted for a money charge, estimated in terms of "one night's farm." Oxfordshire paid farm for three nights, so did Northamptonshire. Other counties, such as Warwick, paid partly in kind, partly in money. Feorm-fultum gradually became a burden on demesne lands only, and eventually lost its identity in rent.

Feorm-fultum.

The payment of feorm-fultum did not relieve the subject from the duty of alleviating his king's necessities in unforeseen emergencies, and this was the excuse for the royal right of "purveyance." The royal purveyors, who provided for the wants of the peripatetic court, claimed the right of "caption" or seizure, as well as those of "pre-emption" or compulsory purchase and of "wainage" or the right to horse and wagon for the king's service. The complaints against purveyance and compulsory service were frequent. We find them in 1215 and 1258, and purveyance was forbidden by the Lords Ordainers, though the prohibition vanished with the ordinances.

Purveyance.

The abuse was practically unchecked till 1362, when Edward III limited purveyance to the personal needs of the king and queen. In spite of this limitation the right was flagrantly abused during the Civil War, and it was not finally resigned until 1660.

Profits of Jurisdiction.

A considerable revenue accrued to the king from the profits of justice in the local courts. In the eleventh and twelfth centuries many crimes were still commutable or "botworthy," though later only for the lesser crimes or "trespasses" could atonement be made by a money payment. Magna Carta limited the amount of the fines by stipulating that they were to be assessed by reputable men of the neighbourhood, and that no one was to be deprived of the implements needful to his calling. Later the king, by increasing the number of the pleas of the Crown, gradually secured a monopoly of criminal justice, and these greater crimes left the offender "in misericordia regis" when life and property often had to be redeemed at a heavy price.

Fines.

Certain fines too were payable to the Crown. A man who neglected his duty of service in the fyrd, paid "fyrd-wite"; he who neglected the summons to the local court, paid the "oferhyrnes," while, with the coming of the Normans, "murdrum" was exacted unless the hundred court could prove the murdered man to have been an Englishman.

Miscellaneous revenue.

Besides this, there were many miscellaneous profits such as those arising from wrecks, mines, and treasure trove which went to the Crown. The three-fold obligation of service in the fyrd, the repair of bridges and the maintenance of fortifications was discharged by personal service.

The firma comitatus.

The profits of justice from the local courts, together with the feorm-fultum, the rent of the crown lands and other miscellaneous revenues coming to the Crown from the shire were collected by the sheriff and commuted by him for a lump sum, which he paid into the Exchequer as the "farm" of the shire or "firma comitatus." It is

recorded that William "sold out his lands as dear as dearest he might and then some other man came and bid more than the first and the king granted them to him who offered the larger sum, and he cared not how iniquitously his sheriffs extorted money from the miserable people."

Sale of offices and privileges.

As chief administrator and the source of honour, the king derived large profits from the sale of offices. Moreover the king was the source of all privileges, but he rarely gave without receiving something in return. London paid for the right to choose the sheriffs of Middlesex, and it was by fine and charter that boroughs secured the right of paying the "firma burgi" and all taxes direct into the Exchequer. In the same way other privileges were won, such as the right of excluding the sheriff in judicial matters, of choosing their own magistrates and of holding markets and fairs. York and Beverley bought freedom from tolls throughout their shire, while the merchants of London had secured the right to come and go throughout all England, without paying tolls as early as the reign of Henry I.

Crown-Lands.

Beside these fees and fines, which the king claimed by right of prerogative, there was the revenue arising from the crown lands. From these he received a rent in kind until the eleventh century, when much of this was commuted for a money rent. Over the unappropriated lands, which were neither those of the folk, nor those of the king, but simply no man's land, the king possessed the right of grant.

The Norman Conquest gave all England into the hands of the Crown and those estates which William I did not grant to his Norman followers became the demesne lands of the Crown. According to Domesday Book these comprised over fourteen hundred manors, of which those which had belonged to the king under Edward the Confessor were known as the "ancient demesne." The crown lands were augmented from time to time by the feudal rights of escheat and forfeiture, while individual kings brought large estates to the Crown. During

Ancient Demesne.

the eleventh and twelfth centuries the feudal rebellions, with the exception of that of 1173, were followed by wholesale confiscations. During the thirteenth century many of the Norman families of the Conquest died out and their estates escheated to the king At the close of the fourteenth century Henry Bolingbroke brought the vast Lancastrian inheritance to the Crown including the Dukedom of Lancaster, the Earldoms of Lincoln, Leicester and Derby as well as many of the great honours, such as Knaresborough and Pickering and the castles of Kenilworth, the Peak and Monmouth. To this Henry V added the estates which he inherited from his mother, one of the coheiresses to the Bohun estates of Hereford, Essex and Northampton. Henry VII married the heiress of the House of York, and the extermination of the Yorkists brought into the hands of the Crown many of the richest lands in the kingdom. Henry VIII grasped all the property of the monastic houses, while the accession of the House of Stuart added the crown lands of Scotland to those of England. The Crown already held extensive lands in Ireland.

Instead of husbanding their resources the kings granted out the escheated and forfeited lands to favourites, to foreign friends, to greedy supporters. But it must be remembered that there is little doubt as to how the barons would have viewed the action of the Crown if the king had kept these fiefs in his own hands, for it would have affected materially the balance of power between sovereign and nobility. As a compromise between a natural desire to add to the strength of the Crown and the fear of baronial jealousy, Edward I set aside the Earldom of Chester for the heir to the throne and Edward III did the same with Cornwall. Besides this, Edward III gave many of the great fiefs to members of the royal house, hoping thereby to gather round the throne barons who were devoted to the royal interests. But the "family settlement" proved a failure; the new nobles forgot their royal birth and took up the pugnacious

traditions of their predecessors, so that the estates granted to them proved a centre of opposition instead of a rallying-point for loyalty. Henry IV gave vast acres to those whose support had won for him the throne. Edward IV and Henry VIII created a new nobility by giving lands to personal followers and royal ministers. Elizabeth and Charles I made large profits from the sale of crown lands, while Charles II gave them away with careless prodigality, so that by the accession of William III they only brought in a yearly revenue of £6,000.

Thus what the kings took with one hand, they gave away with the other, and this was facilitated by the fact that when an estate fell by escheat and forfeiture into the hands of the Crown, it retained its separate existence and all its judicial machinery. The immediate tenants of the fief did not become tenants-in-chief of the Crown, nor could they be treated as such ; hence the whole estate could be given away at a moment's notice in full working order.

Poverty of the Crown.

The result of all this gathering in and giving out of property was that the royal demesne lands tended to decrease rather than increase in extent, and the revenue was always insufficient to meet the expenses of administration. At the same time the expenses of the court and of the government were rising, and the extravagance of the royal household became the cry at a time when the revenue was becoming insufficient to meet the whole of the expenses of the administration, partly because of maladministration, but also because, with the increased work of government, more funds were indispensable. Efforts were made to reform the royal household and in the fifteenth century, when royal finances were at their worst, portions of the ordinary revenue were set aside to meet certain recurring expenses. But the royal finances were hopelessly involved. The various sources of revenue were farmed out, often to foreigners, payments were always in arrears, the revenue was always anticipated by loans, on which a heavy interest had to be paid, and the crown jewels were rarely out of pawn.

Attempts to remedy this by resumption of the crown lands.

From time to time various attempts were made to cope with the royal insolvency. The most obvious remedy was the resumption of the royal demesne. The barons had urged upon Henry III that the royal grants should be recalled and that the aliens, who clutched them so eagerly, should be banished, while the Lords Ordainers required that their assent should be asked to gifts of lands and escheats. In 1343 Parliament begged Edward III not to alienate the property of the Crown, and the giving away of the royal estates was one of the articles of accusations brought against Richard II. Under Henry IV the Commons demanded that those who accepted grants from the royal demesne should be imprisoned for three years, and also that the annuities granted out of the customs should be resumed. In 1450 Henry VI, by an act of resumption, annulled all grants since the beginning of his reign, and this was repeated in 1456. So poor was the Crown, that the annual expenses of the household alone are said to have been five times as much as the ordinary revenue. Edward IV on four separate occasions resumed alienated crown lands, telling the Commons "Y purpose to lyve uppon my nowne . . . and not to charge my subjettes but in grete and urgent causes" Fortescue saw in the resumption of crown lands the sole means of restoring national prosperity and enabling the king to live of his own. Later, one of Charles I's most desperate expedients for raising money was the resumption of forest lands, which he claimed to have been part of the royal demesne under Henry II, but which had been overlooked when the boundaries of the royal forests were fixed under Edward I. At the Restoration, many of the crown lands, sold during the Commonwealth, could not be regained, but in 1700 Parliament resumed the grants made by William of Orange to his Dutch friends, and in 1762 it was provided that henceforth no lease of the royal demesne should be for more than three lives.

Surrender of the crown lands.

The desire of Parliament to secure full control of the

revenue, led to the surrender of the crown lands of England and Wales in 1760, in return for a fixed income. George IV gave up the hereditary revenues of Ireland as well, and William IV and his successors have added to these the hereditary revenues of Scotland, together with all miscellaneous sources of revenue. The Duchy of Lancaster, which Henry IV had jealously preserved apart from the royal demesne, alone remains as the personal property of the Crown, while the Duchy of Cornwall is the property of the heir apparent. Estates such as Balmoral and Osborne are purchased from the Privy Purse.

Feudal dues. As feudal lord, the king was entitled to numerous dues from those who held their lands by military tenure. These he continued to exact spasmodically, long after knight service had ceased to be a reality, and long after the barons had ceased to demand them from their own tenants. The three customary aids, together with relief and escheat, wardship, marriage and forfeiture brought a large if rather intermittent revenue to the Royal Exchequer. Henry VIII systematised all feudal rights under the Court of Wards, because the Crown was not deriving its due profits from these sources. In 1610, so unpopular was the exaction of these antiquated feudal dues, that it was proposed in the Great Contract to pay the king £200,000 yearly in lieu of purveyance and his feudal rights. The scheme proved abortive, because the king and the Commons were at loggerheads over ecclesiastical matters, and because each side thought the other was getting the better of the bargain. At the Restoration purveyance and all feudal dues were abolished by statute, and the Crown was compensated by the grant of the "hereditary excise" levied on beer and other liquors. In 1736 this was commuted for a fixed sum of £700,000 and in 1760 it was surrendered by the Crown along with the crown lands.

Hereditary Excise.

Post Office. At the same time another source of revenue, which had also been acquired by the Crown at the Restoration, was

given up. The Post Office, which Edward IV originated, had been continued by the Tudors for their own convenience, and had been organised by the first two Stuarts for the use of foreign merchants. During the Commonwealth it had become a source of national revenue, and at the Restoration it was continued as a royal monopoly and was farmed out at a rapidly increasing rate. Under the Commonwealth the Post Office had brought in £14,000; under George II, £100,000; in 1909–10 the gross income of all Postal services was £23,000,000, leaving a net profit of over four millions.

The gradual surrender of the old hereditary revenues solved the practical difficulties which had always confronted Parliament when it strove to make its financial supremacy a reality, for the uncertainty as to the exact amount of the king's income had made all efforts to balance expenditure and revenue extremely difficult. Both the Instrument of Government and the Humble Petition and Advice had provided a fixed revenue with which the expenses of government were to be met in times of peace. At the Restoration Charles II was given a minimum yearly revenue of £1,200,000; this was the beginning of the Civil List, a name sometimes applied to the revenue given to the Crown, at other times, to the items chargeable on it. The money was to be secured from the English crown lands, supplemented by the hereditary excise, a temporary excise, a duty on cloth and tunnage and poundage. The Post Office was given to the Duke of York. Parliament was to make good any deficit, and this it had to do during much of Charles II's reign; but under James II the revenue arising from the sources set apart to supply the Civil List amounted to £1,500,000, the surplus remaining in the hands of the Crown. The items charged on the Civil List were the maintenance of the royal state and of the civil government, as well as the military and naval defences of the kingdom in time of peace.

Civil List.

When William and Mary came to the throne, Par-

liament secured some measure of control over the money given for the support of the peace establishment by setting aside £700,000, of the £1,200,000, for the Civil List, which henceforth was to consist of the expenses of the royal household and the salaries of the civil servants including all judges and ambassadors, while the remainder was to be expended on the other and more public services according to the estimates of the various ministers. The sum appropriated to the Civil List was raised in 1777 to £900,000. But the amount was often insufficient and successive Parliaments had to pay off royal debts amounting to one million under George I and three and a half millions under George III.

The heavy debts amassed by the Crown resulted in repeated efforts on the part of Parliament to secure more complete financial control As the various sources of revenue devoted to the Civil List were surrendered to the nation, the possibility of a surplus over the parliamentary minimum was removed, while the Civil List was reduced and gradually relieved of all public charges. The sole public charge on it now is a small pension list, fresh charges on which are limited to £1,200 yearly. Queen Victoria's Civil List was £385,000, that of George V is £470,000. The crown lands in 1909 were bringing in a net income of £530,000 and for many years the nation has benefited largely by the grant of a fixed Civil List, in return for the old hereditary revenues.

Taxation

Early in the history of organised government taxation was recognised as a necessary expedient in times of national peril. The Saxons held the shires responsible for ships wherewith to fight the Northmen, each shire contributing to the national fleet in proportion to the number of hundreds it contained. Danegeld was levied by Ethelred the Unready on the advice of Archbishop

Ship-geld.

Danegeld.

Sigeric at the rate of 2/- from every hide, in order to buy peace from the Northmen. This was in 991 and of course the sea pirates came back for more. The chronicler estimated the first levy at the fabulous sum of £10,000 and says that twenty years later, in 1011, £48,000 was collected. Even the accession of a Danish king brought no relief from the charge, for the geld continued to be levied in order to pay the wages of the Huscarls and these were not disbanded till 1052. William I revived danegeld in 1066–7 when he laid on men a "geld exceeding stiff" and he seems to have collected the tax yearly. In 1083–4 when Swegn of Denmark was planning an invasion of the North, as much as 6/- was taken from the hide. But always many hides throughout the land seem to have been geld-free and few estates were assessed at their full value. William I planned the Domesday survey in order to ascertain exactly how many hides owed geld and how many exemptions had been given, and the inquisitors were to ascertain for the king "si potest plus haberi quam habeatur." 991.

Owing to numerous exceptions and to large allowances for waste land, danegeld yielded little under Henry I and it was collected for the last time in 1162 Its place was taken by a "donum" assessed on the hide and negotiated by the Barons of the Exchequer with the different counties. This proved unsatisfactory and in 1194 it was replaced by "carucage" which was levied on the first unit of assessment of definite extent, the carucate or ploughland of a hundred acres. Carucage was taken at various rates, usually varying between two and five shillings and it was very carefully assessed. In 1198 commissioners were sent into every shire who called before them the stewards of the great lords, the reeve and four men from each vill and two knights from every hundred. These declared the number of carucates in each shire and the tax was levied accordingly. But the plan of taxing an area of land gave way before newer Carucage.

and more lucrative methods and no carucage was levied after 1224.

Auxilium Burgi or Tallage.

At the same time that the danegeld or carucage was taken from the counties, an "auxilium burgi" was levied on the towns. Under Henry II this tax became known as "tallage" and it was taken by the king with increasing regularity and fewer excuses from all towns on the royal demesne. The murmurs of the barons at this independent source of revenue were effectively stifled by the royal permission to take a similar levy from towns on their own lands which had once formed part of the ancient demesne of the Crown: the number of these towns came to be suspiciously large. The article of the barons in 1215 had demanded that tallage should be limited, but this was omitted from Magna Carta and the frequency with which Henry III collected tallage may account for the loyalty of the towns to Earl Simon. Tallages were not even forbidden in 1297, for "De Tallagio non concedendo" was an unauthorised and incorrect version of the Confirmatio Cartarum. But tallage was essentially feudal in nature, and like contemporary levies it finally gave way before the new national taxes: no tallage seems to have been taken after 1332.

Scutage.

"Scutage" or shield money, though accepted instead of military service, is obscure in origin. Those who held their lands by military tenure owed personal service for forty days in the feudal levy, and the owners of the larger estates had to bring a certain number of armed knights with them. Many of these knights the baron would hire in order to make up the full quota due from the estate. The money paid by the lord to the substitute was probably the origin of scutage and at least by the time of Henry I, the king had discovered that it was easier and more profitable to take the shield money from the lord and to secure the soldier himself. On the other hand the ordinary knights, who found military service a great burden, soon claimed to pay scutage as a right

in lieu of rendering service in the field. But the great lay tenants-in-chief could never commute their personal service and if they failed to obey the king's summons were punished by a heavy fine.

John levied scutage for expeditions which he never meant to make, and finally in Magna Carta it was provided that no scutage was to be taken but by the consent of the Commune Concilium. The clause was omitted in the reissue of 1216 but scutage disappeared owing to the increasing difficulty of collection. As late as 1322 Edward II took advantage of his temporary supremacy over the baronage to exact scutage in the shape of fines from those who had been absent from the Bannockburn campaign; in 1385 Richard II remitted it, implying of course that he might take it if he chose. It only became illegal with the abolition of feudal tenures by the Long Parliament.

National replaces class taxation.

Henry II began a new era in the history of taxation when he placed the burden on the whole nation instead of on certain classes of it. National Taxation falls under two heads, direct taxes or those which are demanded from the person who is intended to pay them, and indirect taxes which are collected from one person in "the expectation and intention that he shall indemnify himself at the expense of another." Of the two kinds, direct taxes are far more economical, bringing the maximum return to the Treasury at the minimum expense of collection. On the other hand they have always been unpopular, partly because they are undisguised, partly because the methods of collection are regarded as inquisitorial, while it is impossible nowadays to collect them from the working classes.

Direct taxes: (1) Poll Tax.

The "poll tax" was the easiest of all direct taxes to assess and collect. It was first levied in 1377 at the rate of a groat (fourpence) for every person over the age of sixteen. In 1379 it was taken again, but this time it was graduated, from the Duke of Lancaster who paid ten marks down to the poorest person who paid a groat. It

was repeated in 1380, but the Peasants' Revolt for which it was the pretext, condemned the tax as inexpedient. During the fifteenth century it was occasionally taken on aliens and in 1513 it was revived to pay for the French war. After the Restoration it was taken on three occasions by Charles II, first in order to pay off the New Model Army and later to secure funds for the Dutch wars. William III collected it for his wars in Holland but it was extremely unpopular; it fell on the poor and after 1698 it was not renewed.

(2) Hearth Tax.

Another tax, unpopular for similar reasons, was the "hearth tax." Though this was suggested as a possible tax on several occasions it does not seem to have been levied till 1662, when it was taken at the rate of 2/- for every hearth in the house. The tax involved a house-to-house visitation by the collectors or "chimney-men" and was felt to be very oppressive. It was not collected after 1689.

(3) Tax on movables

The Assize of Arms of 1181 really put the first tax on movable, as well as on landed, property. By the assize every man, according to his means, was to provide himself with weapons to do service in the national fyrd. The character of the arms which each man ought to bear was to be determined by the oaths of knights and lawful men of the neighbourhood.

(4) Fractional taxes.

(a) Saladin Tithe.

The imposition on personal as well as on landed property was repeated in 1188, when after the news of the fall of Jerusalem, Henry obtained the promise of the Saladin Tithe for his expedition to the Holy Land. If any man was suspected of contributing less than he ought, four or six lawful men of the parish were to state on oath how much he ought to contribute. Proceedings were taken accordingly In 1193 a tax of one quarter of each man's revenue or goods was taken by Hubert Walter towards the ransom of King Richard and from this time onwards various fractional taxes were levied on all property. During the thirteenth century they were secured by the personal negotiations of the Barons of the

Exchequer with each county and community. Afterwards they were granted by Parliament and when the clergy, whose liability to pay the national taxes was insisted on by Edward I, separated themselves from the national assembly, they voted money to the king in Convocation whenever supplies were granted by the two Houses.

The fractional taxes were either assessed on the oath of the payer, in which case any suspected under-assessment was rectified by an appeal to the opinion of the country-side, or the assessment itself was made according to the verdict of a local jury. The plan of appealing to the opinion of the locality undoubtedly produced a fairly reliable assessment, for Do-as-you-would-be-done-by and Be-done-by-as-you-did, balanced local prejudices against each other more or less satisfactorily.

In certain cases the burden of the tax was lightened. Those who only possessed the bare necessaries of life were not taxed and every man's means of livelihood was spared, from the tools of the labourer and the cooking utensils of the house-wife, to the horse and armour of the knight. A larger proportion was usually taken from the big towns than from the counties, partly because of their greater wealth, partly because, as royal demesne lands, they were specially bound to minister to the king's necessities.

(b) Tenth-and-fifteenth

The tax gradually became fixed at a tenth from the towns and a fifteenth from the counties, and then, because reassessment became burdensome, it was agreed in 1334 that the assessment made in 1332 should be accepted as permanent and that henceforth every town and every shire should contribute the sum paid in that year. This amounted to about £39,000. But having become incapable of expansion, the sum tended to shrink in amount. Petitions for exemption were frequent. Mablethorpe in Lincolnshire lamented that it was "utterly destroyed and wasted by the overflowing of the waters of the sea" and obtained remission of the tax for two years, and many another district had similar tales to tell. After the Wars of the Roses, as much as £6,000 was remitted, under the

head of waste, for the fact that the tax continued to be levied at the old valuation, on the district from which it had been taken in 1332, made it sensitive to all local decay, while there was no compensation from redistributed wealth or increased national prosperity To equalise the pressure of taxation and make good the deficit in the revenue, a general subsidy on lands and goods was granted. The new tax gradually replaced the older one, and the last tenth-and-fifteenth was collected in 1624.

(c) Subsidy. The first "subsidy" was taken in 1371, on the renewal of the French war, and amounted to £50,000, and from the fourteenth century onwards, subsidies were raised to meet various emergencies. After Henry VIII's reign the subsidy became fixed at the rate of 4/- in the pound on the yearly value of land and 2/8 in the pound on the value of personal property. He who paid on his lands did not pay on his goods, but aliens and recusants had to pay at double the ordinary rate. The subsidy, like the tenth-and-fifteenth, became rigid in amount and incidence. In 1558 it represented about £100,000, but deductions had to be made for waste, and by the end of Elizabeth's reign, a subsidy only represented about £80,000. The tax was very carefully collected, the chancellor on behalf of the Crown appointing "sadd and discrete" persons to supervise the collection, and they nominated assessors and collectors. The former readjusted locally the burden of the tax where poverty and death had caused property to change hands, but they did not attempt any general reassessment, and Raleigh said that not one-hundredth part of the wealth of some of the wealthiest was touched. No subsidy was taken during the Commonwealth and when it was renewed in 1660, the yield was so small that it was not collected after 1663

(d) Monthly Assessments. In its place the "monthly assessments" of the Commonwealth were continued. This was the subsidy in a new and sterner disguise. The amount wanted by government was settled month by month, and apportioned to different districts. Within each district it was assessed on the

actual value of a man's possessions, with none of the former allowances for extenuating circumstances. Any deficiency in the amount due from his district, the official responsible made good by an additional burden on the land, which was the easier to assess. This continual reassessment proved laborious and burdensome; each year the returns were less, and after 1691 monthly assessments were abandoned in favour of a property tax of 4/- in the £ on the value of land and personal property. But the "Property Tax," like its predecessors, became fixed in incidence and amount In 1697 Parliament calculated that every shilling in the pound should yield about half a million and this sum was distributed amongst the counties and towns in the proportion in which it had been paid in 1692. But this stereotyped tax reproduced in an aggravated form all the inequalities of its forerunners. Personal property was always changing hands and moving: landed property was always there and easy to tax, and on landed property was put the burden of making good all deficits due to the migrations of personal property. Thus the Property Tax became in reality a land tax In 1798 Pitt fixed the "Land Tax" at 4/- in the £, chargeable on the lands assessed in 1692 and such of it as has not been redeemed, is still collected, though at a maximum rate of 1/- in the £ on the yearly value of the land. The quota due from each parish is the same as in 1798, less the amount redeemed. Under the land taxes of 1910 when land changes owners (or lessors) a tax is levied on any increase in the capital site value which may have accrued since the last change of owner (or of lessor). A tax of a halfpenny in the £ is levied on the site value of undeveloped land. These taxes are subject to exemptions in the case of agricultural lands and of small properties. A tax is also levied on the "rental value" of all mineral rights.

(e) Property Tax.

(f) Land Taxes.

Effective direct taxation was confronted by the apparently unsurmountable difficulty of efficient and fair and non-inquisitorial assessment. Modern fractional taxes

on property are either assessed as the property, real or personal, passes through official hands, or they are assessed on the personal declaration of the payer. Some taxes are levied as excise licences, others take the form of legacy and succession duties. There is also the "Inhabited House Duty" and the "Income Tax."

(5) House Tax.

The house tax has had rather a chequered existence: it first appeared in 1696, as the immediate successor of the hearth tax. It was closely connected with the "window tax" which sometimes took its place, and which was sometimes levied at the same time. In 1851, the Inhabited House Duty was made a permanent charge, while that on windows was abolished as not hygienic.

(6) Income Tax.

The Income Tax was one of the many financial experiments of the Lancastrians. Both in 1435 and 1450 graduated income taxes were levied. Then the experiment was consigned to oblivion till 1799, when Pitt, in the midst of the Napoleonic Wars and in desperate need of funds, levied a tax of 2/- in the £ on incomes over £200: incomes under £60 paid no tax and those between £60 and £200 had a certain graduated amount untaxed. The tax was not repeated after the Peace of Amiens, but it was revived with the renewal of hostilities. Continued at varying rates until the close of the Napoleonic wars, it was surrendered in 1816 as a tax only proper to war-time. But the Income Tax was too lucrative to be easily forgotten by Chancellors of the Exchequer. By 1842 there had been several years during which national expenditure had exceeded the national income, and no new sources of taxation seemed available. Sir Robert Peel had evoked the sympathy of the House for the Chancellor of the Exchequer, whom he depicted as "seated on an empty chest by the pool of bottomless deficiency fishing for a budget." All turned to Peel himself to remedy the financial situation and while he carried out his tariff reform, he levied an Income Tax to make good any deficit in the revenue till the revival of trade, consequent on the reduction in the customs duties, should once more

value. The customs and the subsidy on wool diminished in amount owing largely to the decreasing exportation of wool when England took to manufacturing cloth : there was also much official dishonesty. To supplement the customs, "impositions" were levied. In 1491 Henry VII put an additional duty on Malmsey wine. Queen Mary put an additional tax on French wines as part of her anti-French policy, and she also compiled a Book of Rates, wherein the taxable value of merchandise was fixed by government instead of by the oath of the merchant. James I laid an imposition on tobacco "a weed of late years brought into the kingdom, with other vanities and superfluities which come from beyond the sea." There was also the celebrated imposition on currants which Bate refused to pay and which the Barons of the Exchequer decided the king was competent to levy.

(4) Impositions.

With the accession of Charles I, Parliament, to reassert its control of finances, proposed to give tunnage and poundage for one year only. The Lords regarded this as an insult to the king and withheld their consent, while Charles continued to levy tunnage, poundage and impositions by royal warrant. The Petition of Right did not touch these taxes, but when in 1629, Charles dismissed Parliament because it would only discuss its own grievances, the Speaker was held in the chair while Holles read a motion declaring those who took and those who paid tunnage and poundage without the consent of Parliament to be betrayers of the liberties of England. Impositions were again ignored. When Parliament met in 1641 it voted tunnage and poundage and the customary impositions, but for a period of two months only The grant was repeated at intervals, until the outbreak of war compelled Charles to seek funds elsewhere and gave to Parliament, as master of the South and East, the revenues from the ports.

At the Restoration the whole system of customs duties was reorganised. The old customs were abolished and aliens and denizens were henceforth to pay the same

Reorganisation of the Customs.

ordues. A tunnage was taken on wines, poundage was levied on merchandise and a special duty was taken on woollen cloth. Prisage and butlerage remained till 1803. But subsequent wars led to the imposition of fresh duties on the articles already taxed and the customs soon became nearly as complicated as they had been prior to 1660.

Walpole's reforms.

Walpole, who was recognised as the greatest financier of his age, removed all export duties on English manufactures, and tried to free such imports as were raw materials for home industries and to reinforce the principle of 1660, that each commodity should only pay one tax. At the same time, to prevent any loss to the revenue and to facilitate its collection, he proposed in 1733 to extend the system of warehousing to wine and tobacco. The

1733

unfortunate application of the word "excise" to the bill gave a handle to Walpole's political enemies and he had to withdraw it, though the warehousing system, under a different name, worked excellently for other commodities.

Walpole's principles of taxation died with him: successive wars added new articles to the tariff: successive Chancellors of the Exchequer sought with increasing difficulty for new sources of taxation, but always with the Mercantile theory inspiring them with the belief that exports should be encouraged and imports restricted, so that the nation might be self-supporting and have a large reserve fund in gold. Towards the end of the

Pitt's reforms.

century Pitt attacked the accumulated confusions of the tariff as an advocate of free trade, and the avowed disciple of Adam Smith. A large number of customs' duties had been repealed and simplified before the French War put an end to all economic reforms and necessitated the raising of existing duties and the reimposition of old taxes. But in 1823 Huskisson as

continued by Huskisson and Robinson.

President of the Board of Trade and Robinson as Chancellor of the Exchequer continued the work begun by Walpole and Pitt. As far as possible all duties levied on raw materials were removed. Their task was complicated by the fact that in many manufactures, such

as the silk industry, the raw material for one branch of the trade was the finished product of another branch.

In 1842 Peel came into office in the midst of commercial depression and national insolvency. This was caused by bad harvests and increased expenses, together with the too rapid reduction of the customs. He relieved immediate want by a sliding scale of duties on corn, so that the duty decreased as the price rose and *vice versâ*. This differed from the existing tax because the duty was not to rise above 20/- when the price fell below 50/- a quarter, thus giving the poorer classes a share in the benefits of a good harvest. Then he attacked the tariff. Twelve hundred articles were paying duty and some of the duties were excessively high. Paper was paying 200 per cent. Tea 100 per cent. Peel removed the duty from 430 articles and reduced it on 320 to not more than 20 per cent. In 1845, 450 more articles were relieved of the customs duties and when a year of bad harvests was followed by a potato famine in Ireland, Peel threw the ports open to foreign corn. The result was that trade revived and the prosperity of the working classes increased, while Consols rose from 89 to par. All export duties vanished and Gladstone continued to reform the tariff on imports, each revision proving a financial success. The various revisions of the tariff represented a reduction of £9,250,000 in revenue, yet in 1855 £300,000 more was coming in from the ports than in 1835, and the national revenue was increasing at the rate of one million yearly. The chief articles now paying port dues are wines and spirits, tea, coffee, cocoa, tobacco, dried fruits, and English copyright books and music.

Peel's Tariff reforms.

Repeal of the Corn Laws.

Gladstone's Tariff reforms.

The Excise, Licences and Stamp Duties

The "excise" was originally a duty on articles of consumption produced in England. It was introduced in 1643 by Pym, who borrowed the idea from Holland, but it was so unpopular that in 1649 necessaries were declared

The Excise.

exempt. At the same time it was levied on certain imports, silks and ribbons and other vanities, which already paid customs. The tax was too profitable to be discontinued at the Restoration and was granted to the Crown as part of the hereditary revenues in return for the surrender of the feudal dues. In addition to the hereditary excise, a temporary excise on the same articles was taken and increasing expenses led to frequent addition to the list of excisable commodities Walpole tried to turn the import duty on wine and tobacco into an excise by collecting a small part of the sum when the goods were landed, warehousing them, and collecting the remainder of the duty when they were taken out for home consumption. If they were taken out for re-exportation the excise was not to be demanded. The change was really one in collection only, the excise officers being responsible for the second instalment of the tax It would have been particularly beneficial to the tobacco-growing colonies, which had to send their goods to England for exportation to their continental customers : but the use of the word "excise" proved fatal to the measure. By the close of the eighteenth century about twenty-seven articles paid excise Between 1825 and 1853 it was taken off salt, leather, candles, soap and other necessaries and it is now levied chiefly on intoxicants.

Licences. The term excise has been extended to include "licences" to carry on certain trades and professions and to enjoy various luxuries These like the stamp duties are really direct taxes Trading licences originated in the Charters given to companies and individuals by the Tudors and Stuarts, conferring on them the monopoly of certain trades, either locally or entirely After the Restoration, the licences became simply yearly permits to carry on trades otherwise illegal, such as auctioneering, hawking, the sale of tobacco and intoxicating drinks. Certain professions cannot be followed without an annual certificate. Licences on luxuries, such as menservants and armorial bearings, horses, carriages and dogs were grouped together by Pitt under

the head of "assessed taxes." The payer was assessed on the maximum establishment of the previous year; a method open to many objections, since it made no allowance for financial catastrophes. In 1869 Gladstone abolished the assessed taxes. Every householder is now required to take out in January licences for his existing establishment, additional licences being taken out for fresh liabilities as they are incurred. Assessed taxes.

The "stamp duties," like the excise, were borrowed from Holland. They are levied, in the form of a stamp, on certain legal transactions and on the inheritance of property. The first stamp act was in 1694, when an official stamp was required on copies of wills, marriage certificates and other documents, the charge varying at first with the length of the document, but subsequently according to the value of the transaction. In 1853 Gladstone changed the *ad valorem* stamp which had been required on receipts since 1784, for a uniform tax of one penny. In 1881, the ordinary postage stamp was allowed for these purposes. The stamp duty on legacies was first imposed by Lord North in 1780 and since 1796 the executors have been responsible for its payment. In 1883 Gladstone added the Succession Duty on landed property. Other duties were added, and in 1894 Sir William Harcourt consolidated these so-called "Death Duties" into a new Estate Duty, consisting of a graduated percentage levied on all property. The percentage taken as succession and legacy duties varies according to the relationship of the legatee. Stamp duties. Legacy Duty. Succession Duty. Estate Duty.

A large portion of the national revenue is permanent; there is, for example, the income from the Post Office and the crown lands. Certain taxes, such as the Land Tax, customs, excise, licences, and stamp duties are not voted yearly: they are only brought up for discussion in the House if any change in the rate is purposed. Such new taxation is voted as is needed to raise the revenue to an amount sufficient to meet the estimated expenditure of the forthcoming year. In the same way certain things,

such as the interest on the National Debt and the salaries of the judges are permanent charges on the revenue : they are not voted yearly, but are met as they recur and are only brought up for discussion if any change is contemplated.

Taxes taken individually often seem insignificant : massed together, they leave the ordinary Englishman a heavily taxed individual A man with £1,000 a year, of which £500 comes from business profits, £200 from landed property and £300 from investments, pays (in 1910) 9d. in the £, on his earned income and 1/2 in the £, on the remainder. In addition he may have to pay a Land Tax of not more than 1/- in the £ on the yearly value of his landed property, which may also be liable to the new land taxes of 1910 If his rent is £80 a year he will have to pay an Inhabited House Duty of £3. For every man-servant that he keeps he has to take out an annual licence which costs him 15/-. For a licence to keep a dog he pays 7/6 ; for one to keep a gun 10/- , for one to use his armorial bearings he pays £1 1s. or if he has them emblazoned on any carriage £2 2s. For the carriage itself he pays a licence duty proportionate to the number of its wheels and the number of horses by which it is drawn : for a motor car the rate is heavier and in proportion to the horse-power of the car. Thus the man with £1,000 a year, who pays a house rent of £80 and who has the modest allowance of one manservant, one dog and one gun and who keeps a carriage and uses his armorial bearings is already paying between £60 and £70 yearly to the Exchequer.

Besides these licences and direct taxes, he has to reckon with a large number of indirect taxes. Every pound of cigars which he smokes has put 7/- into the national purse and every pound of cigarettes 5/8. His beer, wine and spirits are taxed heavily, while in these days of supposed free food, sugar, treacle, currants and raisins are taxed, so too are figs and plums, dried and preserved fruits, foreign sweets, jams and marmalades. Cocoa and coffee pay an import duty of 2d. a pound and tea pays 5d.

often has to pay a licence in connection with his profession and, in any case, many of his business transactions are taxed, for they are illegal unless they are stamped. Add to these direct and indirect taxes, the local rates, which are often excessively heavy and the commuted tithe rent charge, which the owner of landed property pays, and the burden of taxation is a very heavy one.

The Collection of the Revenue

The Revenues of the Crown were originally collected by the sheriff, except where communities or individual barons possessed the privilege of paying dues and taxes direct into the Exchequer. After the Inquest of Sheriffs in 1170, the sheriffs fell into disrepute. New officials did much of their military, judicial and financial work and with the beginning of national taxation, officers were appointed to collect the new taxes. At first knights were specially elected, and, later, collectors were chosen by the local members of Parliament or, after Mary's reign, by the Lords Lieutenant. From the time of Edward I the customs were collected by the "custumers." The collection of the revenues is now in the hands of four departments—The Commissioners of Customs, of Inland Revenue, of Woods and Forests, and the Post Office. All money collected is paid into the Exchequer account at the Banks of England and Ireland.

Government Loans and the National Debt

Certain irregular sources of revenue were always available to an impecunious king. The Jews were the king's earliest creditors and from them he could beg, borrow and steal unopposed, for the Jews were absolutely at the king's mercy. Bracton said "the Jew can have nothing that is his own, for whatever he acquires, he acquires not for himself but for the king." The mediæval hatred of usury and the financial gains which the Jews derived

The Jews in England.

from the misfortunes of their Christian neighbours, resulted in a hostility which occasionally found vent, in spite of royal protection, and in 1290 Edward I yielded to popular clamour and banished the Jews from England. They did not return till the time of Oliver Cromwell.

Foreign merchants as royal bankers.

Their place, as royal bankers, was taken by the merchants of Cahors, Lombardy, Florence and Flanders and when the development of the English cloth industry diminished the number of foreign merchants who came for English wool, the king turned to wealthy communities in his own land. In 1382 the Commons complained that "utter destruction" was the fate of all who ministered to the king's necessities, for loans differed only in name from "free gifts" and "benevolences."

Benevolences, forced loans and free gifts.

Benevolences were first collected by Edward IV, who used "such gentle fashion" towards his subjects that "they could not otherwise doe but frankhe and freelie yield him a reasonable summe." Richard III prohibited benevolences, but they were taken occasionally by the Tudors and frequently by the Stuarts. They were prohibited by the Petition of Right, after the forced loan of 1626, though this differed from other loans and gifts only in that it was resisted The Great Rebellion finally put an end to all free gifts and forced loans, which were really unparliamentary taxation of the individual.

After the Restoration Charles II adopted the Commonwealth expedient of raising large sums from the Goldsmiths on the security of future revenue. In 1672 Charles ordered the Exchequer to suspend the repayment of the Goldsmiths' loans. This "stop of the Exchequer" was a great blow to the credit of the Crown, and it became increasingly difficult to secure loans of ready money to meet emergencies. In 1693, when the estimated expenditure for the year was one million in excess of the revenue, Montague borrowed the necessary funds on the credit of the nation. Paterson's scheme for a national Bank was adopted in 1694 and the Bank took over the Government loan of the previous year, paying 8 per cent.

1672.

The Bank of England.

interest, but making no promise to repay the principal. This was the nucleus of the National Debt. In 1816 it stood at nine hundred millions, in 1909 it was still as high as seven hundred and sixty-two millions, in spite of many reductions. The National Debt.

Successive efforts have been made to pay off the debt, for it makes posterity pay for the extravagances of its forefathers, often out of all proportion to the benefits derived from them. Walpole started a sinking fund in 1717 but the money was used to meet fresh expenses. Pitt's scheme did provide that the money set aside to cancel the debt should be used for that purpose only, but he borrowed money at a high rate of interest in order to cancel a debt paying interest at a lower rate. Consequently, in 1823 the financial reformers took the matter in hand, insisting that the only true sinking fund was surplus revenue. Other methods of reducing the debt exist, such as the transfer of stock into terminable annuities, whereby a higher rate of interest is paid for a fixed period, at the end of which the principal lapses to the Government. The burden of the debt has been lightened by reducing the interest paid on it. Originally 8 per cent. was paid. This was reduced to 6 per cent. by Anne. Owing to successive reductions the interest now stands at $2\frac{1}{2}$ per cent., but in spite of this and of an increased revenue, the interest on the National Debt still absorbs a quarter of the national income. Sinking funds. Reduction of Interest

The Exchequer

By the twelfth century the whole financial organisation of the country was in the hands of the Exchequer. The origin of this court is obscure—there is no foundation for the tradition that the Exchequer was brought from Normandy to England. In the time of the Saxons all treasure was paid into the king's "horde," kept in the royal bedchamber, in the charge of the king's "Hordere." No record exists of any method of auditing the sheriff's accounts, though such a system probably existed in some embryo form. Under the Normans whatever business Origin of the Exchequer.

was brought before the king's court, the undifferentiated "curia," was naturally referred to the official responsible—judicial matters to the Justiciar, military matters to the Constable and questions of finance to the Treasurer and Chamberlain, and when the matter was particularly lengthy, a special session of the "curia" might be called to deal with it. It must have been in consequence of this that the curia first began to split into specialising committees though at first the different courts contained the same personnel, so that they were but "phases of the general governing body of the realm" Each of these courts was a curia regis, and the Exchequer which took definite shape under Henry I, during the justiciarship of Roger of Salisbury, was Curia Regis ad Scaccarium. The grand-nephew of Bishop Roger, Richard Fitz-Nigel, Bishop of London, writing 1176–8, gives a detailed description of the organisation of the Exchequer Court in his "Dialogus de Scaccario" which on the whole seems extraordinarily accurate.

The Upper and Lower Exchequer.

The Exchequer was divided into two courts, the Upper Exchequer or Exchequer of Audit and the Lower Exchequer or Exchequer of Receipt. Attached to the latter at Westminster was a Treasury, where the Royal treasure and the rolls were kept during the Sessions of the Exchequer, after which they were removed to Winchester. The court derived its name from the black cloth with white lines which covered the table in the Upper Exchequer and which was used to facilitate the arithmetic of the calculator, who placed a counter to represent each unit paid, in the corresponding column on the table.

The Staff of the Exchequer.

The staff of the Exchequer consisted, as in other phases of the curia, of the royal household officials with their staffs and of other persons specially nominated. In their financial capacity they were known as the Barons of the Exchequer. Until the Justiciar and Chancellor withdrew from the court, the Treasurer did not preside, but he was responsible for all financial transactions in both the upper and lower courts. The two Chamberlains of the

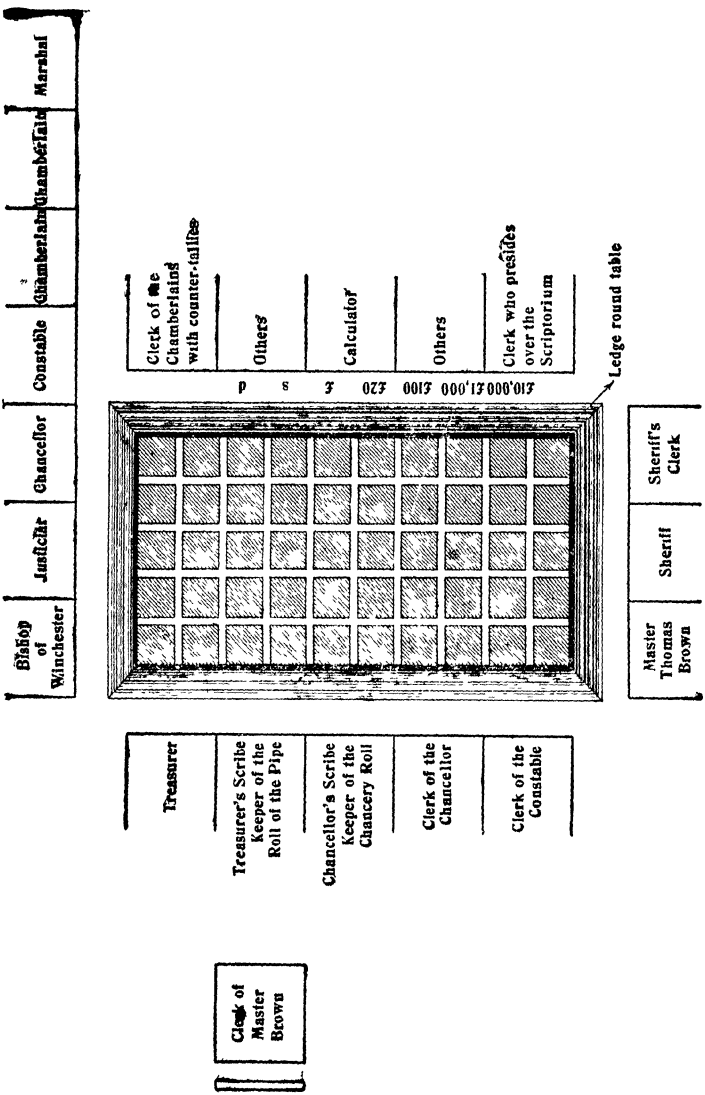
Exchequer shared the responsibility of the Treasurer "serving under one and the same mantle of honour and loss." The Constable and the Marshal were particularly charged with the payment of all soldiers and the keepers of the Royal hawks and hounds: the Marshal was also responsible for the prison of the Exchequer. The Bishop of Winchester and Master Thomas Brown, the king's Almoner, sat in the court as special representatives of Henry II but they had no successors, unless they were the forerunners of the king's Remembrancer. The Chancellor's clerk and the Chancellor's scribe later became respectively the Chancellor of the Exchequer and the Comptroller of the Pipe.

The staff of the Lower Exchequer consisted chiefly of the deputies of the Treasurer and Chamberlains. The clerk who represented the Treasurer kept his accounts in writing, the two knights who represented the Chamberlains kept their record by means of tallies. The money was counted by four Tellers. The Pesour and Melter who were in charge of the money to be assayed, seem to have belonged to either court.

Sessions of the Exchequer

Two sessions of the Court of Exchequer were held yearly. At Easter the sheriff paid in as much as he had collected and could spare. The remainder was paid at Michaelmas. Payments were acknowledged by a "tally" or notched piece of wood, which was split down the centre, one half being kept by the sheriff, the other by the Exchequer; the notches corresponded to the sum received. In the Upper Exchequer, the sheriff's accounts were audited. The amount he had paid into the Exchequer of Receipt was recorded on his tally, the amount which he owed was recorded in the roll of the farm of the shires, Domesday Book and the Treasurer's rolls for previous years. From it was deducted the money paid out by the sheriff on the king's behalf, either as alms, or for the upkeep of the royal castles and manors, or for the sustenance of the king's court. When the sum had been worked out

Diagram of the Exchequer of Account.



by the help of the chequered cloth and the counters, any excess was credited to the sheriff, any deficit was debited to him, or he was declared quit. Later, when other collectors supplemented the work of the sheriff, all money still had to be paid into the Exchequer, though complaints show that the rule was not always kept, and that much went direct to the king. All payments out of the Exchequer were recorded on the Pells of Issue and the royal order under the Great or Privy seal was required to authorise them.

Reorganisation of the Exchequer (1) in the sixteenth century.

This financial machinery remained untouched till the sixteenth century. Then the Exchequer was reorganised. Four Tellers of the Exchequer were appointed who received and paid out all moneys. They were responsible to the Auditor of Receipt, formerly the Treasurer's clerk, who sanctioned all issues from the Exchequer, while the clerk of the Pells kept a record of all outgoings and incomings. Queen Elizabeth appointed Auditors of Imprest, who did the auditing of accounts previously done by the Barons of the Exchequer. The Chamberlains became honorary officials responsible only for the making and keeping of the tallies, while by the end of Elizabeth's reign the Treasurer withdrew from most Exchequer work and authorised the issue of money from the Exchequer by warrant, on receipt of the royal command under the Privy Seal. During the seventeenth century it became necessary for the Auditor of Receipt to authorise the Treasury warrants before the Tellers could unlock the Exchequer chest, where the revenue was still deposited. The old double Exchequer vanished. The Lower Court remained as the Exchequer and was quite distinct from the Treasury and the Auditor of Receipt and Auditors of Imprest who carried on the work of the Exchequer of Account. The old tally system was continued until 1826, despite the amused contempt with which it was received in Scotland at the time of the Union.[1]

(2) Seventeenth century changes.

[1] In 1833 when the Star Chamber, in which the tallies were stored, was needed for other purposes, they were used as fuel, the flues became overheated and the old Houses of Parliament perished in the conflagration.

By the latter part of the eighteenth century the majority of the Exchequer officials exercised their offices by deputy. At the same time they were in receipt of enormous salaries. The Paymasters of the different services kept the money voted for their services in their own hands and gave no account of their expenditure, consequently in 1785, five Commissioners of Audit took over the work of the Auditors of Imprest and efforts were made to limit the salaries of Exchequer officials.

(3) In 1834. In 1834 the whole department was reorganised. The Exchequer sinecures were abolished. In place of the Auditor of Receipt and the Clerk of the Pells, a Comptroller-General was appointed. All money hitherto paid direct to the Paymaster of the Forces and the Treasurer of the Navy and of the Ordnance was to be paid into the Exchequer Account at the Banks of England and Ireland, which thus became the Exchequer of Receipt. In 1836 a Paymaster-General was appointed and the paymasters and treasurers of the various services were abolished. Specified sums are now transferred from the consolidated fund of the whole revenue, an innovation of 1787, to the account of the Paymaster General for the use of the various services. In 1866 the offices of the five Commissioners of Audit and the Comptroller-General were merged in that of the Comptroller and Auditor General, a non-political official, whose salary is a permanent charge on the consolidated fund, and who can only be removed by the king on the petition of both Houses of Parliament. He is not only responsible that national money is not issued unless it has been voted by Parliament, but he is also responsible that the money is spent on the services to which it has been appropriated. Thus he controls issues, and audits accounts, as did formerly the Barons of the Exchequer, but with this difference: the Barons did it on behalf of the king, the Comptroller and Auditor General does it on behalf of Parliament.

The Comptroller and Auditor General.

CHAPTER VII

THE MAKING OF PARLIAMENT

Witenagemot and Commune Concilium

GOVERNMENT by discussion is at least as old as the earliest records of the English tribes. Amongst those tribes which Tacitus describes in the "Germania," matters of importance were decided by the whole body of freemen. Small affairs were arranged by the chiefs, who also prepared the business which was to be submitted to the larger assembly.

The Great Council in the "Germania."

How much of this political organisation survived the migration and the altered conditions of life which must have resulted from it, is largely a matter of conjecture. Mr. Freeman maintains that the Witenagemot of the Saxons was the direct successor of the full council of the folk which Tacitus describes, and that, in theory at least, every freeman had the right to attend and take part in the proceedings. Dr. Stubbs believes that the migration, together with the development of kingship, emphasised the aristocratic element in the constitutions of the tribes. The committee of chiefs developed into the Witenagemot, which co-operated with the king, in all important matters, while the whole body of freemen probably retained little political power. At the same time, Dr. Stubbs admits that it is by no means unlikely that in many of the small kingdoms a folkmoot or assembly of freemen existed, as well as the Witan, and that as each of these kingdoms was subjugated by its stronger neighbour, its Witan became merged in the

Origin and composition of the Witenagemot.

Witan of the conqueror, while the folkmoot lived on as the court of the shire and dealt with matters of local interest.

The actual composition of the Witan of the united kingdoms is ill-defined. The number which attended its gatherings was usually comparatively small. Their most important meetings were held at the three great festivals of Easter, Whitsuntide, and Christmas. Upon grand occasions such as the promulgation of laws, and the election of kings, the people of the neighbourhood probably came in crowds out of simple curiosity, to see and hear the wise men. But as Dr. Stubbs points out, they took no legal share in the proceedings, though occasionally, maybe, they gave vent to spontaneous manifestations of approval or disagreement. The presence of an unruly crowd of local villagers is not sufficient authority for seeing in these gatherings a mass meeting of the folk. Mr. Freeman acknowledges that by the eleventh century the Witan was an aristocratic body. Dr. Stubbs shows that though the older and more authoritative part was made up of the national officials such as ealdormen, bishops, and later abbots, yet as, the feudal principle developed, the number of king's thegns was augmented. The king could at any time command a majority by increasing the number of his dependents.

Its powers.

The competence of the Witan is equally difficult to define. Mr. Freeman holds that the powers of the old Saxon council of the wise surpassed those exercised by a modern Parliament, for the king could do nothing without the consent of the Witan by whom he was elected and by whom he could be deposed. Bishop Stubbs substantially modifies this view. He acknowledges that in all national business the Witan had the right to advise, but he points out that not until the reign of Henry II have we any historical data for deliberations in which the king did not get his own way. The practical absolutism of a strong king is acknowledged by Mr. Freeman and it seems as

dangerous to speculate on the theoretic weight of the Witan's advice, as on its theoretic composition. It is easy to magnify the Witan's right to advise into a right to determine. The most original act of the Witan was the election of the king, and here its choice was limited to the line of Cerdic Moreover, in electing the candidate best fitted for the office, it prescribed the limits to its own authority: the real powers of the Witan varied inversely with the strength of the monarch

Laws were promulgated with the "counsel and consent" of the Witenagemot, but the laws thus enacted were mainly recapitulations of existing customs and not original decrees All grants of "bookland" were witnessed by it, but, at least in the later day of Saxon rule, it can only be said to have assented to the grants because it never objected to them National officials, lay and ecclesiastical, were elected in the Witenagemot, which was also the supreme judicial tribunal of the kingdom. Shipgeld and Danegeld were levied with its counsel and consent and it doubtless discussed matters of national importance, for every strong king could afford to ask counsel of his wise men. In so doing he pledged them to support him and divided the responsibility in case of failure. Ethelred II failed to save his kingdom from the Danes because he was "unready" or devoid of counsel. Kings such as Alfred and Cnut frequently gathered their wise men around them, but there is little doubt that the Witan was only expected to confirm the determination of the king, who alone had the right to initiate.

The Commune Concilium.

The Norman "concilium," its ancestry and its composition, has been, like the Saxon Witan, the cause of much discussion. Mr. Freeman believes that the Conqueror continued the old assemblies of wise men, and that still, upon great occasions, such a vast concourse of the folk was gathered together, that, as in 1086 at Salisbury, vast plains were needed to hold them. The definition of the common council of the realm in Magna

Carta was, according to this view a disfranchisement of all but the king's tenants-in-chief.

Dr. Stubbs also prolongs the Witan beyond the Conquest, dovetailing a feudal council into the Saxon assembly. He holds that the king still gathered together the wise men of his kingdom, but to the old qualification of official wisdom was added that of tenure-in-chief. As a result of this double qualification Dr. Stubbs maintains that the Norman kings discriminated amongst their tenants-in-chief, calling only the great landowners to their Commune Concilium, which the bishops still attended by virtue of their office. Not until the days of Henry II will Dr. Stubbs allow that this council had so far extended its ranks as to include, on extraordinary occasions, all the tenants-in-chief, and even then he maintains that the bishops still linked the assembly with the Witan of pre-conquest times.

The theories of both Mr. Freeman and Dr. Stubbs have been considerably criticised by Mr. Round, who holds that the continuity asserted by them is as misleading as a veritable will o' the wisp. The use of the word Witan after the Conquest, by the compiler of the old Saxon Chronicle has no hidden significance. Possibly the writer knew no other name for the great council of the kingdom, possibly he clung to the old name from habit or patriotism. The vast assembly of 1086 seems to have consisted not of all landowners, but of all tenants-in-chief and their knights. It was called together solely that those there should swear fealty to the king, so that his claim upon the good faith of all military tenants, whose so ever men they were, should take precedence of that of their immediate lords. William I was determined that no man should plead his duty to his lord as an excuse for warring against his king.

(1) Its feudal character.

The circumstances of the Conquest made universal, though they did not introduce, the feudal principle of basing all social and political relations upon land tenure. The king as chief feudal lord would prefer to consult

his vassals and thus secure their co-operation. At the same time, it was contrary to all feudal principles that he should omit to do so. Mr. Round points out that the bishops despite their learning were unquestionably tenants-in-chief and that wisdom apart from tenure seems to have met with few invitations to the Norman concilium.

Undoubtedly tenure-in-chief was the one necessary qualification for the Commune Concilium, while official wisdom was the essential characteristic of the Saxon Witan. Mr. Round argues that the difference in qualification establishes beyond doubt, that the Norman council was not evolved from the Saxon assembly, but was an innovation for which the Conquest was responsible, though in many respects it carried on the traditions of its predecessor.

(2) Its composition

Not till Magna Carta was the composition of the "Commune Concilium Regni" officially defined. According to the great charter it consisted of the Archbishops, bishops, abbots, earls and greater barons and all tenants-in-chief of the king. The greater barons, the "majores," received a personal summons to the national council; the "minores," "all those who hold of us in chief," were called collectively by a writ addressed to the sheriff of each county. The special and collective summons emphasised a distinction which was a very old one. The greater vassals had always led their own tenants to the feudal levy, and had paid their dues and taxes direct into the Exchequer. The lesser tenants-in-chief mustered under the banner of the sheriff, and paid their dues and taxes through him. The line which originally divided the one class from the other, is indistinguishable now; possibly it was drawn somewhat capriciously; it was the different writs of summons which definitely separated the "majores" from the "minores"; henceforth all those who received a special summons to the Commune Concilium were greater barons, no matter whether they held sway over one acre or a thousand.

Probably the great council of the Normans had been

from the first, a feudal court, consisting theoretically of all tenants-in-chief. To it came the great men of the kingdom. But the smaller tenants of the Crown found the privilege of giving counsel burdensome; the homesteads fared ill in their absence; the journey to the king's court was long and difficult and when they got there, they found that their voices carried little weight, so they quietly stopped away. It was far more convenient for them, and no one seemed to object to their doing so.

(3) Its powers.

The Commune Concilium met whenever the king liked to call it together, but on the three great Church festivals the first two Norman kings "wore their crown in public" at Winchester and Gloucester and Westminster. On these occasions it seems to have devoted itself almost entirely to judicial work, and since, like all courts at which the king presided, it was "curia regis" the title is not unfrequently applied to these assemblies of magnates, though it more properly belongs to the small and official curia which was in constant attendance on the king.

In matters of taxation and legislation the powers of the Commune Concilium, like those of the Witenagemot, were probably such as the king chose to allow. National taxation was still in its infancy and legislation was rare. The king unhesitatingly asked advice of the Commune Concilium when he wanted it, and such opposition as he met with was individual, rather than collective, and feudal, rather than constitutional, while usually it had to be faced, not in the council chamber, but on the battlefield.

Constitutional Experiments of the Thirteenth Century

Growing activity of the Commune Concilium.

The beginning of the thirteenth century completed a great change which had gradually been taking place in the character of the baronage. Normandy was lost to the English crown in 1204 and the loss, by compelling the barons to choose between their English and their Norman

estates, gave to England a baronage whose sympathies were no longer half Norman. From this time, their interests were one with those of Church and people, and the Commune Concilium became a real factor in the Constitution. The barons no longer played each for his own hand, but united in opposition to royal tyranny. The Great Charter, which was the first act of a united baronage, paved the way for the constitutional development of the century, not so much by the liberties which it claimed, for of the powers of the Commune Concilium it only asserted that of sanctioning taxation and in many respects its notions were behind the times, but by the unity of opposition which it represented.

Once awakened to the sense of its own power, the Commune Concilium began to assert its right to share the work of government. Repeatedly it claimed the right to nominate or to confirm the nomination of the three great executive officers, justiciar, chancellor, and treasurer. In 1233 the barons threatened to call together the Commune Concilium and to elect a new king unless Henry dismissed his alien councillors. More than once they refused to assent to money grants and stipulated that redress of grievances was the necessary preliminary to an aid. Schemes of reform were brought forward, those of 1258 and 1264 were only two amongst many others.

The weak point in the position of the barons as constitutional leaders was the spirit of monopoly which possessed them. The king was not slow to see where they were most vulnerable and he turned for support to the nation through the neglected "minores" and the shire courts. The more disinterested and statesmanlike of the barons, grasping the significance of the royal policy, appealed to the same class that Henry had called to his aid. The nation, once given a share in political life, could no longer be excluded and Edward I completed the work of Simon de Montfort.

The growth of Representation and Election.

No new machinery was necessary to secure a great council which should include representatives of the

different localities. In a certain sense, the courts of hundred and shire were representative. Domesday Book was based on information gathered from representatives of the hundreds and vills in each shire. Henry II used local juries for financial and judicial purposes, who declared the opinion of the whole countryside. Richard I's ministers enacted that these declarers of local opinion should be elected by the county court instead of being nominated by the sheriff. John, seeking the support of the towns, tried to concentrate these elected representa-
1213. tives in a central assembly. In 1213 the counties were summoned to send four "discreet" men to confer with the king at Oxford upon the business of the kingdom. But there is no record that the council ever met and the Commune Concilium of Magna Carta was a purely feudal assembly. The precedent of 1213 seemed forgotten.
1254. Then in 1254 Queen Eleanor and Richard of Cornwall, who were regents during Henry III's absence in Gascony, summoned to Westminster two knights from each county and representatives of the clergy of each diocese, there to state the amount of aid which their electors were prepared to grant to the king.

For a time it seemed as though the experiment of 1254 was to bear no fruit. The baronial scheme of reform
The Provisions of Oxford. which was embodied in the Provisions of Oxford in 1258 was curiously oligarchical in view of the more liberal opinions which were in the air, and which the barons seem to have entertained until they had the chance of putting them into practice. The new constitution which they drew up included a committee of twenty-four, which was to appoint the great officers of state and redress all grievances, and a council of fifteen which was to be in continual attendance on the king. A third committee of twelve, chosen by the barons and called a Parliament, was to meet the council of fifteen three times a year and discuss the common business of the community. Another body of twenty-four was to negotiate financial aids.

The scheme was ill-conceived, functions were not

value of their share in the life of the nation was being taken at their own estimation. But from 1314 to 1340 letters were addressed to the two Archbishops at the calling of each Parliament, urging them to compel the attendance of the clerical representatives. The letters were ineffectual, and since supplies were voted by the clergy separately in Convocation as regularly as by the Commons in Parliament, and to a satisfactory amount, the Crown let them have their own way.

The clergy continued to vote supplies separately till 1663, when, by an informal agreement between Archbishop Sheldon and Lord Chancellor Clarendon the practice was abandoned. The clergy became liable henceforth to the ordinary taxes, while as freeholders of their glebe lands they were entitled to vote for the knights of the shire. The "præmunientes" clause, ordering the election of proctors of the cathedral and diocesan clergy, is still attached to the writs of the bishops, yet by the decision of 1801 in the case of Horne Tooke, the clergy of the Established Church are excluded from Parliament.

While the clergy withdrew altogether from the national assembly, the relative positions of barons, knights and burgesses adjusted themselves. The gulf between the "majores" and the "minores" had always been rather a wide one. In financial, judicial and military matters, the one dealt direct with the central authority, while the other was under the control of the sheriff. The former had obeyed the individual summons to the Commune Concilium, the latter had interpreted the general summons addressed to the minor tenants-in-chief as permission to stop away. At first it seemed as if the knights of the shire would form a fourth estate; but they represented the freeholders of the county court as well as the residue of the tenants-in-chief. Perhaps the strongest factor in the mutual approximation of knights and burgesses was the fact that they were both representatives of classes particularly affected by taxation;

(2) Separation of the minores from the majores.

(3) Knights and burgesses coalesce.

the burgesses because of their readily taxed wealth, the freeholders because of their limited means. Locally, their interests often overlapped. Knights and burgesses had long worked together in the national courts. They were returned to Parliament through the same assembly. The younger sons of the knights joined in trade and intermarried with the families of the burgesses, while from the time of Edward I freemen and merchants who bought land were compelled to take up the burdens and privileges of knighthood if they possessed land of the annual value of £20. Thus the line separating knights and burgesses was already blurred and though the social code of feudalism fixed a wide gulf between the tradesman and the knight, the two classes amalgamated in the House of Commons.

(4) Formation of two Houses.

The date when the Lords separated from the Commons is uncertain It is equally uncertain whether they ever sat together at all The fact that barons, clergy, knights and burgesses voted supplies in different proportions in 1297 suggests four sessions as possible. The first recorded session of the Commons apart from the Lords temporal and spiritual was in 1332. In 1341 the "grantz" and the Commons sat in two separate chambers and after 1352 the Chapter House at Westminster was regarded as the special meeting place of the Lower House, while the Lords sat in the White Chamber or the Chamber of Parliament.

CHAPTER VIII

THE HOUSE OF LORDS

Development of the Commune Concilium into the House of Lords.

THE creation of a national Parliament did not immediately transform the Commune Concilium into the House of Lords. Though the one assembly grew out of the other, they differed not only in characteristics, but in powers The transition from the Commune Concilium Regni to the "other House" was the work of centuries and was only effected after many a pitched battle between Lords and Commons.

The minority of Henry III and the constitutional experiments of his later years had left the feudal council more conscious of its own identity and its own dignity, and with a firmer grip on the regulation of government than ever before. The magnates as well as the clergy had attained a real corporate existence, each in their own assemblies, when Edward I called on them to become a part of the national council. The lower clergy refused to imperil their class privileges and held aloof. It was not possible for the magnates to do so, and gradually they admitted the Commons to a real share in taxation, in legislation and eventually in deliberation. Ultimately the relations between the Lords and the Commons were readjusted so that the popular assembly secured the monopoly of taxation and in other matters a preponderating voice. But the change was a very slow one, and as the Commons gradually forced their way into the citadel of the old Commune Concilium they had to fight for every inch of ground they gained.

Certain of the powers of the old Commune Concilium were handed on unchallenged to the House of Lords. Until the time of the Lancastrians, a session of the Magnum Concilium, or Council of Magnates, was often a preliminary to a meeting of Parliament and the Commons were only called in when the question of supplies arose. In theory, it is still the great council of the realm and it continued to sit in this capacity on rare occasions as late as the seventeenth century; the last occasion was when James called together the Lords, that they might advise him as to the measures necessary for the defence of his kingdom against William of Orange. Moreover the House of Lords still monopolises those judicial powers it has inherited from the days when as Commune Concilium, it was without partner or rival.

Qualifications for Membership

During the years which saw the gradual partition of powers between the Lords and the Commons, another change took place. The Commune Concilium was transformed into the House of Lords by the gradual extinction of the feudal qualifications and the triumph of the hereditary principle. Membership of the Commune Concilium from the first, was restricted to the Tenants-in-chief. After Magna Carta the qualification for membership became, not tenure, but the reception of a writ of summons. But the composition of the Commune Concilium was still largely biased by considerations connected with tenure, nor were the writs of summons an innovation. The practice of issuing them for the great council was at least as old as the days of Becket. The Archbishop was much aggrieved in 1164 because he had received no special call to the Council of Northampton, but had been summoned through the sheriff. Mr. Round suggests that the stress laid in Magna Carta on the method of calling together the Commune Concilium may have been due to efforts on the part of John to withhold the writ from

Membership of the Commune Concilium.

Tenure and writ.

unfriendly barons. The king could thus have controlled the personnel of the great council and undermined its feudal character. In the eleventh or twelfth centuries such an expedient might have passed unquestioned. By the beginning of the thirteenth century the greater barons looked upon attendance at the king's court, not as a burden, but as a right. John's misgovernment and his contempt for feudal privileges made that right exceptionally precious for the time being, more especially as the absent were bound by the decisions of those present. Consequently, while acknowledging that they could not attend the Commune Concilium without a writ of summons, the barons insisted upon their own right to receive one. The same attitude on the part of the barons can be traced through the following reign: on more than one occasion the Commune Concilium refused to act because all those entitled to a writ had not been summoned.

Earl Simon deliberately excluded his baronial antagonists from the Parliament of 1265 by withholding the writ of summons from all save five earls and eighteen barons. Edward I completed the change from membership based on tenure to membership based on writ, by summoning only a certain number of the barons to Parliament and by calling others who did not hold their lands by baronial tenure. Yet the idea that tenure was associated with the right to be a lord of Parliament clung about the House of Lords, as the qualification of official wisdom, which was proper to the Witenagemot, clung about the Commune Concilium. Britton, the great lawyer of Edward I's reign, said that the reason for granting baronies was that the grantees might be liable to a summons to Parliament. Moreover, the idea that summons and tenure were inseparable, gave rise to the custom of granting a special writ to the husband of an heiress, even if he were a commoner, the husband discharging the duty of "suit of court," as well as all other services by which the land was held. Sir John Oldcastle sat in the House of Lords as Lord Cobham, in right of his wife, and

Membership of the House of Lords.
(1) The change from tenure to writ.

Richard Neville was Earl of Salisbury and his son, the "king maker," was Earl of Warwick not by inheritance, but by marriage. Occasionally too, the claim to be a lord of Parliament was propounded by those who succeeded by purchase and not by inheritance to estates whose original owners had received a special writ. The vitality of the idea that the right to a writ was associated with the possession of lands is shown by the fact that it even survived the abolition of feudal tenures at the Restoration. It was not till 1861, in the Lords' judgment in the case of the Berkeley peerage, that it was definitely laid down that no person could claim to be a lord of Parliament by reason of tenure.

The substitution of writ for tenure was a very definite gain to the Crown. But the royal claim to decide which of the great men of the realm should be summoned to the national council had hardly been recognised when it was undermined by a rival theory, protective of baronial and not royal privileges. The option of the first issue of a special writ remained with the Crown. But it was gradually established that a summons, once issued and once obeyed, created an hereditary claim to the writ: this was confirmed in 1677 by the Freshville case. Dr. Stubbs fixes the year 1295 as the point of time from which "the regularity of the baronial summons is held to involve the creation of an hereditary dignity." This is perhaps rather too definite, but a statute of 1382 which asserted that a writ of summons conferred a right to be summoned upon the heirs of the recipient, if the original writ had been obeyed, was probably a declaration of the custom as it then was. From the outset no king would have dared deny the writ to the greatest of the majores; but the varying number of peers summoned to the earlier Parliaments shows that the royal right of discrimination was exercised freely, within judicious limits.

(2) Letters Patent.

Possibly the desire to limit the right to a summons to the direct line suggested the creation of new members of the peerage by letters patent, that is by an open document

to which the Great Seal is affixed. In 1387 John de Beauchamp Baron of Kidderminster was created an hereditary Lord of Parliament "not in virtue of his lands but of his dignity." By the time of the Tudors, this new method of creating parliamentary lords had entirely superseded creation by special writ, though the latter method remained lawful. At the same time, the writ of summons has still to be issued and obeyed : the issue of letters patent alone did not entitle the recipient to a seat in the House. The hereditary members of the House of Lords owe their seats to the double qualification of letters patent and special summons

(3) Representative Peers.

The unions of the Parliaments of Scotland and Ireland with the English Parliament introduced a representative element into the hereditary chamber. The Scottish peers are summoned to Holyrood by a royal proclamation, read from the Market Cross at Edinburgh and in the county towns of Scotland ; there they elect sixteen of their number to represent them in Parliament. The Irish peers elect twenty-eight representatives, by means of voting papers, for which they apply, and which they fill up in the presence of specified officials. The Irish peers hold their seats for life, the Scottish peers are elected for one Parliament only. No provision was made in the Act of Union with Scotland for the retention or increase of the existing number of Scottish peers. With regard to Ireland, one new peerage may be created for every three which are extinguished until the total number falls to a hundred. Then, for every title which becomes extinct, a new one can be created.

(4) The Lords Spiritual.

The Lords Spiritual were, until the Reformation, by far the most important element in the Upper House. Those abbots and priors were summoned to the Commune Concilium who were tenants by barony of the Crown and it seems superfluous to insist that the bishops were summoned in virtue of their office, in view of the fact that they too were endowed with baronies for which they did homage and owed service to the king.

Moreover, in the Constitution of Clarendon it was asserted that bishops held their possessions of the king "sicut baroniam" and in the Merciless Parliament of 1388 the Archbishop of Canterbury asserted the right of all prelates whatsoever, holding of the king by barony, to be present in person at all the king's Parliaments, as peers of the realm.

Why the spiritual lords did not secure the privileges of peerage.

As long as the spiritual lords made up the majority of the House it was impossible for the hereditary element to claim preponderating powers or to monopolise the privileges of peerage. But from the first the position of the spiritual differed from that of the temporal lords. They did not necessarily hold their lands for life, for they might be translated to another see. They could not transmit their lands to their heirs. To be attainted because of treason or felony did not affect their successors. Under no circumstances could they claim to sit in Parliament by hereditary right. The Canons of the Church forbade them to remain in Parliament if the question before the House touched life or limb. Moreover, they deliberately preferred their privileges as churchmen, to their privileges as lords of Parliament. They made no claim to trial by their peers because the House of Lords, in common with every other temporal court, was not competent to dispense justice to churchmen. Consequently when the Court of the Lord High Steward was instituted, it was a Court in which they could not sit, but in which all true peers of the realm could give verdict and judgment.

The result was inevitable. As soon as the Reformation thinned the ranks and lowered the prestige of the lords spiritual, the lords temporal arrogated to themselves the status and privileges of peerage and the bishops were forced to submit to a less exalted position. Already, in the time of Henry VII, the bishops were declared to sit "in virtue of the ancient baronies annexed to their dignities" and not because of their nobility. The old qualification of the Commune Concilium clung to them

after the barons had secured an hereditary right to sit in the House of Lords. In the time of Henry VIII it was determined that Parliament might well be held without the presence of any spiritual lords. In 1592 the lords passed a resolution denying to the bishops the privileges of peerage. A committee considered the question in 1661, when the doors of Parliament, which had been shut to the bishops during the Commonwealth, were reopened to them. The committee came to no decision. In 1679 the Lords tried to prevent the bishops taking part in the first stages of Danby's impeachment, because, though lords of Parliament, they had not the "ennobled blood" of peers of the realm. In 1692 a resolution was carried denying the right of the bishops to the status of peers.

Number of spiritual lords in Parliament.

The number of spiritual lords in Parliament is limited to twenty-six. In 1847 the Act which provided for the creation of the see of Manchester prohibited any increase in the number of spiritual lords. The two Archbishops and the Bishops of London, Winchester and Durham are always entitled to a writ of summons, but the remaining twenty-one seats are filled by the other bishops, in order of seniority. The bishops are lords of Parliament only so long as they discharge their spiritual office. They sit in virtue of the royal writ of summons, to which they have a prescriptive right, for feudal tenure was abolished at the Restoration and the ancient baronies, by which the bishops once claimed their seats, are now vested in the Ecclesiastical Commissioners.

Life peers.

Life peers, other than the Lords of Appeal, cannot sit in the House of Lords. Professor Freeman believes that the creation of lords of Parliament by letters patent was adopted in order to reassert the king's right of free summons, since, by the terms of the grant the honour could be limited to the life of the recipient. But Dr. Stubbs thinks it improbable that the Crown ever contemplated the creation of a barony for a single life. The prerogative of creating life peers seems to have been exercised only in the grant of higher rank to members

of the peerage, or in the creation of baronies the recipients of which were expressly excluded from Parliament by the terms of the letters patent.

The question of the Crown's right to summon life peers to Parliament came up, and was decided against the Crown in 1856 The patent which made Sir James Parke Lord Wensleydale, for life, included a special clause entitling him to a writ of summons to the Upper House. The Lords refused to receive him. For four hundred years no new life peer had been admitted to the House, and the hereditary peers feared the advent of an overwhelming number of royal or Cabinet nominees At the same time that it was decided that life peers could not be lords of Parliament, the right of the Crown to create life peers was recognised In 1876 the Lords of Appeal were appointed and admitted to Parliament, though they are life peers and can transmit no dignity to their heirs.

The Lords of Appeal

Mr. Bagehot points out that in refusing to admit life peers to the Upper House, the Lords rejected at the same time the opportunity of being tacitly reformed and invigorated. The number of peers is unlimited, and men of exceptional ability can be admitted to the Upper House, but only by the creation of hereditary peerages. Unfortunately they cannot transmit their specialist qualifications, together with their seats in Parliament, to their descendants. By the admission of life peers to the House, the dignity of intellect and training might have been added to that of birth, and the House rescued from the danger of decline and atrophy.[1]

[1] The Parliament Act of 1911 limited the veto of the House of Lords (see note, p 250) Lord Bryce's report of the conference on the Reform of the Second Chamber suggests a House consisting partly of members chosen by a joint Committee of the two Houses, partly of members elected by panels of members of the House of Commons A proportion of the members are to be chosen from the holders of hereditary peerages and from Bishops holding diocesan sees. The reconstituted House as planned by the Conference is not to have equal powers with the House of Commons nor "incur the charge of acting under the influence of party motives," but is to "preserve as far as possible continuity with the ancient House of Lords," "ascertain the mind and views of the nation as a whole," and "enlighten and influence the people through its debates."

The Judicial Powers of the House of Lords

The creation of the Common Law Courts still left to the Crown residuary judicial powers. Fleta, a lawyer of the thirteenth century, records that "the King has his court in his council in his Parliaments, in the presence of Prelates, Earls, barons, nobles, and other learned men, where judicial doubts are determined and new remedies are established for new wrongs and justice is done to every one according to his desserts" The "King in his council in his Parliament" was apparently the Commune Concilium sitting in its judicial capacity, the king's council at first forming, probably, the core and essence of every national council. Hence for long no distinction was drawn between the functions of Council and of Parliament. Ultimately about the end of the fourteenth century, when the powers of Parliament and of the Council separated, the judicial powers of the Crown apportioned themselves between the Crown in Chancery and the Crown in Council and the Crown in Parliament. Chancery dealt with those matters for which the Common Law, owing to the rigidity of its procedure, could provide no remedy. The Council gave redress against great offenders, whom the ordinary courts dared not bring to justice. Parliament remained a court of first instance in certain cases and administered that remedial justice which the Crown offered against the errors of inferior courts. As a court of justice it consisted of the Lords only. The bishops, forbidden by Canon Law to take part in cases which imperilled life and limb, gradually withdrew from any share in the judicial functions of the House. They did so under protest, saving to themselves and their successors "such rights in judicature as they had by law and by right ought to have."

The residuary judicial powers of the Crown.

Apportioned between Chancery, the Council and Parliament.

The Commons, though they asserted their equality to the Lords in all other matters, never seriously attempted to share their judicial powers. In the reign of Henry IV. the Commons begged to be relieved of the judicial business of Parliament. Such attempts as were subsequently

The Commons disclaim judicial powers.

made to assume powers of jurisdiction were chiefly connected with efforts to stretch to the utmost their privilege of "committing for contempt" and of determining the composition of their own chamber.

Original jurisdiction of the House of Lords (1) in civil cases.

The original jurisdiction of the House of Lords in civil cases, though inherited from the Commune Concilium, became insignificant as the different courts acquired distinct functions, and though the barons seemed to have made a claim to judgment by their peers in civil cases, this was never conceded by the Crown. In addition the peers of the Restoration claimed jurisdiction in great matters when the remedy which could be given in the Common Law Courts might prove inadequate. This question was settled in the case of Skinner *versus* the East India Company in 1667. Skinner brought an action against the Company, who had seized his ship and his goods as well as his house and a small island on which he lived. The Lords took the matter into their own hands and gave judgment for Skinner. The Company petitioned the Commons against the action of the Lords, and they voted the action of the Upper House to be contrary to law. The question degenerated into a squabble between the two Houses over Parliamentary privilege. Finally at the personal intervention of the king, all records of the matter were erased from the journals of the Houses. The Lords, by never reviving the disputed powers, practically admitted that they had no competence to deal with civil matters, as a court of first instance.

(2) In criminal cases.

As a court of first instance in criminal cases, the jurisdiction of the House of Lords originated in the claim of the barons to be judged by their peers and not in the king's courts nor by the king's judges. Judgment by a man's peers or fellow-vassals was an old and well-established principle of English law. Originally the expression conveyed no impression of class privileges; much less did it conjure up visions of trial by jury. The peers of a crown tenant were his fellow crown tenants, who would give judgment in the court of the king; the

peers of the tenant of a mesne lord were freeholding tenants of the same lord, assembled in the lord's court. With the development of the Common Law Courts and the introduction of new methods of procedure the administration of the law fell into the hands of professional judges, many of whom were of inferior rank. Magna Carta promised that no free man should be in any way molested save "per legale judicium parium suorum." The barons perverted the phrase from its original meaning, and indignantly denied the claims of the royal justices, that they, as representatives of the king, were the peers of any man, no matter how exalted his rank.

Ultimately, therefore, though in questions affecting their civil rights the barons had to submit to the decisions of the justices, in criminal matters they made good their claim to judgment by their peers. In questions of treason or felony, which involved the forfeiture of lands to the Crown, the king would otherwise have been both prosecutor and judge in his own cause. In 1391, a committee, appointed to examine the question reported that all peers of the realm should on no account be brought to judgment save in full Parliament and by their peers. After the abolition of appeals in Parliament, the Court of the Lord High Steward was instituted for the trial of peers by peers when Parliament was not sitting.

The earliest method of accusation in cases of felony and treason was by way of "appeal," that is, at the suit of an individual. Appeal and trial by battle were lawful until 1819, but appeals in the High Court of Parliament were abolished at the beginning of Henry IV's reign, possibly because of the uses to which they had been put during the days of Richard II. Because of this, though in the case of an "indictment" by the Crown for either treason or felony, a peer of the realm could always claim the removal of the case from an inferior court into Parliament, if a peer were "appealed" of felony in an inferior court he could not claim the privileges of peerage. In Parliament, appeals were replaced by

Appeal.

Indictment.

Impeachments and Acts of Attainder.

impeachments and by acts of attainder, both of which, however, were used against commoners as well as peers.

The practice of trial, upon impeachment by the Commons, at the bar of the House of Lords, owes its historical importance to the power of controlling the Executive, which was thus acquired by Parliament. The fourteenth century had seen a steady development in the powers of the House of Commons. The year 1376 marked the climax of long rising indignation against the incompetence and extravagance of the Court. There had been no Parliament for three years when the Good Parliament was summoned, and the first act of the Commons was to impeach Richard Lyons and Lord Latimer for malversation. Both were condemned, by judgment of the Lords, to imprisonment and forfeiture of office. In the Parliament of 1386, the same method of accusation and trial was used against Michael de la Pole, Earl of Suffolk Moreover in spite of the Lords' assertion in 1330, that peers were not bound to render judgment upon others than peers, both Houses were eager to use impeachment by Commons and trial by Lords as a means of bringing great officials to justice, no matter what their rank. In 1387, when the Lords Appellant had brought appeals of treason against five of the king's friends, two of whom were commoners, the Lords asserted their right to judge "Peers of the Realm and others of high treason committed by them against the king and his realm." Ten years later, Parliament made protestation before the king and caused to be recorded "that they intended by his leave to accuse and impeach any person as often as seemed to them good in the Parliament then sitting," and proceeded forthwith to impeach Thomas de Arundel, Archbishop of Canterbury, of high treason.

1376.

Between the impeachment of the Duke of Suffolk, grandson of Michael de la Pole, in 1449, and that of Mompesson in 1621, no one was thus called to account. Bills of Attainder, usually initiated in the Upper House, were easier and more rapid. They were legislative and

not judicial acts. During the wars of the Roses the victorious party used a subservient House to attaint their enemies of treason and the Tudors used the same means to clear their path of dangerous rivals. They themselves were the first to recognise inefficiency and dishonesty and to put good servants in the place of bad ones.

But the seventeenth century found king and nation at loggerheads. The people were eager to secure administrative efficiency and responsibility : the Crown strenuously withstood any action of the Lower House which could in any way diminish the power and dignity of the Crown. The records of the past were ransacked for precedents, by both king and Parliament In 1621 the Commons re-asserted their right to impeach in the cases of Sir Giles Mompesson, the monopolist and Francis Bacon, the Lord Chancellor. In 1624, the Earl of Middlesex was impeached for corruption as Lord High Treasurer, while successive Parliaments in the reign of Charles I were prorogued or dissolved because they would proceed to no business save the impeachment of the Duke of Buckingham. From this time onwards, impeachments were used as a method of getting rid of political opponents It was one which had its drawbacks. If the king elected to champion the person impeached, successive prorogations and dissolutions left Parliament impotent and punished it very effectively by suspending its share in the life of the State. Moreover, it was not till the case of Warren Hastings that it was definitely decided that the prorogation and dissolution of Parliament did not terminate an impeachment already begun, and necessitate a fresh start from the beginning. The Long Parliament obviated these inconveniences by a statute providing it should not be prorogued or dissolved without its own consent, and since it could convict neither Strafford nor Laud of high treason, changed the impeachments brought against them into Bills of Attainder.

Impeachments revived, 1621.

The Restoration made these somewhat high-handed methods of the Long Parliament no longer possible. The king could still, when he chose, set at nought an impeach-

ment by the Commons. Charles had found the homilies of Clarendon tedious, and he made no effort to save him. But Danby produced a pardon under the Great Seal as a bar to impeachment. The gift of a pardon to ministers, for deeds done at the command of the Crown was a somewhat hazardous move; it left the king personally responsible for the act for which the pardoned minister was impeached. The Commons voted the pardon illegal and void and demanded judgment of Danby by the Lords. But Commons and Lords fell out over the right of the bishops to take part in the trial of a peer and the prorogation of Parliament ended the matter for the time being. The Act of Settlement declared that no pardon under the Great Seal could be pleaded to an impeachment by the Commons in Parliament Apart from this, the increasing control of Parliament over the national purse strings after the Revolution would have foiled any attempt on the part of the Crown to rescue favourites from the clutches of the Commons by means of prorogation or dissolution.

Since the accession of the Hanoverians impeachments and acts of attainder have been occasionally employed, but the development of the doctrine of the mutual responsibility of the Cabinet for the actions of each of its members has rendered these weapons unnecessary save against individuals guilty of treason or dishonesty. A whole Cabinet cannot be attainted or impeached for a mistaken or unsuccessful policy. After the Jacobite rebellion of 1715, acts of attainder were passed against a large number of the followers of the old Pretender. The most recent cases of impeachment were those of Warren Hastings in 1786 for misgovernment in India and of Lord Melville in 1805 for malversation in the Navy. An act of attainder is still lawful in certain contingencies. It has been suggested that the right of either House to appoint a committee of inquiry to investigate the conduct of either individual officials or whole departments has rendered obsolete the process of impeachment.

Appellate jurisdiction of the House of Lords.

The appellate jurisdiction of the House of Lords over

the decisions of the Common Law Courts has been so long recognised, that it has little history. When the Council and the House of Lords first definitely separated, the Council had as good a right as the Lords to remain the court of final appeal As offshoots of the undifferentiated curia, the Council and the Common Law Courts were more nearly related to each other than to the descendant of the Commune Concilium In certain cases the Council retained and still retains appellate jurisdiction, but in 1376 the judges declared unanimously that, when 1376.
errors occurred in the King's Bench, they should be amended in Parliament and the decision was recorded on the rolls of Parliament Errors in the Court of Common Pleas were amended in the King's Bench, whence the case could be taken to Parliament. Appeals were also made to the Lords from the Court of Exchequer Chamber, an intermediate court of appeal from the Exchequer, to which some errors might be taken from the King's Bench. The Court of Exchequer Chamber owed much of its jurisdiction to the fact that the irregularity with which sessions of Parliament were held made remedial justice difficult to secure elsewhere.

The equitable jurisdiction of the Chancellor did not at first come into contact with the Lords No petition or appeal against the decision of the Chancellor was brought before them until the reign of James I, when the Lords heard and decided an appeal But until 1675 the 1675.
appellate jurisdiction of the Lords, in equity cases, was disputed. The matter was then settled in the case of Shirley *versus* Fagg, when the jurisdiction of the Lords over appeals from Chancery was finally recognised.

In 1873, by the Supreme Court of Judicature Act, the 1873.
jurisdiction of the House of Lords as a court of appeal was threatened with extinction. But the Appellate Jurisdiction Act of 1876 saved to the House of Lords its 1876
judicial functions and constituted it the court of final appeal for the United Kingdom. At the same time, provision was made for the hearing of appeals when the

Lords of Appeal.

House was not sitting, and the efficiency of the High Court of Parliament was secured by the creation of Lords of Appeal in ordinary. No appeal can be heard in the Upper House, except in the presence of at least three of the Lords of Appeal, these being the four Lords of Appeal in ordinary and those members of the House who hold or have held high judicial office. At the same time, because the House of Lords was once the Commune Concilium every member of the House is entitled to be present and to record his vote.

CHAPTER IX

THE HOUSE OF COMMONS

COMMUNITY of interests, social and political, had welded together into one House, the knights of the shires and the representatives of cities and boroughs. The burgesses usually outnumbered the knights by more than two to one, but, despite their numerical superiority, they played only a small part in the House of Commons during the first two centuries of its existence The years which saw the acquisition of political power by the Lower House, contain but one record of a burgess who took a prominent part in the constitutional battle which king and Parliament were fighting for the control of the machinery of government. In 1455, Thomas Yonge of Bristol claimed for members of Parliament the right to freedom of speech. It was not until 1532 that a burgess, one of the members for Yarmouth, occupied the Speaker's chair. The position of the burgesses in Parliament, if undignified, is easily explicable They came there unwillingly. They had no desire for political life. National interests were quite overshadowed by local interests. At home, they were fully occupied with the development of town organisation. Inevitably, they were very loth to leave their own affairs to look after themselves, while they journeyed to Westminster to look after the affairs of the nation, and this notwithstanding the small wage, which they, in common with the knights of the shire, received. Moreover, their position as representatives of the towns was in many cases weakened by a lack of civic unity. The great merchants held aloof from the main body of townsmen,

Relative position of knights and burgesses in the House of Commons.

who were thus deprived of their natural leaders. As long as they granted supplies to the king apart from Parliament, in return for commercial privileges, it even seemed not improbable that a separate estate of merchants would be formed. In addition to this, not a few of the towns lost their commercial prosperity owing to the French wars. They were heavily taxed at the same time that many of the usual avenues of trade were closed; and if they could escape Parliamentary representation, they were rated with the county and so only paid one-fifteenth, when the boroughs paid one-tenth.

Under the Tudors, with the development of prosperity, this desire for political obscurity passed away. The commercial classes aspired to the highest offices in the state, and towns, which had once been represented, petitioned that they might again send members to Parliament. Candidates for seats volunteered to forego the customary wages if elected, and in 1624 the Commons resolved that a borough could not forfeit the privilege of sending members by non user But from the time of Edward VI much of the vitality of the burgher class in Parliament was sapped by the Crown. Those towns which were too small and too poor to reject royal nominees were deliberately enfranchised, so that the Crown should be able to control the personnel of the Lower House. Later, the infinite variety of borough franchises often left the seats of the burgesses at the mercy of the highest bidder, or the local landlord

From the first, the knights were "the leaders of parliamentary debate; they were the link between the good peers and the good towns; they were the representatives of those local divisions of the realm which were coeval with the historical existence of the people of England, and the interests of which were most directly attacked by the abuses of royal prerogative." During the fourteenth and fifteenth centuries it was the knights of the shire who "won the battle of the constitution"; who asserted the authority of Parliament and claimed for its

members a share in all matters affecting the national welfare. Later, before the passing of the first Reform bill, when Parliament was largely an assembly whose support could be bought, the knights of the shire were to a great extent immune from the influences of bribery. They were still, as in the first days of Parliament the "depositaries of the constitutional tradition." The reformers of the eighteenth century, Chatham, Wilkes and Pitt, recognised that the knights of the shire were still the less corruptible and the more independent section of the House of Commons.

The Reform Bills, by extinguishing rotten boroughs and rearranging the franchise, gradually changed the relations of borough to shire members. The bills of 1832 and 1867 gave to the shires a large number of the seats acquired by disfranchising or partially disfranchising rotten boroughs. The Reform bill of 1884 and the Redistribution bill of 1885 by creating single-member constituencies in town and shire, and by assimilating the county and borough franchise, practically obliterated the old distinction between county and borough members.

The Knights of the Shire

The number of shire representatives.

The knights of the shire were the indestructible element of the House of Commons. To the Model Parliament of 1295, and to all subsequent Parliaments, were summoned two knights from each of the thirty-seven shires. Chester and Durham, as counties palatine, sent no knights to Parliament and Monmouth was omitted as part of Wales. No permanent addition was made to the number of shire representatives till the reign of Henry VIII; but on two occasions the seventy-four knights were reinforced. In 1322 "discreet men" from Wales were summoned to the Parliament which was held at York after the royal victory at Boroughbridge, to serve the cause of the Despensers. Five years later there were representatives from North Wales in the Parliament which, prompted by Isabella and

Mortimer, deposed Edward II and declared in favour of his son. After 1536, the Welsh counties and county towns, each returned a member and Monmouth sent two knights to Parliament. In 1543 the privilege was extended to Chester, though Durham was not enfranchised before 1673, possibly on account of its adherence to Roman Catholicism. In 1707, thirty members were added to the House from the Scottish shires and in 1800, sixty-four from the counties of Ireland.

Effect of the Reform bills.

The Reform bill of 1832 divided the largest and most populous of the counties into electoral districts and sixty-five of the 143 seats acquired by the disfranchisement of small or decayed boroughs were given to the English and Welsh and five to the Irish shires. In 1867 the Representation of the People Act gave forty-four seats to the shires of England and Wales and three to those of Scotland. The Acts of 1884 and 1885 gave seventy-two seats to the shires of the United Kingdom This raised the total number of shire representatives for England and Wales to 253, for Scotland to 39 and for Ireland to 85. The electoral districts were rearranged as single-member constituencies at the same time. Rutland was deprived of one of its members while Yorkshire, for example, now returns twenty-six members from as many constituencies and Lancashire, which before 1884 returned eight members from four divisions, returns twenty-three members from twenty-three constituencies.

Single-member constituencies.

The Representatives of the Towns

The towns represented.

Representatives of the towns were summoned to Parliament because, as wealthy and important communities, they were entitled to special consideration and could give generously towards the relief of the king's necessities. It has been suggested that the towns originally summoned to send representatives were all in the ancient demesne of the Crown. But there seems little foundation for the statement. Towns which were part of the ancient demesne and

towns which were not, were summoned to elect members of Parliament or were never called upon to send representatives. Some towns occasionally claimed exemption on the plea that they were not part of the ancient demesne, but others claimed exemption because they were part of it and neither claim was allowed. In the boroughs, as in the shires, the Plantagenets were eager to eliminate the feudal principle from national life, while, except in the case of those towns which were counties corporate, the writ of summons was addressed to the sheriff, and with the sheriff must have remained the decision as to which towns should be represented: no limitation was imposed by the writ, till the irresponsibility of the sheriff was checked by the statute of 1382, which forbade him to omit to summon any town that was wont to be summoned. Thus at first, the number of representatives summoned from the cities and boroughs varied considerably. In the Model Parliament there were 220 burgesses, and at various times during the reign of Edward I, 166 towns sent representatives to Parliament, while during the reign of his son, sixteen new boroughs sent members and Edward III issued writs to the eight Cinque Ports. In spite of this the number of towns represented in each Parliament steadily dwindled: in a large number of cases the summons were discontinued until, under Edward III only ninety-nine boroughs sent representatives. Any further decrease was checked by the Statute of 1382 which practically fixed the number of borough representatives at 200: for the extra two, London was responsible. The city with commendable foresight had been in the habit of nominating four members, so that the attendance of two in Parliament should be ensured: in 1378 its representation was raised, permanently, to the higher number.

1382.

The number of citizens and burgesses.

The ninety-nine parliamentary boroughs were very unequally distributed. But their distribution was roughly indicative of the relative wealth of the counties, which as yet was concentrated in the agricultural districts. Thus Lancashire sent no burgesses to Parliament during much

Early distribution of parliamentary boroughs.

of the fourteenth and fifteenth centuries. Sixteen counties contained only one parliamentary borough apiece: but Wiltshire sent twenty-four burgesses to Parliament and Sussex eighteen.

Creation and revival of parliamentary boroughs.

From 1445 onwards, we find the creation and re-creation of Parliamentary boroughs by royal charter. In this way eight boroughs were made by Henry VI and four by Edward IV. But the Tudors were the great creators of parliamentary boroughs. Between the accession of Henry VIII and the death of Queen Elizabeth, about eighty-five were either created or revived. In the majority of cases, two members were returned by each town, but sometimes, as in the case of Monmouth and of the Welsh county towns, only one member was allotted to each borough. In some cases burgesses were summoned because of a petition made by the town itself for the revival of its ancient privilege In some cases too, the new boroughs were of sufficient importance to warrant their enfranchisement Henry VIII summoned representatives from Chester, Berwick, Calais, Monmouth and the Welsh county towns, and here at least his motives are unimpeachable: but in the largest number of cases the new Tudor boroughs were created with the object of securing the return of a royal nominee. One example is enough :—at the accession of Edward VI, Cornwall contained five parliamentary boroughs: at the death of Queen Elizabeth it contained twenty-one: there was hardly this number of large hamlets in the royal duchy. But the creation of rotten boroughs ceased with the Tudors. James I enfranchised six new boroughs, two of which were the Universities and revived seven. Charles I agreed to the revival, on petition, of ancient rights of representation, but he hated Parliament too well to attempt to manage it by the gentler methods of his Tudor predecessors. Charles II enfranchised Newark and Durham, but the action was greeted with such a storm of opposition, that he dared not repeat the experiment.

By the close of the seventeenth century, the borough

representatives numbered 421 : by the union with Scotland fifteen were added and thirty-six were added by the union with Ireland. The Reform bill of 1832 totally disfranchised fifty-six boroughs and deprived thirty-one boroughs of one member apiece. Of the 143 seats thus cancelled, ten were given to London by the creation of five new boroughs and many of the great industrial towns such as Liverpool, Manchester and Birmingham were enfranchised. In all sixty-five members were given to English and Welsh and eight to Scottish boroughs. Of the fifty-two seats left free by the total or partial disfranchisement of boroughs in 1867, twenty were apportioned amongst the towns, some being given to existing constituencies and others to new parliamentary boroughs. By the act of 1884, towns having less than 15,000 inhabitants were deprived of separate representation and 160 borough seats were cancelled in one way or another. Only eight new boroughs were created. The remaining seats and twelve new ones were distributed amongst existing electoral divisions in both shire and borough, which with a few exceptions were divided into single-member constituencies. For example Wolverhampton, which formerly returned two burgesses for the whole town, was given a third representative and the city was divided into three wards, each of which returned one of the members. Only the Universities of Oxford, Cambridge and Dublin and towns with a population between 50,000 and 165,000 now send two members to Parliament from the one constituency. Representatives of the boroughs and Universities now hold 293 seats in Parliament : of these 242 are claimed by England and Wales, 33 by Scotland and 18 by Ireland. This leaves the sum total of the Lower House at 670 members.

The Reform bills : 1832.

1867.

1884.

Single-member constituencies.

Qualifications and Disqualifications of Knights and Burgesses

Representatives of the Commons were first called to Parliament solely that they might give to the king, on

Part played by the Commons in Parliament.

behalf of the nation, supplies wherewith to carry out such policy as seemed good to himself and to the great men of the kingdom. By the terms of the original writ
1295 of summons the Magnates were to "treat ordain and execute," the representatives of the shires and boroughs were to bring full powers to "do" what was ordained by the Common Council. Edward II added that the Commons should give their consent to such measures as were proposed in Parliament and so the writ, with its superannuated limitation of functions remained until the Ballot Act of 1872, when it was changed into a formal command to elect and return representatives. At first, therefore, the primary qualification demanded of the representatives of the people was local standing. The shires were in consequence ordered to return knights, but the only limitation put by the central government on the free choice of the towns was that the members returned should be able to speak authoritatively on behalf of their fellow-townsmen.

Qualifications of shire representatives.

The knights were extremely unwilling to serve in Parliament and in 1325 only twenty-seven of the seventy-four representatives of the shires were of knightly rank. The writs of 1340 demanded that "Belted" knights should be returned to Parliament and the demand, frequently repeated, became a permanent one after 1376. In spite of this, in the Good Parliament, not more than
1413 half the shire members were knights and in 1413 it was stipulated that they should at least be "gentlemen born." At the same time it was enjoined that the member should be resident in the county or borough which chose him, a restraint upon the choice of the electors which was not removed until 1774. But long before then it had become obsolete and in the case of the towns, it had actually been repealed in 1571, though for some unknown reason, the statute was never enrolled in the statute book.

Qualification of borough representatives. 1710.

The qualifications of burgesses varied with the different borough constitutions. In 1710 however, in the vain hope of checking the growing corruptibility of Parliament,

a property qualification was introduced. Knights and burgesses were required to possess an estate in land worth, in the case of the former £600 and in the case of the latter £300. Like most statutes dealing with the question of qualification for membership, it was consistently evaded. Yet it survived the great Reform Bill and in 1838 was extended to include personal property to the same amount. It was not removed till 1858. 1838. 1858.

Oaths required of members of Parliament

From the middle of the sixteenth, to the middle of the nineteenth century, certain oaths were required of knights and burgesses before they could take their seats in Parliament. In 1563 the oath of Supremacy was imposed on all members of the Lower House, mainly for political reasons. The Lords were exempt because the Queen "was otherwise sufficiently assured of their faith and loyalty." To this oath was added in 1610 an oath of allegiance to the reigning sovereign. In 1678, in the national scare at the discovery of the "Popish Plot," both oaths were required from the Upper House and to them was added a declaration against Transubstantiation. After 1701 an oath, abjuring the claims of the Stuarts "on the true faith of a Christian" was required from members of both Houses, so that after this the Jews were practically excluded from Parliament, in addition to the Roman Catholics and those of the Non-conformists who objected to taking any form of oath 1610. 1678.

By the beginning of the nineteenth century, the political considerations which had prompted the imposition of the oath of Supremacy and the declaration against Transubstantiation had long ceased to exist Grattan and Plunket, Fox and Canning, had urged Roman Catholic Emancipation. Pitt had promised it at the time of the union with Ireland and had gone out of office in 1801 because the opposition of George III made it impossible for him to fulfil his pledges to the Irish Roman Catholics. The question could no longer be shelved when, in Ireland, O'Connell's Catholic Association was stronger than the Government at Dublin Castle. The Duke of Wellington

finally sacrificed his principles to the dread of civil war and forced George IV to agree to the act of 1829 by threatening resignation. The Roman Catholic Emancipation bill abolished the declaration against Transubstantiation altogether and allowed a modified form of the oath of Supremacy to be tendered to Catholics. Similar privileges were subsequently conceded to members of other religious denominations. After 1833, Quakers and other sects with conscientious objections to taking an oath, were allowed to make an affirmation. In 1858, the oath of Abjuration was modified in favour of the Jews and the three oaths of Abjuration, Supremacy and Allegiance were welded into one. After 1888, as a result of the celebrated Bradlaugh case, an affirmation, instead of an oath, was allowed under all circumstances.

1829.

1833

1858

1888.

Disqualifications for membership of Parliament.

Apart from the negative disqualifications for membership of Parliament implied in inability to qualify, there are certain legal disqualifications based on common and on statute law. Certain of these disqualifications are mental and social, others are professional. Infants as well as lunatics are excluded from the two Houses, while any one convicted of treason or felony cannot sit till his sentence is served or he has received the royal pardon. Aliens were excluded from Parliament in 1700 owing to the jealousy which William's Dutch friends had inspired. This disqualification was modified in 1870 in favour of naturalised persons. Peers cannot sit in the Lower House, but in 1549 the sons of peers were declared eligible. At the time of the union with Scotland, all Scottish peers were excluded from the House of Commons, and until the first Reform bill their eldest sons could not sit. Irish peers, not of the number of the representative peers, can stand for any constituency in Great Britain. Of the professions which disqualify for membership of Parliament :—an ordinance of 1372 forbade the election of any "man of the Law" because he might neglect the business of the nation in order to follow his own calling. In 1404 lawyers were excluded from

(1) Mental

(2) Legal

(3) Social

(4) Professional and governmental.

the "Unlearned Parliament" and their exclusion, though it remained a dead letter, was not cancelled until 1871, while a resolution of the House of Commons declaring judges incapable of sitting because they were "attendants in the Upper House" made in 1605, still holds good. In 1372 sheriffs were forbidden to sit for shire or borough during their term of office. In practice the ordinance was only held to apply to the shire and boroughs for which the sheriff was the returning officer. Ultimately all returning officers were disqualified, but when, after 1835, writs to the boroughs were no longer addressed to the sheriff, he became eligible for the towns in his own shire. It was long a debatable point whether Holy Orders made the recipient incapable of sitting in Parliament. Precedents were contradictory, but in 1801, when Horne Tooke was elected for Old Sarum, it was decided that clergy of the English and Scottish Churches could not sit and Roman Catholic clergy were expressly excluded by the Roman Catholic Emancipation bill. Since 1870, a clergyman of the Established Church has been allowed to sit in Parliament after divesting himself of his orders. Non-conformist clergy can sit so long as they do not hold a cure of souls.

The most numerous disqualifications are those connected with the holding of government office The Act of Settlement provided that all holding an office of honour or profit under the Crown should be excluded from Parliament. The provision was prompted by the fear that Parliament would be crowded with government officials and pensioners of the Crown, so that all fearlessness of opinion would disappear, while any criticism of the Executive would become a farce when critics and criticised were one and the same. Besides this, it was essential that the efficiency of the various departments should not depend upon the vicissitudes of party warfare. Officials who would not have to resign office with each change of government were necessary in order that the traditions of the departments might be carried on and

continuity of policy preserved as far as possible. At the same time it was not desirable that subordinates should vote against their chiefs, while it was admitted in 1705–6 that ministerial responsibility would be a myth, unless the heads of the various departments sat in Parliament to defend and expound their policy.

Consequently, the holders of offices created before 1705 were admitted to Parliament, on condition that, upon their nomination, they sought re-election at the hands of their constituents To the list of offices the holders of which can sit in Parliament if re-elected, have been added from time to time the heads of various new departments of government and other officials, whose presence in Parliament is desirable

The abolition of the necessity of seeking re-election has often been mooted. It causes much anxiety and work to a man whose hands are already over-filled by his new duties and it serves no practical purpose ; for should the new minister fail to secure re-election by his old constituents, a subordinate member of the party can always be found to resign a safe seat in his favour. Sir William Anson has classified those government officials who are excluded from Parliament. They include all representatives of the Crown, such as colonial governors, the permanent civil servants and government contractors, all officials connected with the administration of justice, the collection of the revenue, the auditing of public accounts and the administration of property for public objects.

(Resignation of a seat in the Commons)

The fact that the majority of those who hold office under the Crown cannot sit in Parliament has provided a curious loophole of escape for any who desire to resign their seats. Previous to 1700 it was extremely difficult for a member of Parliament to sever the tie which bound him to his constituents The member might plead ill-health, the constituents might even prove the member's insanity. But, since it was one of the privileges of Parliament to judge all matters connected with its own constitution, it made itself judge both of ill-health and of insanity. If

for exemption from contribution to the wages of the knights of the shire, and the natural corollary to this was exclusion from the election. Mesne tenants, tenants in socage and tenants in ancient demesne preferred the same request. Only very occasionally were any of these requests granted and then it was with considerable misgivings. On the other hand the Commons urged that the expenses of the knights should be levied upon the "whole of the commons of the county." The number of petitions made in connection with parliamentary representation, the uncertainty of the answers given, together with the vagueness of the expressions used concerning the electors, point to the conclusion that the representation of the shires was very imperfect, the electorate varying, probably, in each county with each election.

At the same time, every one who was present at the time of the election had a right to vote. The right of the county court to elect the representatives of the shires was jealously guarded. In 1388 Richard II had been compelled to withdraw from the writs his directions to elect persons who had taken no part in the recent quarrels, and one of the accusations against him in 1399 was that he had interfered with the freedom of elections. The rebels of 1405 even complained with considerable bitterness of the exclusion of lawyers from the "Unlearned Parliament." At the same time, though the right to elect freely was watched over unceasingly, it was rarely exercised. Sometimes a few local magnates determined the election, at other times the sheriff appointed his own nominee, while often a noisy crowd failed to come to any decision.

Reorganisation of the Electorate. 1406.

The fifteenth century saw the reorganisation of the electorate in the shires. To secure order and fair representation it was enacted in 1406 that the election should be made in the first county court after the reception of the writ: that all persons present should vote and that the names of the persons elected should be returned "under the seals of them that did choose them." In

1413. 1413 it was stipulated that the electors, as well as the members chosen, were to be residents of the shire.

1430. While in 1430, because of the disorders in the county court due to the great attendance of people of "small substance and no value," the franchise was restricted to those who possessed a freehold of the clear yearly value

1432 of 40/-. In 1432 it was provided that the qualifying freehold must be within the shire itself. The franchise was limited at the same time that it was defined and for four hundred years it remained unchanged. Its effect was to exclude not only the smaller freeholders—40/- represented from £30 to £40 of present value—but the far larger class of emancipated villains and their successors, who, as copyholders and leaseholders, often held lands of considerable extent

The electorate since 1832. The Reform acts of the nineteenth century swept away the simplicity and the inequalities of the old franchise. By the act of 1832 the old 40/- freehold qualification was limited to occupation by the voter or to acquisition by

Property qualification. methods other than purchase. To it were added four property and non-residential qualifications: a freehold for life, however acquired, of the annual value of £10: copyhold of the same value: leasehold of £10 value if originally created for not less than sixty years and of £50 value if originally created for not less than twenty years. By the act of 1867 the freehold for life, the copyhold and the leasehold created for sixty years, were reduced to a uniform rate of £5 value The 40/- freehold and the £50 leasehold property qualification still remain as in 1832.

Occupation franchise. The occupation franchise for county constituencies was an innovation of the first Reform bill. The right to a vote was given to the tenant "of any lands or tenements for which he shall be liable" of the yearly rent of not less than £50. In 1867 this was supplemented by the extension of the franchise to the tenant of lands or tenements of the rateable value of £12. In 1884 for these two qualifications an annual rental value of £10 was substituted.

Qualification of residence

The qualification of residence, though created in the boroughs in 1867, was not extended to the shires until 1884. The inhabitant occupier of any rateable dwelling house, or of part of a house, used as a separate dwelling, as well as the lodger occupying unfurnished rooms of the yearly value of £10 is now entitled to a vote: the extension of the franchise to these "latch-key" voters has largely increased the numbers of the electorate and has made manhood suffrage almost universal.[1]

The Electorate in the Boroughs

Borough franchises determined by the towns themselves.

Originally the Crown put no restrictions upon the borough franchise, and in consequence we know little of mediæval practices Disputed elections have revealed some of them, but as long as representation was a burden there were no disputed elections; the great trouble was to induce the boroughs to elect members and to secure the presence of the members in Parliament, once they had been elected. It was not until the growing importance of the towns in the fifteenth and sixteenth centuries made the franchise a thing of value, that it became a subject of dispute amongst different classes. In many cases where disputes arose, there were no precedents whereby to determine who was entitled to the franchise. In some cases, the rules of municipal elections were applied to the Parliamentary elections In others the customs of the county court were followed. Sometimes the strength of the governing bodies excluded the townsmen from the electorate, at others, the weakness of the magistrates left the franchise in the hands of the freemen. Occasionally, a borough franchise would be crystallised by the determination of an election petition, for once an election was declared valid or invalid on the ground of the inclusion or exclusion of a certain class of voters the franchise of the borough would be fixed.

Narrowing of the borough franchises.

The charters by which, from the time of Henry VI onward, parliamentary boroughs were created often

[1] See note, page 242.

conferred on the corporation the exclusive right of electing the borough representatives, while in the boroughs which were only intended to return royal nominees, the franchise would be strictly limited. The newer the charter of the town was, the less liberal, as a rule, was the franchise; towns were continually securing new charters and the general tendency therefore was to narrow the borough constituencies.

Qualifications of borough electors on the eve of the Reform bill

The qualifications of borough electors on the eve of the first Reform bill were based either on tenure, residence, incorporation or corporate office. The oldest of the franchises was probably that of burgage tenure, which

(1) Tenure.

was exactly analogous in origin to the freeholder's qualification in the counties. But in many towns, such as Richmond, the burgage vote had become attached to certain houses in the town, possibly those which originally had contributed to the "firma burgi." In some large towns which enjoyed the status of counties and also in some few others such as Tavistock, the franchise, as in the shires, was vested in the 40/- freeholders: occasionally, as at Cricklade, the electoral vote was also given to the copyholders and leaseholders of the borough.

(2) Residence.

The residence qualification was nearly always coupled with the payment of scot and lot. This was the most generous of the borough franchises and prevailed in the older and larger cities, such as Norwich and Newark, Coventry and York. Usually the resident had to be a householder, but in Taunton and Honiton, residents, whether lodgers or householders might vote provided that they were "pot-wallers," that is that they provided their own food and "boiled their own pot." Sir William Anson points out that in the middle ages the non-residence of voters within the borough for which they voted was not contemplated. Residence of both members and electors for borough or shire was required by law after 1413 and the act was not repealed till 1774.

(3) Incorporation.

A charter of incorporation gave the vote to the freemen of the borough or of the local merchant guild. From

the fifteenth century political were thus connected with trading privileges. In London, after a variety of changes, the franchise was vested in the liverymen of the city companies. The qualification of a freeman might in course of time be acquired by a variety of means—birth, marriage, gift, purchase, or service, while the freeman, by his incorporation acquired political rights but often incurred no financial burden and was not even required to be resident in the borough of his incorporation. Many towns could give the privilege of freedom to as many as they pleased and used this power unscrupulously to carry Parliamentary elections. These manufactured, or "fagot" votes continued in the boroughs until 1832, though an effort was made to stop their creation under William III and Anne

(4) Corporate office

The latest of the qualifications was that of corporate office, which was really a narrower form of that arising from incorporation. This limited franchise was only found in the chartered towns created by the Tudors and in towns whose charters, owing to disputed returns, came up for interpretation before the oligarchical Parliaments of the Restoration. In the latter case, many of the towns, such as Bath and Salisbury, protested vigorously, but in vain, against this arbitrary narrowing of their constituencies.

Rotten boroughs.

By the time of the first Reform Bill the franchise in many of the parliamentary boroughs was in an extraordinary condition. In many places, incorporation and the restriction of the franchise to the governing bodies in the towns had reduced the electors to a mere handful. At Buckingham the right of electing was in the hands of the bailiff and twelve burgesses. At Bath the franchise was confined to the Mayor, ten aldermen and twenty-four common councillors. At Salisbury and Winchester it was restricted to the Mayor and Corporation, numbering in the former case fifty-four, and in the latter, thirty-four electors. In other cases when the franchise was based on tenure, or on scot and lot there were very few in-

habitants to exercise the right. At Tavistock all the freeholders might vote, but they only numbered ten. At St. Michael and Gatton all paying scot and lot possessed the franchise: there were seven electors in each borough. At Cockermouth the number of voters was nominally 165, but actually one. At Old Sarum, the right of election belonged to seven burgage tenements, but there was neither house nor inhabitant in the borough. Oldfield, writing at the end of the eighteenth century, records that at Midhurst the constituent body consisted of "118 stones denoting where the same number of burgage tenures" were to be found. These were represented at an election by three or four of the proprietor's friends who acted for the time being as "proxies for the dumb body of constituents." At Castle Rising two houses returned two members to Parliament. Westminster, with twenty thousand inhabitants sent the same number, while Birmingham, Manchester and Liverpool with about fifteen thousand dwellings apiece were unrepresented. In 1793, the Society of the Friends of the People was prepared to prove that seventy members were returned by thirty-five boroughs with practically no electors; that ninety members were returned by forty-six constituencies each of which had less than fifty electors and that thirty-seven members were returned by nineteen boroughs with less than a hundred voters each.

The Reform bills, 1832.

The Reform bill of 1832, while preserving the individual rights of the existing electorate, swept away all the old franchises. With one exception, the franchise was left to the freemen of those towns where the qualification had hitherto prevailed and it was untouched by the bills of 1867 and of 1884. But henceforth the freemen could only vote if they resided in the borough, or within seven miles of it and the means of acquiring the freeman qualification were limited to birth and servitude. The new qualification, created in 1832, based the franchise on the occupation of house or tenements of the annual value of £10. In 1867, the household and lodger franchise,

1867.

which in 1884 was extended to the counties, was created in the towns: it is a qualification of wide and increasing scope. The act of 1884 left the main principles of the borough franchise untouched, but assimilated to it the county franchise. The property qualification, which exists in the counties, has not been extended to the boroughs, where the right to vote depends entirely upon occupation and residence.[1]

The Control of the Electorate and of the House of Commons

Until the nineteenth century, many illegitimate outside influences were brought to bear both upon the electorate and upon the Lower House Theory and practice in parliamentary government were widely separated. Elections were said to be free, but they were more often controlled by the sheriff, by the local landowners or by the Crown In Parliament, the members were nominally free to speak or to vote as they pleased In reality speeches were often made and votes were often given at the bidding of a few influential politicians, who gathered into their folds the patrons of the nomination boroughs, or who controlled, by means of secret service money and the gift of offices and pensions, many of those who had secured their seats by purchase County and borough were equally at the mercy of sheriff and landowner. A dependent and apathetic electorate was inevitable, so long as Parliament was only synonymous with taxation and all interest in political affairs was overshadowed by the wages which the electors had to pay to knights and burgesses. On the other hand, the control of the electorate and of Parliament became a matter of supreme moment to the Crown when the patriotism, which national prosperity and national success had kindled, gave rise to a growing zest for political life. Hence the Tudors created rotten boroughs and enlisted the landowners on their side. But nowhere,

See note, page 242.

during the sixteenth and seventeenth centuries, do we find, either in Parliament or in the constituencies, the bribery and corruption which permeated eighteenth-century politics After the Revolution, the Crown was powerless to exercise any direct control over the electorate or the members of the Lower House, but it reduced parliamentary government to a farce nevertheless, and the strength of many a ministry depended on the length of its purse and the number of prizes it had to offer.

That public integrity survived at all seems extraordinary. But it must be remembered that then, as now, much of the best ability in the country was attracted by political life, and that there were many quite legitimate prizes to be won. The best statesmen condemned parliamentary corruption unhesitatingly and unceasingly and so paved the way for reform, while they kept alive a standard of political morality which otherwise must have been stifled by the existing condition of affairs The growth of political parties by stimulating debate in the House and by prompting the advocacy of popular measures, gave a wholesome zest to parliamentary life, which the buying and selling of votes could not take away. Moreover, on the whole the electorate consisted of the most educated classes of the community and in spite of all temptations to the contrary, in moments of national excitement they and their representatives responded to popular pressure.

Outside influences upon the Electorate.

(1) The sheriff.

The earliest of the outside influences on elections was exercised by the sheriff Until the middle of the nineteenth century the sheriff received and returned the writs authorising elections in both shire and borough, and the unwillingness of the people to elect representatives encouraged any sinister designs which he might entertain. In the shires the sheriff not infrequently sent nominees of his own. It was less trouble, and the wages of 4/- a day, were not to be despised ; and even when the election was duly made, the sheriff sometimes returned his own candidates, whether or no they had been chosen. An election

petition of 1362 reveals that on one occasion two knights, the lieutenants of the sheriff, suppressed the writ, returned themselves as duly elected and then proceeded to collect the wages due to them as knights of the shire.

Even the return of the names of the electors, together with those of the successful candidates was but an indifferent guarantee of the purity of the election. In 1450, 124 freeholders of Huntingdonshire addressed a letter to the Crown stating that they, together with 300 others, had voted for two persons and that 70 others had voted for another candidate, who was not of "gentill birth." In this particular case the sheriff had not made a false return, but the letter shows an electorate numbering 494. There were the signatures and seals of five persons only on the indenture which was tacked on to the returned writ. Though it was doubtless more convenient that a committee should sign the indentures on behalf of the whole body of electors, a very little manipulation could restrict that committee to the sheriff's own friends and reduce the whole procedure to a farce. 1406.

In the towns the sheriff was master of the situation. At first his discretion as to which towns should be represented was unlimited and many such as Leeds and Birmingham obtained exemption by private bargains. In 1382, however, the sheriff was forbidden to withhold his precept from towns which were wont to send members to Parliament. But since the formal election took place in the county court and the names of the burgesses were returned in the document which contained those of the shire, it was an easy matter for the sheriff to insert the names of his own nominees. In 1384 Shaftesbury demanded a remedy for the sheriff's action. The next year Barnstaple refused to pay the wages of one of their burgesses, John Henrys, because he had been returned without their knowledge or consent. In 1604 Cardigan complained that the sheriff had returned his own nominee, though a burgess had been lawfully elected to represent the town. Each election called forth a torrent of similar

complaints. Every effort was made to check the unlawful influence of the sheriff. In addition to the regulations of 1406, in 1410 the Justices of Assize were given authority to inquire into the conduct of elections and a fine of £100 was imposed for any breach of the law. In 1445 heavy penalties were imposed on sheriffs and mayors guilty of any irregularities in the elections. The residence qualification, required of electors and candidates and the restriction of the franchise to 40/- freeholders, were the most effective checks on the sheriff's influence. Ultimately it was practically annihilated by that of the Crown and of the local landowners.

(a) The great landowners.

From the first the local magnates must have exercised considerable influence at any election which they chose to attend. Every suitor, and later every 40/- freeholder, at the county court was entitled to vote irrespective of his rank. But theoretic equality with the great men of the shire put little courage into the heart of the ordinary freeman and many considerations not connected with the respective merits of the different candidates must have influenced his choice. Under the Tudors the influence of the greater landowners was systematically exercised on behalf of the Crown. Many of them were Tudor creations and the whole nation was intensely loyal. The rotten boroughs and those with narrow electorates were at first largely under the control of the Crown itself, though they ultimately went to swell the influence of the local magnates. In the reign of Mary the Earl of Sussex wrote to the electors of Yarmouth and of Norfolk ordering them to vote for his nominees, while in 1572 Dame Dorothy Packington, Lady of the Manor, returned the two members for Aylesbury. By the end of the eighteenth century it was estimated that 218 members in England and Wales were returned by 87 peers, and 137 by persons of lesser rank. The Duke of Norfolk alone had eleven seats in his gift, the Earl of Lonsdale nine, and Lord Darlington seven.

(The sale of pocket boroughs.)

A large number of the borough seats were secured by

purchase and by the payment of an annual rent. This method commended itself to the more upright of the eighteenth-century politicians, since the purchaser of a pocket borough was free to vote as he pleased: the right of a patron to control the political conduct of his nominees was unquestioned, and the House of Lords prior to 1832 has been justly described as a "chamber of Directors." As early as 1571 Thomas Long of Westbury had confessed to bestowing £4 on the mayor and another person for his return as burgess for that borough. But the most eager purchasers of seats in Parliament were the wealthy merchants and Indian "nabobs" of the eighteenth century, who coveted the honours and offices which were to be won there. Lord Chatham protested that, with foreign gold, they forced their way "by such a torrent of corruption as no private hereditary fortune could resist." In 1768, there were complaints that, owing to competition, the price of seats had risen: as much as £4,000 was paid for Ludgers hall. Many boroughs, such as Sudbury, publicly advertised themselves for sale. Oxford volunteered to return its two former members a second time, if they would pay the debts of the city. This they refused to do, but Oxford eventually concluded the bargain to its satisfaction with the Duke of Marlborough and the Earl of Abingdon.

(Bribery of the electorate.)

Where a seat was not to be secured by direct purchase enormous sums were spent in bribing the electorate. In 1695 Sir Walter Clarges, an unsuccessful candidate for Westminster, is said to have spent £2,000 in a few hours. In 1768 the contest for Northampton cost each of the candidates £30,000, while the Duke of Portland spent £40,000 in contesting Westmoreland and Cumberland with Sir James Lowther. In 1807 the joint expenses of the two candidates for Yorkshire is said to have been as much as £200,000.

(3) The Crown.

The control exercised by the Crown over the electorate was at first insignificant. Sometimes, less than the statutory number of forty days was allowed for the business of the election. In 1294 only thirty-five days were allowed

and this is the modern rule. In 1352 twenty-eight days, in 1399 seven days, elapsed between the issue of the writs and the meeting of Parliament. In the latter case, the avowed object of the Crown was to secure the return of the same persons as had sat in the previous assembly. Occasionally the writ of summons was altered, to secure the election or exclusion of certain classes of candidates. After 1340, belted knights were usually demanded from the shires and after 1372 the election of sheriffs was prohibited in the writ But variations in the writ were viewed with extreme jealousy and the form of the writ remained practically unchanged till the Ballot Act of 1872. Occasionally, with the help of sheriffs and nobles, a packed House was secured The Parliament of 1377, which undid the work of the Good Parliament, was packed with the partisans of John of Gaunt In 1397 Arundel protested that there were none of the "faithful Commons" in the assembly before which he was arraigned; while in the disorderly years of the wars of the Roses, such Parliaments as were called, were crowded with the partisans of the victor of the moment

The Tudors controlled elections partly through the local magnates, partly by creating boroughs with electorates so narrow that they were easily manipulated The council of Edward VI sent a circular letter to the sheriffs ordering the election of men of "learning and wisdom" and in certain cases these were recommended by the Council. Under the Stuarts, the creation of rotten boroughs ceased and all efforts to manipulate elections in the interests of the Crown. Both James I and Charles I undervalued the power of Parliament and recognised it only to insist on its inferiority to that of the Crown. In 1626 certain leaders of the opposition, amongst them Coke and Wentworth, were nominated as sheriffs and so excluded from Parliament, but this was Charles I's only effort to limit the choice of the electors.

The Restoration initiated that bribery and corruption which permeated the eighteenth century. The systematic

purchase of votes both at the hustings and in Parliament, became part of the science of government. In 1695, in 1762 and again in 1802 laws were passed to check the bribery of the electors, but to little effect. The correspondence between George III and his ministers leaves no doubt of the Crown's complicity in the corruption of the electorate In 1779 George III wrote to North "if the Duke of Newcastle requires some gold pills for the election, it would be wrong not to satisfy him," and there is abundant proof that the king put large sums at the disposal of his ministers for this purpose.

(Bribery of the electorate)

Where the electorate was too large to be controlled, the Crown tried the opposite method of swamping the independent electors by creating a large number of voters, who, as servants of the government, were pledged to return the royal nominee. This led to the multiplication of revenue officers in the seaport towns so that when in 1782 they were disfranchised, Lord Rockingham stated that they numbered 11,500 and controlled seventy constituencies They were not enfranchised again until 1868, when, owing to the enormous increase in the number of voters consequent on the Reform bills, there was little danger of their controlling any constituency. Sometimes, of course, the electorate was too large to be controlled even in this way, but by withholding the returns, if the popular candidate triumphed over the government candidate, and by a variety of other ingenious devices, the electorate in the boroughs was often impotent, even when it was numerous enough to escape corruption and the danger of being outnumbered by government officials.

(Creation of government officials)

1782.

Within Parliament the greatest of the outside influences at work was inevitably that of the Crown, and round it, all others centred. Until the Tudors, at first because of the weakness of the Lower House, and later because of the weakness of the Crown, the Commons had been left largely to their own devices, so long as the necessary funds were forthcoming. By the sixteenth century however, when the assembly had acquired legislative, financial

Parliamentary corruption

(1) Under the Tudors and Stuarts.

and deliberative powers, its control became a necessity to a government, which although all-powerful, was founded upon popular approval and support. Under the Tudors, the speaker was nominated by the Crown instead of by the Commons, and Queen Elizabeth secured the return of her chief secretary as a member of the Lower House. Very occasionally recalcitrant members were punished by the Crown; but the experiment was a dangerous one and there were angry murmurs at the breach of privilege. Later, in 1642, Charles I's attempt to arrest the Five Members was viewed with such wrath in the City, where the members had taken refuge, that the king had to leave London. Occasionally Elizabeth sent for obnoxious bills. This she did in 1572 and 1593, when the suppressed measures touched upon dangerously controversial topics. With extraordinary lack of spirit, James I consented to an experiment in parliamentary tactics which Queen Elizabeth would have despised. undertakers were nominated to facilitate his dealing with the Commons. the result was the "Addled Parliament" But as a general rule both James and his son preferred to act independently of Parliament and to weather, as best they might, the storm of protest which they knew would greet them the next time the assembly had to be called.

(2) Under the Hanoverians

After the Restoration, the arguments which swayed the electorate were brought to bear upon their representatives. Amenability opened the road to advancement and honour. Independence led to certain insignificance and oblivion. Burke says the independent member was doomed to vote for ever in a "dispirited minority," and that when he spoke a swarm of loquacious placemen went out to tell the world that all he aimed at was to get into office, while the servile knew figures of arithmetic better than figures of speech. The Indian nabobs were particularly purchaseable and they were usually free from party ties and political prepossessions. Often money was offered and accepted, openly and without a blush. In 1754 Henry Fox refused the leadership of the Commons unless New-

(Secret service money.)

castle told him how the secret service money was distributed, so that he might know how to approach the different members. The same year Barnard moved the repeal of the oath against bribery because it was the cause of general perjury, and Horace Walpole asserts that as much as £25,000 was spent by the government in one morning when the peace of 1763 was being debated in the House.

(Offices and pensions)

Offices and pensions proved excellent baits and caught many unpledged members The clause in the Act of Settlement which excluded all placemen from Parliament was modified in 1705–6, so as to admit the holders of the older offices. The Place bill of 1742 excluded many subordinate government officials from Parliament, and the Rockingham Act of 1782 abolished a large number of old and useless offices, while one of the most valid objections to Fox's India Bill was the large amount of patronage it gave to the government. At the accession of George I there were 270 place-men in the Commons ; in 1820 there were eighty-nine ; by 1833 there were only sixty.

1742.

1782.

1833.

The royal pension list was so long that it crippled the resources of the Crown to a large extent, and was mainly responsible for the enormous royal debts of the eighteenth century. Those who held pensions at the pleasure of the Crown were excluded by statute from the House, but many were conferred secretly either on the members themselves, or on their wives This was why Burke could say that, of the vast sums voted to the Crown, the generality of people saw "nothing expended and nothing saved" : that they were confronted by the humiliating spectacle of royal indigence, while the revenues accruing to the Crown must have amounted to over a million yearly, if the hereditary revenues were also taken into account.

In 1782 the amount to which the Civil List could be burdened with pensions was limited. But until the hereditary revenues of Scotland and Ireland were surrendered the king could devote the whole of them to his pensioners. With the surrender of all independent

sources of revenue, the further limitation of the royal pension list and the appropriation of the money voted for the Civil List to specified heads of expenditure, the corruption of Parliament by the Crown ceased to be possible. The bribing of electors by the candidates for seats in Parliament, though untouched by the Reform bills, has been largely checked by a number of statutes imposing heavy penalties for corrupt practices at elections, while the influence of the landlords over voters and members disappeared with the disfranchisement of the rotten boroughs.

The Duration of Parliament

Failing all other methods, coercive or persuasive, a recalcitrant Parliament could always be prorogued or dissolved, and the threat of either prorogation or dissolution was a powerful weapon in the hands of the Crown. There is no statute enjoining the frequent calling together of Parliaments. In 1330 it was enjoined that they should be held "once a year or oftener if need be," but the "if need be" came to be interpreted as applying to the whole clause, while from 1460 to 1642 Parliament met at very irregular intervals. Queen Elizabeth stated the views of the Crown as to when Parliament should be summoned, in a message to the Commons in 1593, with her customary straightforwardness in such matters. "It is in me and my power to call Parliaments and it is in my power to end and determine the same" Between 1566 and 1571 she had made good this assertion, for no Parliament met during those five years since the Commons had persisted in debating the forbidden questions of the Queen's marriage, and the succession to the Crown. James I and Charles I parted with each of their Parliaments in wrath, and for eleven years Charles I ruled without one.

Provision for triennial Parliaments. Because of this, in 1642 a bill was passed providing that Parliament should meet once in every three years, with or without the royal summons, and it stipulated

at the same time, that no Parliament should be prorogued or dissolved within fifty days of its meeting, without its own consent. In 1664 this bill was repealed as derogatory to the royal dignity, but the revocation contained a clause providing that Parliament should not be intermitted for more than three years. In 1694 the Triennial Act confirmed this and limited the life of each assembly to the same period. For the "Pensionary Parliament" had sat from 1660 till 1677 and had lost all touch with the country in consequence. Nor had its long life proved more satisfactory to the king: Charles II said of it that "Parliaments, like cats, grow curst with age." In 1716 the Septennial Act prolonged the possible life of Parliament to seven years[1] The Reform bill of 1867 made the duration of Parliament independent of the demise of the Crown. The only guarantee for frequent sessions of Parliament which we possess is the need for an annual Appropriation bill and for an annual Mutiny bill. Much of our taxation is permanent, but only about one-third of the nation's liabilities are permanent charges on the Consolidated Fund, while the Mutiny bill is necessary to legalise what is otherwise illegal:—the maintenance of a standing army in time of peace.

1664. 1694. Septennial Act.

The Reform of Parliament

The details of parliamentary reform, including the redistribution of seats, the development of the franchise and the exclusion of corrupting influences, have already been given. But the development of the whole movement towards the reform of the Legislature needs summarising. After the Revolution, the power of the House of Commons and the influence of the Executive over its members developed simultaneously. The best statesmen of both parties fully recognised the evils of a corrupt Legislature. Burke, the spokesman of the Rockingham Whigs, contrasted the ideal of Parliamentary government, with the reality. "A vigilant and jealous eye over executory and

[1] The Parliament Act of 1911 limits the duration of Parliament to five years.

judicial magistracy; an anxious care of public money; an openness approaching towards facility, to public complaint; these seem to be the true characteristics of a House of Commons." But "a House full of confidence, when the nation is plunged in despair; in the utmost harmony with ministers whom the people regard with the utmost abhorrence; who vote thanks when the public opinion calls upon them for impeachments; who in all disputes between the people and the administration presume against the people; who punish their disorders, but refuse even to inquire into the cause of them, this is an unnatural, a monstrous state of things. Such an assembly may be a great, wise, awful Senate, but it is not, to any popular purpose, a House of Commons."

Burke, for all his clearness of political vision, looked not to organic change, but to administrative reform, as the true remedy. Though he championed the Middlesex electors and urged the abolition of sinecures and the disfranchisement of revenue officers, the reform of the method of trying election petitions and the publication of the parliamentary division lists, he shrank from any change in the constitution of Parliament. He said the machine itself was well enough, provided the materials were sound, and urged that our scheme of representation was "as nearly perfect as the necessary imperfections of human affairs and human creatures will suffer it to be."

Early schemes for the reform of Parliament.

Lord Chatham in 1766 and again in 1770 proposed the addition of a third member to the counties to counterbalance the weight of the corrupt boroughs, but Wilkes in 1776 hit upon the only true remedy for the corruptibility of Parliament. He proposed the disfranchisement of the rotten boroughs, the enfranchisement of certain large towns, and an increase in the number of members returned by London and the large counties. Four years later the Duke of Richmond came forward as the advocate of universal suffrage and of equal electoral districts, a programme which the House itself refused to take seriously, but which had many supporters outside the

walls of Parliament. William Pitt, in 1782 and in 1783, brought forward motions in favour of reform. The next year, as head of the Government, he brought in a comprehensive scheme, which it was calculated would add, by the enfranchisement of copyholders and of a certain number of large towns, about ninety-nine thousand voters to the electorate. The remarkable part of the scheme was Pitt's proposal to treat the pocket boroughs as private property and to disfranchise them only with the consent of their proprietors, who were to be compensated out of the national funds At the time of the Union, the proprietors of the disfranchised Irish boroughs were actually compensated in this way The scheme of 1785 did not go far enough to please the reformers, while the king and the ministry were opposed to any change. Then came the French Revolution, and though in 1790 on Grey's motion, and in 1792 on Flood's motion, Pitt avowed himself a supporter of reform in the abstract he declared that it was not the time to make "hazardous experiments."

Pitt's attitude was shared by Whigs as well as Tories. This was due to the violence of the French mob and of the French Government, and the consequent terror with which the growth of democratic societies and a certain amount of unrest amongst the working classes was viewed in England. Erskine and Grey reopened the reform campaign in 1797, but their removal to the House of Lords left Sir Francis Burdett as its only advocate in the Lower House until 1820, when once again it became a Cabinet measure.

The reform movement, 1820–1830.

From 1820 Lord John Russell brought forward successive motions in favour of reform; but they were defeated by large majorities. Then efforts were made to reform Parliament piecemeal. Grampound was disfranchised and its members given to the county of York, but an attempt to disfranchise four other boroughs for corrupt practices and to give their seats to Manchester and Birmingham, was defeated in 1826. Different tactics were tried next. In 1830 Lord John Russell proposed

the direct enfranchisement of the larger commercial towns and O'Connell took up the programme of Sir Francis Burdett, universal suffrage, equal electoral districts and vote by ballot. Finally political events brought the matter to a crisis. The bloodless revolution in France caused by Charles X's repressive measures, and the successful revolt of Belgium from Holland, excited popular enthusiasm while party ties were still weak owing to the struggle over Roman Catholic emancipation of the previous year. With the way thus paved for change, the Duke of Wellington, in the debate on the address from the Throne, challenged the reformers by asserting that
1830. "the system of representation possessed the full and entire confidence of the country." Two weeks later the Government was defeated and Lord Grey accepted the premiership, with the stipulation that reform should be a Cabinet measure.

Struggle over the Reform bill of 1832.

The new Prime Minister had to face royal reluctance and the opposition of those who profited by borough-mongery in both Houses of Parliament. The first bill only passed its second reading in the Commons by a majority of one and it was defeated in committee. The ministry persuaded the king to appeal to the country. Parliament was dissolved and a large majority in favour of reform was returned. The second bill, which passed its third reading in the Commons by a majority of 109, was thrown out by the Lords. The Commons responded with a vote of confidence in the ministry and a third bill was immediately introduced, which was sent up to the Upper House by a majority of 162. There it passed its second reading by nine votes, but the Lords immediately proceeded to its destruction by amendments moved in committee. Lord Grey demanded powers to swamp the hostile Lords by the creation of Liberal peers. William IV shrank from this and the ministry resigned. The Duke of Wellington was therefore asked to form a ministry, but failed, and Lord Grey was recalled and given the necessary powers. But the king and Wellington used

their personal influence to obviate the necessity of using them. In consequence, a hundred hostile peers agreed not to attend Parliament and the bill was passed by 106 to 22 votes.

Popular dissatisfaction.

The Reform bill of 1832, by redistributing seats and reforming the franchise remedied the chief evils of the old system. But the artisan and labouring classes were not taken into account at all and owing to the difference between the county and borough franchises, every measure of redistribution was also, of necessity, a measure of disfranchisement. In consequence there was a certain amount of popular discontent. From 1838 to 1848 the Chartists, under Fergus O'Connor and Daniel O'Connell, worked strenuously and often with more zeal than discretion for the "People's charter." They demanded vote by ballot, manhood suffrage, equal electoral districts, the abolition of the property qualification for members, annual Parliaments and the payment of members. Many of their aims have since been realised, but the Chartist movement itself was hopelessly discredited by the discovery that a monster petition presented to Parliament was largely made up of fictitious names.

The Chartists.

During the following years reform again became a Cabinet measure. In 1858 the property qualification for members was abolished. Lord John Russell introduced no less than three bills, but withdrew them and Gladstone's bill was only carried by five votes in 1866, owing to the secession of the "Adullamites," led by Lowe. The government, regarding its small majority as equivalent to a vote of want of confidence, resigned. Under Lord Derby, Disraeli introduced the Conservative reform bill of 1867. In its final form, it was more democratic than the Tories and even many of the Whigs desired; but the bill was passed and Disraeli took "the leap in the dark" which enfranchised the masses. With the exception of the agricultural labourers in rural districts, practically all householders now had the right to vote and the electorate was nearly doubled. The Ballot Act of 1872 secured the

The Reform bill of 1867

The Reform bill of 1884

democratic safeguard of secret voting, the acts of 1884-5 assimilated county and borough franchise, established single-member constituencies and made a large advance towards equal electoral districts. By so doing they removed many of the old inequalities which the acts of 1832 and 1867 had failed to remedy. But there are those who still think the franchise very imperfect: minorities, though many have pleaded on their behalf, are still unrepresented in Parliament; electoral divisions are still far from equal and the result is that sometimes, as in 1886, the party for which the majority of votes is given, is not the party which has the most seats in Parliament. On this particular occasion it is said that the greatest number of votes was cast for candidates in favour of Home Rule, but the result of the general election in Parliament was a Unionist majority of over a hundred members. [1]

The Privileges of the House of Commons

Privileges of the House of Commons.

The privileges which the Speaker claims at the beginning of each Parliament as the "ancient and undoubted right" of the Commons and which the Lord Chancellor, on behalf of the Crown, "most readily grants and confirms," are freedom from arrest, freedom of speech, and freedom of access, together with the promise that the proceedings of the House shall receive the most favourable construction. In addition to these privileges there are certain others now recognised as belonging to the House and as essential for the maintenance of its dignity and independence. Thus it can regulate its own constitution and its own procedure, and it can punish, for violation of its privileges, both its own members and persons outside the House.

Privileges of the House of Lords.

The House of Lords enjoys privileges similar to those claimed by the Lower House. But since they have been rarely called in question, they have no history. Three special privileges belong to the Lords or have belonged to them: that of personal access to the sovereign: that

[1] See note, page 242.

of the right of the minority to record a protest on the journals of the House: and that of voting by proxy, but this last privilege was waived by resolution in 1868.

The first recorded demand by the Speaker for the privileges of the Commons was in 1554. After 1571 it was habitual and in 1589 a committee of privileges was appointed, which, after 1601, became a permanent institution. Freedom of access to the sovereign belongs collectively to the Commons through the Speaker; but it belongs individually to all such members of the Lower House as are Privy Councillors, just as much as to the peers, who are the hereditary advisers of the Crown. The petition is now entirely formal and so is that for "the most favourable interpretation," for apart from the fact that the Crown can take no cognizance of what is said or done within the House, the right of freedom of speech would nullify any proceedings inspired by unfavourable interpretations.

(1) Freedom of access.

(2) The most favourable interpretation.

In order that members may be unhindered in the discharge of their public duties, freedom from arrest is still demanded for them and for their servants, while well into the nineteenth century the immunity of their estates from legal proceedings was also claimed. The origin of the privilege has been seen in a law of Ethelbert of Kent, who imposed a twofold fine on any who did evil to his people when the king had called them to him, and Knut extended his special protection to those journeying to and from the "gemot." King Knut however, withheld this special protection from any one who was a notorious thief and the privilege has never been held to protect members from the consequences of treason, felony or a breach of the peace. Thus it was protective against the vengeance of individuals rather than against that of the State and in civil cases the privilege was frequently and successfully asserted. In 1433 it received statutory recognition. In 1543 the House secured the release of Ferrers, on its own authority and rejected a writ of privilege offered by the

(3) Freedom from arrest

Chancellor as an unnecessary justification of their proceedings. After the case of Shirley in 1604, the power of the House to order the liberation of its members was recognised by Act of Parliament and at the same time the gaoler was protected from the consequences of allowing his prisoner to escape the clutches of the law.

The immunity of members' servants possibly originated in the inconvenience at one time inseparable from long journeys and sojourns away from home. A sufficient bodyguard was essential and the slowness of the journey and the sparsity of accommodation on the road necessitated a large amount of baggage and a correspondingly big retinue. The privilege was successfully asserted in the case of Lark in 1429 and Smalley in 1575. In 1584, in the case of Digges, the Lords successfully established a similar claim This immunity of members' persons, their property and their servants from prosecution for debt and similar offences, bore very heavily on ordinary folk, especially as the privilege held good, not only while Parliament was sitting, but for forty days before and after the session, so that members might come and go in safety. In consequence, it was enacted in 1770, that any suit might be commenced or prosecuted at any time against members or their servants and the privilege of freedom from arrest or imprisonment was limited to the members themselves. On the plea that their presence is required in a higher court, both Houses enjoyed two privileges allied to that of freedom from arrest, namely exemption from appearing as witnesses and from serving on juries. The former privilege is now waived, the latter was confirmed by statute in 1870.

(1) Freedom of speech.

The greatest of the privileges, freedom of speech within Parliament at first meant immunity from punishment for words uttered in debate: later it was interpreted to convey the right to discuss freely all affairs of State. This privilege is the keystone of parliamentary government and its successful vindication established the right of the two Houses to initiate legislation and to criticise the policy of

the Executive. In token of it, a curious custom has survived: a bill is still read for the first time in Parliament before the speech from the Throne is taken into consideration as a protest that the House is free to deal with matters which are not mentioned therein. The right of free speech was first successfully vindicated at the end of the fourteenth century. In 1397 Haxey introduced a bill into Parliament to limit the expenses of the royal household. The king demanded the name of the introducer and with many expressions of regret at his unseemly conduct, the Commons surrendered Haxey to the king. He was condemned in Parliament as a traitor and was only saved from execution by the interposition of Archbishop Arundel, who claimed "benefit of clergy" for him. Later Henry IV with the advice and assent of the Lords entirely reversed the judgment of his predecessor and thus acknowledged the right of the Lower House to freedom of speech. But as yet the Commons vindicated their own claims but timidly. The Parliament of 1455 plucked up heart to petition against the imprisonment of Thomas Yonge of Bristol in 1451, for suggesting that the Duke of York should be declared heir. But as late as 1515 the Speaker still made the ancient request of freedom of speech for himself alone, and Speaker Moyle in 1542 was the first to make it for the House in general. 1397.

(a) Under the Tudors.

Under the Tudors, the growing activity of the Commons raised the question whether freedom of speech was to mean not only immunity from punishment for the spoken word, but also the right to discuss matters, other than those which the Crown chose to bring before the House. Against the outside world, members were protected by bill after 1512, since Strode's prosecution in the Stannary Court for introducing a bill to regulate the Cornish tin mines resulted in an Act of Parliament declaring that all legal proceedings "for speaking reasoning or declaring of any matter" in Parliament should be utterly void and of none effect. This however gave no protection against the

Crown, which resorted to more drastic remedies than legal proceedings.

Freedom of speech, in its widest sense, the Tudor sovereigns were loath to recognise, nor could they really afford to do so. Every one wanted to discuss religious questions and the European situation, but both religious and foreign affairs were too nicely adjusted to stand anything but the most delicate handling Strickland in 1571, Cope in 1587 and Wentworth in 1587 and 1593 were imprisoned by order of the Queen because they persisted in discussing forbidden matters In 1571 the Queen sent a message to the Commons telling them "they should do well to meddle with no matters of state but such as should be propounded unto them." Occasionally the Queen
1593. prohibited bills that were before the House and in 1593, when the Speaker asked for the customary privileges, he was given an exact definition of what the Crown conceived the greatest of these privileges to imply. "Liberty of speech is granted you, but you must know what privilege you have; not to speak every one what he listeth, or what cometh into his brain to utter; but your privilege is aye and no. Wherefore Mr Speaker, her Majesty's pleasure is, that if you perceive any idle heads which will meddle with reforming the Church and transforming the Commonwealth, and do exhibit any bills to such purpose, that you receive them not, until they be viewed and considered by those, who it is fitter should conceive of such things and can better judge of them." A week later, the Queen in a message to the Commons expressed her amazement "that any would be of so high commandment as to meddle with matters of state," after she had expressly forbidden it.

(b) Under the Stuarts. Under the Stuarts Parliament defined its privileges, as it found them ignored by the Crown, and in this way answered James' definitions of the royal prerogative, which it regarded, not without reason, as indirect threats against its own independence. In 1604, in an "apology," presented to the king, the Commoners represented that the privileges of their House and therein "the liberty and

stability of the whole kingdom had been more universally and dangerously impugned than ever since the beginnings of Parliament." Above all freedom of speech had been "prejudiced by often reproof," and particular persons had been "noted with taunts and disgrace, who had spoken their conscience in matters proposed to the House, but with all due respect and reverence." Nevertheless in 1614, after the session had ended, James imprisoned the more violent speakers against the royal favourites. In 1621 the king imprisoned Sandys, one of the leading opponents of his Spanish policy: the Commons remonstrated: James answered that the imprisonment had nothing to do with Sandys' conduct in Parliament, at the same time he added that he was "very free and able to punish any man's demeanours in Parliament" Thereupon followed a lengthy and somewhat entertaining correspondence on the subject, between king and Commons. James, as usual, was bombastic and claimed that the privileges of Parliament were derived from "the grace and permission of his ancestors and himself." He added that he would be graciously pleased to continue them, so long as the Commons did not "pare his prerogative and the flowers of his crown." The Commons protested with the utmost deference, but equal firmness, that the liberties of Parliament were the "ancient and undoubted birthright and inheritance" of the people of England, and so were not dependent on the royal pleasure. Finally, they recorded a protest in the journal of the House, adding that "arduous and urgent affairs, concerning the king, state and defence of the realm, and of the Church of England, and the maintenance and making of laws and redress of mischiefs and grievances are proper subjects and matter of counsel and debate in Parliament, and that in the handling of those businesses every member of the House hath, and of right ought to have freedom of speech." James sent for the journal and tore out the obnoxious protest with his own hand and in the proclamation which dissolved Parliament, expressed his displeasure against those members

1621.

who "took such inordinate liberty" as to treat of "high prerogative and sundry things" which "without special direction, were no fit subjects to be treated of in Parliament."

James had the last word, but the victory really remained with Parliament. The last instance of the violation of the privilege was in 1629 when Sir John Eliot and others were imprisoned by the Council. They were proceeded against in the Court of King's Bench for seditious speeches in Parliament: but in the next reign the judgment was reversed on the ground that "words spoken in Parliament could only be judged in Parliament." Finally the Bill of Rights declared that "freedom of speech and debates in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

1689.

(5) Privacy of debate.

Liberty of speech is imperfect without privacy of debate. Both Lords and Commons can exclude strangers and prohibit the publication of the proceedings of the Houses. The right to clear the House of strangers was probably claimed at first as a precaution against royal spies and as a matter of convenience, for people invaded all parts of the house to such an extent, that, as late as 1771 a stranger was included in a division. Since 1875 the exclusion of strangers has been upon the vote of the whole House only, and not upon the demand of individual members.

(a) Exclusion of strangers.

(b) Restrictions on the publication of debates.

The publication of speeches made in Parliament was prohibited by the Long Parliament in 1641: at the same time it published itself "Diurnal Occurrences in Parliament." In 1680 it was ordered that votes and proceedings were to be printed under the direction of the Speaker. But after the Revolution, there were frequent resolutions against the publication of debates, on the plea that it was a breach of privilege: the Whig oligarchy which then controlled Parliament was extremely jealous of all outside influences. A keen discussion took place on the subject in 1738. Wyndham, the leader of the Tories, said the people ought to have the means of judging of the worth

of their representatives. Walpole maintained that the publication of proceedings would inevitably lead to misrepresentation. Pulteney, the leader of the discontented Whigs, added that he, for his part, had no wish "to be made accountable without doors for what he said within." In the end it was resolved that any publication of the proceedings of the House was "an high indignity and a notorious breach of privilege."

Such reports as were issued were only occasional and the members were cited under fictitious names. But in 1771, at the instigation of Wilkes, garbled reports of the proceedings in Parliament began to appear in the daily papers, and members were quoted under recognisable nicknames. The Commons attacked the publishers, Wheble, Thompson and Miller, who were championed by Wilkes and other members of the London corporation. The battle ultimately went against the Commons, who had to drop the matter, but until 1834 reporters were liable to be crowded out of the House: they were not allowed to take notes and matters were so uncomfortable for them that they had little chance of reporting proceedings faithfully. In the new Houses reporters' galleries were provided, and after 1835 the publishing of proceedings was facilitated. After 1836 the Commons, and after 1857 the Lords, adopted the practice of publishing the division lists, while the protection given after 1840 to printers of Parliamentary papers issued by the order of the House, against actions for libel by any person whose character was incidentally defamed therein, was extended in 1868 to proprietors of newspapers. But a private individual publishing speeches made in the House does so at his own peril.

(6) Regulation of the constitution of the House.

The House of Commons can regulate its own constitution by immediately enforcing legal disqualifications, by expelling unfit members, by ordering the issue of writs and by determining disputed elections. The first point it made good in the case of Alexander Knowell in 1553, who, as a member of Convocation, was declared unable to sit in the Commons. The right has been repeatedly

(a) By enforcing legal disqualifications.

asserted in the case of persons attainted of treason and felony: notably in that of John Mitchel in 1875 and of Michael Davitt in 1882. The first case of the expulsion of a member for unworthy conduct was that of Hall, the master of the celebrated Smalley, in 1581, for a libel on the Speaker. In 1584 Dr. Parry was expelled the House for branding a bill against the Jesuits as "bloody" and in 1620 Shepherd met the same fate for speaking disparagingly of the Puritan sabbath. The case of Wilkes created much controversy. In 1764 he was expelled for writing a seditious libel. But the expulsion of a member does not disqualify him for re-election and three times Wilkes was re-elected as member for Middlesex Finally in 1769 the House asserted that votes given to him were thrown away and declared his opponent duly elected. The Commons were unquestionably exceeding their powers at the expense of the electors and in the Parliament of 1774 Wilkes was allowed to take his seat unopposed, while in 1782 the proceedings against him were expunged from the journals of the House.

(b) By expelling unfit members.

(c) By determining election petitions

The right to try disputed returns was not claimed till the reign of Queen Elizabeth. At first they had been decided by the King, with the help of the Lords, but an Act of 1410 gave authority to the Judges of Assize to examine into all election petitions and the return of writs to Chancery after 1406 left the matter in the hands of the Chancellor and the Justices. In 1586, however, the Commons resolved that these officials were exceeding their powers when they undertook the settlement of a contested return for Norfolk and they finally substantiated this resolution in 1604. James had directed the election of fit and proper persons and had ordered the return of the writs to Chancery, in order that, if any were elected contrary to the proclamation, they might be rejected as "unlawful and insufficient." Goodwin, an outlaw, was elected for Buckinghamshire. Chancery declared the election void and issued a new writ and Fortescue was returned. When it met Parliament asserted

that Goodwin had been duly elected and embarked on a lengthy controversy with the Crown. In the end the elections of both Goodwin and Fortescue were declared void, but on the very day that a new writ was issued for Buckinghamshire, the House decided, unchallenged, two other disputed elections.

Having secured the right to try election petitions, the House first entrusted it to the permanent committee of privileges and elections, but after 1672 such matters were brought before a committee of the whole House and in the days of Speaker Onslow, from 1727 to 1761, the trial was held at the bar of the House. Inevitably election petitions became a trial of party strength. Walpole resigned because the defeat of his candidate in the Chippenham election case was equivalent to a vote of want of confidence. Such a condition of affairs entirely ignored the rights of the electors, and in 1770 Grenville's Act transferred the trial of disputed returns to a committee of fifteen. Peel reduced the numbers of the committee to six and then to five, but it had no specialist knowledge and this did little to remedy its partiality and incompetence. Finally in 1868 the trial of disputed elections was once again put into the hands of the Justices, who now act as the nominees of the Lower House. Two judges of the High Court conduct the trial in the borough or county whose return is disputed; their decision is reported to the Speaker and the House takes action accordingly.

(7) Exclusive cognizance of matters arising within the House.

The Commons have exclusive cognizance of matters arising within the House itself. Thus apart from expelling unfit members, it can punish them for unworthy conduct. In 1548 John Storie was imprisoned for violent language. In 1576 Peter Wentworth was imprisoned by order of the House itself for discussing forbidden matters, while within recent years the disturbances which arose in Parliament over Bradlaugh's refusal to take the oath of allegiance and his subsequent efforts to do so, gave rise to the declaration of the Judges that, except in the case

of ordinary crimes the House has the exclusive power of regulating all proceedings within its own walls.

(8) Punishment for breach of Privilege.

The natural corollary of this exclusive cognizance is the power of inflicting punishment on private individuals, as well as on members of Parliament, for any breach of privilege. Until the Restoration this punishment often took the form of a fine, but the modern form of punishment is expulsion in the case of a member and admonition by the Speaker and commitment to the custody of the serjeant-at-arms, or to prison, for all offenders. The Commons can commit for no definite time and the termination of the session liberates the prisoner. On the other hand the Lords can commit for a definite period and the prisoner is not released by the prorogation of Parliament. With regard to actions committed outside the walls of Parliament, the Common Law Courts have established their power to uphold the rights of private individuals although a question of parliamentary privilege be involved and to make inquiries into alleged privileges and determine their extent and application.

NOTE, pp 213, 217.—The Representation of the People Act, 1918, gives the vote to every man resident in the constituency during the qualifying period or occupying premises or land of the yearly value of not less than £10. The vote is also given to women over thirty with certain qualifications No elector can vote for more than one constituency by virtue of the residence qualification, and for one constituency by virtue of any other qualification of whatever kind

NOTE, p. 232.—The Representation of the People Act, 1918, provided for an experiment in Proportional Representation in the interests of minorities, but the scheme was rejected by the Commons. Electoral divisions have been made more equal by a redistribution of seats.

CHAPTER X

THE WORK OF PARLIAMENT

The Legislative Authority of the two Houses

IN the making of laws the counsel and consent of the great men of the realm has been asked from time immemorial. But Witan and Commune Concilium seem to have had no power to initiate legislation, nor did they ever refuse to sanction the measures proposed by the king. When the Commune Concilium gave place to Parliament representatives of the Commons were summoned to the council of the nation for financial reasons alone. In 1322 however, it was enacted as an excuse to quash the Ordinances, that "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 assent of the prelates, earls, barons and the commonalty of the realm." This extended to the knights and burgesses the ancient right of the great council to assent to legislation. But as yet laws were framed by the king and his Council and such power to set legislation in motion, as the right of petitioning the Crown implied, could be exercised as well out of Parliament as in it. 1322.

In the early days of Parliament it is not clear how far the assent of all three estates to the petition of each was essential. The assent of the clergy to the statutes based upon the petitions of the Commons became immaterial, Petitions as a means of initiating legislation.

for they soon withdrew from the national assembly. But we find in 1340 and in 1352, statutes passed at the petition of the clergy and with the assent of the Commons, while certain protests of the Commons distinctly imply that their assent to such statutes was too often taken for granted. The barons sometimes joined in the petition of the Commons, at others they concurred with the answer of the king, for they were both lords of Parliament and hereditary counsellors of the Crown. On the other hand, the Commons seem to have always identified themselves with the petitions of the Lords.

To petition for redress does not initiate remedial legislation, but it plants the seed from which it springs. The articles of the barons in 1215 and 1258, the petitions of the whole community at Lincoln in 1301 and at Westminster in 1309 were the forerunners of a long list of petitions, in answer to which the king framed laws, or promulgated ordinances. Edward I perfected the machinery for receiving petitions and from his reign onwards Receivers and Triers of petitions were appointed at the beginning of each session, while from the accession of Edward III it was the custom for the Chancellor to declare the king's willingness to hear the petitions of his people at the opening of each Parliament.

Treatment of petitions by the Crown.

Had the royal answers been satisfactory, matters might have continued thus indefinitely But the king interpreted according to his own liking the petitions of his people. Sometimes redress was promised and never given. Sometimes a temporary remedy was provided by a royal ordinance. Sometimes saving clauses which vitiated the whole statute were introduced, or enactments which the Commons did not want were put side by side with those which they did. Nearly always Parliament got either more or less than it desired. Against such treatment it fought incessantly, and the murmur that redress ought to precede supply grew steadily louder. In 1341 and again in 1352, the Commons insisted that the king's answers should be "granted, confirmed and

sealed" before Parliament broke up. In 1377 the Commons petitioned that statutes should be read to the House before they were sealed. In 1353 Parliament protested against the Ordinance of the Staple because the regulation of trade was too grave a matter except for the consideration of Parliament, and confirmed the ordinance the next year as a statute which "was to endure always." Henry V promised that "no thing should be enacted to the petition of his comune that be contrarie to their asking, whereby they should be bound without their consent" In 1414 it was demanded that statutes should be made without alteration of the petitions on which they were based In 1429 a petition was presented with the request that "hit lyke unto ye king . . . yat graciously hit may be answered after the tenure and fourme yerof."

The constant reiteration of similar demands only served to demonstrate the futility of the royal promises. The real remedy against insufficient and unwelcome legislation was elsewhere. Though by the fifteenth century nearly all laws were based on the petitions of Parliament, which thus practically initiated legislation, the weak point in its position was that, in as far as it initiated, or prompted initiation, it did so by petition and not by bill. Measures which originated with the king or the Council were usually presented to the Houses in the form in which they were to become law. Towards the end of Henry VI's reign Parliament adopted a similar practice. It thus secured to the full the right of initiation. Henceforth no amendments were possible save under the eyes of the promoters of the bill and the king had to accept or reject each measure as it stood. In legislative matters the Crown and Parliament had changed places, and the "foundation of the omnipotence of Parliament" was laid.

Initiation by bill.

A few years later, another change took place. From the beginning of Edward III's reign statutes were generally said to have been enacted "at the request" of the Commons and with the "assent" of the Lords. This formula began

Recognition of the legislative equality of the two Houses.

to die out during the reign of Henry VI and with the accession of Henry VII it vanished altogether Instead of it, we find statutes enacted "by the authority of Parliament" and the legislative equality of the two Houses was thus recognised

Legislative rivalry between Crown and Parliament.

As Parliament grew in power and gradually asserted its monopoly of legislation, rivalry with the Executive became inevitable The functions of king-in-Council and king-in-Parliament had at first been indistinguishable and the fact that the king's Council formed an important part of Parliament, served to increase still further this obscurity and complicated the differentiation of functions.

The Crown's use of— (1) Ordinances

At first ordinance and statute differed rather in form than in weight or scope, and the ordinance was a convenient means of providing immediate remedies or remedies which were meant to be tentative and experimental rather than permanent When king and Parliament became rival, rather than co-operative legislators, the king-in-Council still claimed legislative powers, undiminished by the creation of Parliament But after 1322 royal ordinances had not the same weight as statutes to which Lords and Commons had given their assent, these were recorded on the rolls of Parliament and were only to be amended or revoked by the powers which made them During the fourteenth century the difference between an ordinance and a statute was gradually made clear and the action of the Commons with regard to the Ordinance of the Staple established the temporary character of the one, as against the permanent character of the other

(2) Proclamations.

In the sixteenth century the Crown again entered into rivalry with Parliament over legislative matters Proclamations were but ordinances in disguise. Like their predecessors they were in part necessitated by the irregularity with which Parliament was summoned, but they were a more formidable menace to the legislative authority of Parliament because the high notions of prerogative, entertained by Tudors and Stuarts, gave to

them a sanctity which ordinances had never possessed. Moreover, there was the Star Chamber ready to enforce them by every sort of remedy, short of the death sentence. Under Henry VIII proclamations were given the force of an act of Parliament, providing that they were not "prejudicial to any person's inheritance, offices, liberty, goods and chattels," and did not infringe the established law Why this suicidal concession was made it is difficult to tell, for the Houses must have known that the limitations they imposed on its use were certain to be ignored. Protector Somerset wisely repealed the statute, but proclamations dealing with religious, economic and social matters continued to be issued and enforced in ever increasing numbers The Judges under Mary ruled that they could only be issued to emphasise or explain existing laws But this decision was unheeded both by Elizabeth and James I In 1610 came a protest from Parliament against the excessive use of proclamations. Not unreasonably, they feared that "by degrees they would grow up and increase to the strength and nature of laws" James consulted the Judges, who led by Chief Justice Coke decided that the king could not, by proclamation, create any offence which was not an offence before At the same time they conceded that the king might, by proclamation, admonish his subjects to keep the laws and any neglect of such admonition would aggravate the offence After this no proclamations were issued imposing penalties, such as fines or imprisonment. At the same time, till the Star Chamber was abolished, it continued to impose minor penalties for actions which were breaches of proclamations but which were not contrary to the law of the land.

A greater, because a more subtle danger than either ordinances or proclamations, to the legislative supremacy of Parliament was the claim made by the Crown to suspending and dispensing powers. The power of suspending statutes was incompatible with good government. It could easily have amounted to wholesale and

(3) The suspending power.

capricious abolition of the laws During the middle ages it was occasionally used on behalf of the Pope, whose power in England was considerably curtailed by the anti-papal legislation of the fourteenth century. But under the Stuarts it assumed vaster proportions The Parliaments of James I and Charles I protested against it and after the Restoration it was again challenged when it was used on behalf of the Roman Catholics, whom the Stuarts were eager to shield, but whom Parliament was penalising with ever increasing zest Thus Charles II 's suspension of the Navigation Act was unquestioned but
1672 in 1672 his Declaration of Indulgence, which practically suspended the penal statutes against the Roman Catholics, roused such a storm of indignation that he cancelled it in Parliament with his own hand James II. issued a similar declaration which he ordered to be read in the parish churches The protest of the seven Bishops, their trial and their triumphal acquittal struck the death-blow to royal absolutism, and the Bill of Rights declared the "pretended power" of suspending laws without consent of Parliament to be illegal

(4) The dispensing power. The dispensing power admits of more defence Statutes often bore heavily in individual cases and, since the king could pardon the criminal, it sounded illogical to deny his power to grant immunity from punishment before the law was broken But it was a power which might easily be misused During the fourteenth century petitions were frequent against the king's indiscriminate grants of pardon and impunity, so that murder and every kind of felony were committed without restraint. The Lancastrian lawyers drew a distinction between "mala in se" and "mala prohibita," that is between crimes which violate the divine law and crimes which are the creation of Statute law, and they argued that the king could only use the dispensing power with regard to the latter But all distinctions vanished before the Stuart lawyers, who claimed the royal power of dispensation as inherent in the royal prerogative, which could neither be limited nor

taken away In spite of this the authors of the B.s Rights only condemned the dispensing power as it been "assumed and exercised of late"

The royal veto

The royal assent to petition or statute was not refused point blank, for to a large extent supplies depended on the redress of grievances If the measure displeased the Crown the diplomatic promise "Le roi s'avisera" was made, and this was the last that was heard of the bill: the King's assent was given in the words "le roi le veut" Before the seventeenth century the royal right of veto was often exercised, in 1597, for example, of the ninety-one measures presented to the Queen, only forty-three received the royal assent The Stuarts accepted statutes readily enough and then dispensed with them in particular cases or suspended them altogether as they thought fit After the Revolution, William III vetoed four measures of importance —amongst them the first Triennial bill The last occasion when the veto was used was in 1707, when Queen Anne, in face of Scottish disaffection, refused to sanction the Scottish Militia bill The royal hostility to any measure is now signified to the ministry at an early stage of the bill

Commons' methods of overcoming opposition of the Lords

With the exception of money bills, Lords and Commons have an equal right to introduce bills and to amend or reject measures sent by either House to the other In the event of a deadlock, a conference between the Houses is possible but this practice was dropped during the nineteenth century, while in 1857 both Houses passed resolutions in favour of messages By this means a compromise is usually effected. But should the hereditary Chamber prove obdurate over a measure about which an unimpeachable mandate has been received from the electorate, it is possible to swamp the hostile majority in the Upper House by a creation of peers This was used as a threat to overcome the opposition of the Lords to the Reform bill of 1832, and it was actually resorted to in 1711 by Harley and St John, in connection with the Treaty of Utrecht. Bagehot describes this power of creating peers

ie safety-valve of the Constitution. But it is a safety-
e, the use of which is fraught with great danger to
a scheme of government which puts the legislative
authority in the hands of two Chambers, and it can only
be justified, when as in 1832, the desires of the nation are
unquestionable.[1]

The Financial Work of Parliament

The control of the national purse was from the first a vital question. Upon its answer hung the decision between limited and unlimited monarchy. At first a large portion of the Revenue was outside the control of Parliament, and the power of Parliament to make its voice heard in national affairs depended upon the restrictions which it was able to put upon the taxation necessary to supplement the hereditary revenues of the Crown. In Magna Carta, the Commune Concilium was organised for the express purpose of sanctioning taxation. Unquestionably it was enforced with representatives of the people for the same purpose. Step by step Parliament fought with the Crown for the control of all demands upon the national purse. The struggle was a long one, for while Parliament, with each concession wrung from the Crown, was striving to establish the principle, finally laid down in the Bill of Rights, that all "levying of money for or to the use of the Crown by pretence of prerogative without the grant of Parliament" is illegal and contrary to the spirit of the Constitution, the Crown accepted each new limitation upon its taxing powers in the letter rather than in the spirit, and, abandoning the arbitrary exaction of the particular taxes enumerated, still claimed the right to exact all others, whether feudal or national, without the consent of Parliament.

[1] By the Parliament Act of 1911 the Lords' power of veto was limited. They can no longer reject Bills which the Speaker of the Commons decides to be "Money" Bills, and an ordinary Bill can be passed without their assent after two years, if it has been sent up three times by the Commons within the lifetime of a single Parliament.

The parliamentary advance was therefore necessarily slow. In 1215 it was established that no scutage or aid, other than the three customary aids, was to be exacted without the consent of the Commune Concilium regni, but this clause was omitted when the Charter was reissued in 1216. In 1279 Edward I promised that no "aids tasks or prises" should be taken save by the "Common assent of the realm and for the Common profit thereof." Nevertheless he saved his right to collect the ancient tasks and prises "due and accustomed," which had been sanctioned by the Commune Concilium in 1275. In 1340 Edward III was forced to assent to a statute enacting that no "charge or aid" should be imposed henceforth save with the consent of the great men and the Commons of the realm. In 1362 and again in 1371, a similar control over indirect taxation was established, for owing to the separate negotiations with the merchants, Edward had been largely independent of Parliament. It was enacted that "neither merchants nor any other body should henceforth set any subsidy or charge upon wool without the consent of Parliament." Moreover in 1373, since there seemed every prospect that with or without the consent of Parliament, the king meant to exact tonnage and poundage, the Commons with no small strategical skill asserted their right to sanction taxation by granting to the Crown the two taxes in question.

Early attempts to secure the right to consent to taxation 1215 — 1297 — 1340 — 1362 1371 — 1373

The Lancastrians acknowledged the right of Parliament to consent to taxation, so too, did the Tudors. But the Act of 1534, authorising Henry VIII "to regulate by proclamation the course of trade," left a wide discretion as to the imposition of new customs duties in the hands of the Sovereign. James I, like his predecessors, used this power without hesitation. It was eventually challenged by a merchant, Bate, of the Levant Company. The judges decided quite justly in favour of the Crown, and the Parliament of 1608 acquiesced in their decision. But Cecil embodied the new duties in the customary Book of Rates, and James, in a commission

The right acknowledged by the Lancastrians and Tudors — 1608

authorising their levy, asserted that this special power and prerogative was "proper and inherent in the person of princes, that they may, according to their several occasions, raise to themselves such fit and competent means by levying of customs and impositions as to their wisdoms and discretions may seem convenient." This meant unlimited impositions and the end of all parliamentary government seemed imminent Successive Parliaments protested against their levy, and the dissatisfaction of the Legislature was shown by the fact that Charles I did not receive the customary life grant
1628. of tonnage and poundage The Petition of Right which dealt only with the grievances of the moment, while forbidding the levy of any "gift, loan, benevolence, tax or such like charge," did not touch upon the question of
1629. the impositions, nor did the Remonstrance of 1629, though it declared the unsanctioned collection of tonnage and
1641. poundage to be a breach of the "fundamental liberties of the kingdom" Finally the Long Parliament reasserted parliamentary control over the levying of tonnage, poundage and impositions and over direct taxation in the question of ship-money James II authorised by proclamation the collection of the customs, which had been given for life to his brother an act which was allowed to pass unchallenged But any contest between Crown
1688. and Parliament, over questions of taxation became impossible after the Revolution

Appropriation of supplies

Effective parliamentary control over the national purse means not only the giving of supplies, but their appropriation to the various services of the state, and, as an inevitable corollary, the auditing of accounts. Oddly enough the first proposal that the Legislature should control the expenditure of public money came from the Crown. In
1237. 1237, William Raleigh, the king's clerk, suggested that the Commune Concilium should appoint a committee to lay out the proposed aid according to the needs of the nation, but the barons did not accept the proposal. Under Edward III both Houses were usually told the purposes

for which money was needed and a subsidy was not infrequently granted on condition that the war was continued. The money was often diverted to other uses, but the practice, though as yet merely formal, was useful, and under the Lancastrians it seemed likely to become a reality The king was always bankrupt and an effort was made to simplify financial matters by setting aside certain sources of revenue to meet certain inevitable expenses Thus a fixed sum was appropriated to the royal household Henry IV set aside tonnage and poundage for the defence of the sea The rents of forfeited lands and the goods of felons and outlaws were to go towards the payment of the royal debts, while a part of the subsidy on wool was to be spent on the upkeep of that "precïouse jeuelle," Calais.

Under the Lancastrians.

The appropriation of supplies ceased under Yorkists and Tudors It was revived by James I in 1624, when he proposed to hand over the money granted for the succour of the Palatinate to commissioners chosen by the Commons Votes of particular taxes to specified purposes became customary during the Commonwealth. It was continued at the Restoration at the suggestion of Charles II himself in connection with the supplies voted for the Dutch War of 1665 Charles' zeal for constitutional practices was due to the fact that Clarendon, of whom the king was weary, regarded the appropriation of supplies as an encroachment on the royal prerogative

1624.

The right of Parliament to audit national accounts was conceded by Edward III Like most of his constitutional concessions, it was made in order to lull discontent for the moment, and then was suffered to remain as a dead letter In 1376 the demand was repeated by the Good Parliament and in 1379, and again in 1381, "treasurers" of the grants were appointed who were to see that the money was expended on the purposes for which it was voted, and who were to give an account of receipts and issues. In 1406, Henry IV met the demand for audit with the assertion that "kings do not render accounts": nevertheless, the next year he thought it wise to agree to the

Audit of accounts.

demand of the Commons. From this time onwards the claim to appropriate supplies and to audit accounts had the same history. The latter right was conceded finally under Charles II. In 1666 Parliament asserted its right to inquire into the expenditure of the sum voted in the previous year for the war with Holland. The inquiry was prevented by a prorogation, but the following year the Commons secured the appointment of a "committee of audit" with extensive powers One of its first actions was to expel from the House Sir George Carteret, the Treasurer of the Navy, for issuing money without legal warrant. The control of the House over appropriation and its audit of accounts is now exercised through the Comptroller and Auditor General He is not only responsible that no public money is issued except to the amount and for the purposes specified by Parliament, but he also examines the accounts of the different departments and submits them, together with his report thereon, to the House of Commons.

The Comptroller and Auditor General.

Results of Parliament's financial supremacy.

As the guardian of national finances, Parliament can exercise large coercive powers over the policy of the Executive As early as 1339 we find the suggestion that the redress of grievances ought to precede supply. In 1348 and again in 1373 it was implied more definitely. In 1401 it was petitioned that the king's answer to the request of the Commons might be declared before the grant of money was made the petition was refused as unprecedented Subsequently the Commons adopted the practice of delaying the grant till the last day of the session, and until recently any member upon the motion that the House should resolve itself into Committee of Supply, could move an amendment upon any subject whatsoever. In 1882 this practice was stopped by a standing order of the House. As it is, the Appropriation bill is not passed till the end of the session At the beginning of each year the House discusses, amends and agrees to the estimates submitted by the heads of the different departments in the Committee of Supply, and

(a) Redress precedes supply

provides for them in the Committee of Ways and Means, for to the latter committee the Chancellor of the Exchequer submits the national Budget At the end of the year, the resolutions of the Committee of Supply are embodied in the Appropriation bill together with the Ways and Means or Consolidated fund bills which are passed from time to time to meet the immediate financial necessities of the government.

(b) The Commons monopolise taxation.

The Lower House has the right to initiate all money grants. It only does so at the recommendation of the Crown. At first the king sent commissioners to lay his needs before both Houses The Lords and Commons then joined in consultation and the grant was voted by both Houses together, the proportion in which each estate was to contribute being decided at the same time. But after 1395 all grants were said to be given "by the Commons with the advice and consent of the Lords." While in 1407, Henry IV, who had drawn a protest from the Commons by discussing the financial needs of the year with the Lords, promised that henceforth no report should be made upon a grant until both Houses were agreed and that then it should be made by the Speaker of the Lower House Dr. Stubbs suggests that the full significance of this concession was probably not recognised at the time, but it really gave to the poorer assembly the preponderating voice in money matters In 1625 supplies were said to be given by the Commons and no mention was made of the assent of the Upper House. In 1671 and again in 1678 the Lords' right to amend money bills was denied and in the latter year it was asserted that all supplies were the sole gift of the Commons, and that consequently all money bills ought to begin with them. After this money bills received such gentle treatment at the hands of the Upper House that the Lower House at one time adopted the undignified but ingenious device of "tacking" to them measures which they knew to be obnoxious to the Lords.

Until 1860 the Lords' right to reject money bills,

though unpopular and seldom exercised, went unchallenged. But in that year their rejection of a bill repealing the paper duties upset the financial arrangements of the ministry, and the Commons formulated a series of resolutions, wherein, while saving to the Upper House its right to reject money bills, they proposed to safeguard themselves against "any undue exercise of that power by the Lords" This cryptic utterance was given practical effect the following year, when the Commons embodied all proposed financial measures in one Appropriation bill Henceforth the Lords seemed to have no alternative but that of unqualified acceptance to reject the bill—they could not amend it—meant administrative chaos Nevertheless in November 1909 the Upper House took this step on the grounds that the measure contained proposals so revolutionary that they could not sanction them until they had been referred to the nation In January 1910 Mr Asquith dissolved Parliament He was returned to power and the House of Lords, acting on the verdict of the electorate, accepted the financial measures of the Ministry

Parliament as the Supervisor of the Executive

From the time of Edward III, the Chancellor, on behalf of the Crown, declared the readiness of the king to hear the grievances of his subjects. This was usually coupled with a petition for advice as to the best means of securing public peace. The declaration and the petition of the king together amounted practically to an invitation to review the whole administrative system The Crown was quick to resent any questioning of the royal prerogative and was perhaps more willing to hear complaints than to remedy them, but on the whole, as Dr. Stubbs has pointed out, the petitions of Parliament show that the "government was ill-administered, rather than that any resolute project for retarding the growth of popular freedom was entertained by the administration."

Control exercised by Parliament over (1) Home affairs

In domestic matters, every administrative matter needing reform was the text for a petition to the king in Parliament. Disregard of existing statutes was pointed out: and the need of new legislation insisted on The Good Parliament presented no less than a hundred and forty petitions dealing with matters ranging from the extortion of the royal purveyors and the necessity of dealing with the many sturdy beggars in the country to the petition that the knights of the shire might be duly elected and that Parliaments should be held annually.

(2) Foreign policy

In foreign affairs the attitude of the Houses was less confident. The Commons were not always quite sure whether they wanted to advise the Crown on questions of peace or war. If they directly sanctioned war the king could, with reason, demand adequate supplies: if they rejected all responsibility in the matter they had, on the other hand, an excellent pretext for refusing taxation. by controlling the purse strings they could exercise a very real control, though an indirect one, over all foreign policy. At the same time, the kings were eager for Parliament's advice upon such matters, and for the self-same reasons as Parliament wished to withhold it. From the time of Edward I, the king turned to Parliament for counsel before embarking upon any military enterprise. In 1297 the barons refused to go to Flanders solely on technical grounds, not because their advice had not been asked. In 1328 Edward III resigned his claims upon Scotland, at the advice of the Lords and Commons. Ten years later he embarked on the great struggle for the French crown "at the earnest request" of the Commons. Then, as the war dragged on and expenses grew, popular enthusiasm waned and the Commons shrank from direct responsibility. Already in 1339 we find the Commons protesting that they were not bound to give advice on matters beyond their knowledge, while in 1348 they said they were too simple and ignorant to counsel the king in such matters, but promised "to keep firm and stable" the decision of the great and wise men of the Council. In

1354, they welcomed the proposals for peace with much the same protests of willingness to submit to the superior wisdom of the king and the Lords. Richard II also failed to get any definite answer upon warlike matters from the Commons In 1384, when he bade them choose either war, or peace upon such terms as the king of France would accept, they would only answer that, though they desired peace, they could not recommend the king to resign his claims on France

Henry V however, received whole-hearted and generous support for his foreign policy and his French wars and we find Parliament joining in the royal ratification of the Treaty with the Emperor Sigismund in 1414 and of the Treaty of Troyes in 1420 Under Henry VI Parliament was at the mercy of hostile factions and while Beaufort and his following urged peace, Gloucester headed an influential war party By the sixteenth century, Parliament was quite certain that it wished to have a voice in foreign affairs as well as in all other national questions But the Tudors forbade it to meddle with foreign policy and Queen Elizabeth declared such matters to be above its comprehension. The attitude of James I, with regard to the Spanish match and the war in the Palatinate was much the same, and more than once he expressed his amazement that Parliament should have presumed to discuss matters far above its reach and expressly forbidden by him. To this Parliament retorted in 1621 by a vigorous assertion of its right to speak freely in all matters concerning the king, the state, the Church and the defence of the realm In 1624 James had to yield what the Parliament of 1621 had claimed and since then the right of the two Houses to a voice in the foreign policy of the nation has been fully recognised.

At the same time the Executive retains full power to declare war or peace and to make treaties, save where money or personal rights and liberties are concerned, without consulting the Legislature. In 1890, when Lord Salisbury brought the bill for the cession of Heligoland

before the House and thereby practically asked for its vote upon the whole of the treaty with Germany, he was attacked by Mr Gladstone and Sir William Harcourt for betraying the powers of the Crown Parliament only reserves the right to control the treaty-making and war-declaring powers of the Crown by punishing those who misuse them It is significant that George I's negotiations for the surrender of Gibraltar to Spain came to nothing because, though they approved the transaction, the king's ministers dared not face Parliament The treaty which recognised the independence of the American colonies caused the downfall of the ministry which concluded it, while, when the Conservative government resigned in 1905, it was losing its majority in Parliament largely because of the reaction against the policy which had prompted the South African War

The control of Parliament over all questions of general policy was finally established when its financial and legislative supremacy was fully recognised It is made more effective by the presence in Parliament of the heads of the different departments of the Executive, and by "question time" at the beginning of public business each day in Parliament The fact that Parliament indirectly appoints the Executive, that the Executive is drawn from the leaders of the party having a majority in the Lower House, prevents its control of general policy from weakening the hands of the Executive. The Executive leads Parliament, while at the same time it is responsible to it. It is its guide but also its servant, its creature as well as its self-elected commander-in-chief.

CHAPTER XI

THE ADMINISTRATION OF JUSTICE

Primitive Justice
The feud.

PRIMITIVE societies had no courts of law: if one man wronged another there was a feud between the kindreds of the injurer and the injured man, sometimes extending over several generations Later, every offence became an offence against the whole community and the injured party had to be content with the remedy afforded it by the custom of the folk, as declared in the gemot And, though in England, as late as the days of Edmund, the blood feud existed in a modified form, the idea early gained ground, first of all that the feud might be, and then that it must be, wiped out by a money composition, by outlawry, or by the punishment of the offender An elaborate tariff was gradually built up: the "weigild" or blood-money of every man was fixed according to his social rank and for other offences the fines exacted were minutely graded. Every fine was made up of "bot" or compensation to the injured man or his kindred and "wite" to the king, as the guardian of the public peace. Certain offences, such as treason to one's lord, or to the king, and secret killing were "botless": the offender was an outlaw, whose goods were forfeited and to slay whom was a meritorious action in the interests of the public weal. Imprisonment was usually impracticable; punishment by death or mutilation was uncommon, for here the Church intervened and "for the mildheartedness sake that Christ taught," exercised a

Fines.

Punishment by death or mutilation.

strong deterring influence on anything which might cut short the repentance of the sinner. After the Conquest mutilation became common and later, the death penalty, while the tariff system grew both burdensome and complicated and varied considerably between different districts. By the time of the Assize of Clarendon it had given place to one in which certain crimes or "felonies" placed the life of the convicted man, his goods and his lands, at the king's mercy and in which lesser crimes or "trespasses," left the offender liable to a money penalty, fixed by the judge instead of the wite, and to damages, assessed by the court, instead of the bot The new system was in fact much the same as the old, but it possessed flexibility: the old system had ceased to be workable because of its rigidity and its local peculiarities

Felonies trespasses.

Before the days of Henry II, when new methods of procedure in certain cases were introduced, the method of testing all persons suspected of crimes was the same, but it varied in severity according to the heinousness of the charge to be substantiated or repelled. The chief characteristic of all early procedure was its strict formality. A slip in the prescribed form of speech or action was taken as an irrefutable proof of guilt The innocent and the nervous had a far worse chance than the hardened sinner. The trial was held in the open air . some officer—bishop, ealdorman, sheriff, or sheriff's steward presided over the court. The suitors, those who were bound to attend the court, declared the "doom" They concerned themselves with no question of fact or of guilt or innocence. When the accused gave the lie direct to the accuser the matter had become too difficult for them to fathom and appeal was made to the supernatural The usual procedure was as follows: the two parties appeared before the court; the plaintiff in set phrase made his charge and by a fore-oath, by the production of witnesses or by showing his wounds, substantiated his assertions. The defendant answered with a formal denial of the charge. Thereupon the suitors declared the manner of proof—they uttered the

Old methods of trial

"doom"—and decided which of the two parties to the suit should be subjected to it. Judgment, therefore, preceded the trial. Usually the burden of proof was put upon the defendant: he was held to be guilty till Heaven had declared him innocent If he survived the test successfully, he was declared innocent and the false accuser was fined If Heaven declared him guilty, punishment or fine was allotted according to the nature of the offence, which was now aggravated by perjury.

Oath. There were two methods of proof, oath and ordeal The accused might swear away a charge on his own oath; more often he made "wager of law," that is, he secured a certain number of oath-helpers who swore to their belief in the truth of the oath already taken, by the party for whom they appeared They were in fact, witnesses to character and the oath was according to a set formula,

Ordeal. so elaborate, that by the twelfth century the ordeal was preferred to oath-helping In the ordeal of water, the accused was thrown bound into the water, which as the emblem of purity, was abjured to receive the innocent and to reject the guilty. Other forms of single ordeal required the accused to carry a red-hot bar of iron weighing a pound for three paces or to plunge his hand into boiling water. the hand was then sealed up in cloth for three days and if, by the end of that time it was healed, he was declared innocent. The threefold ordeal involved similar tests of greater severity. The Normans introduced trial by battle, which was a bilateral ordeal, and in this sense resorted to in criminal cases only. The prosecutor offered to prove the truth of his charge "on his own body"; the defendant, if an Englishman, was allowed the option of refusal; if a Norman, he had no choice but to accept the wager of battle. In civil suits, most of which were connected with land, the accuser offered battle by the body of a champion and many of the great landowners kept a professional pugilist to do battle on their behalf. In both civil and criminal suits the case was declared to have gone against the accuser if, before

nightfall, he had not wrung "that odious word, craven" (I beseech you to stop) from his adversary.

A classification of crimes as botless and botworthy; judgment by the suitors of the court; trial by an appeal to the supernatural; punishment by death, mutilation or fine,—these were the chief characteristics of early mediæval justice. Henry II formulated new principles and new methods of procedure, which eventually transformed the whole system. But until the twelfth century the king took no part in the administration of justice save to reserve certain cases for trial in his own court and to hear the appeals of those who could secure no attention in the local courts. Justice was dealt out to ordinary folk in the national courts of the hundred and the shire, in municipal and in seignorial courts; the development of the Common Law Courts where royal justice was offered to every free man synchronised with the concentration of justice in the king's hands.

The local character of mediæval justice

The National Courts

The piecemeal conquest of England by the Jutes, the Saxons and the Angles and the gradual gathering together of the kingdoms thus created under the banner of Wessex eventually mapped out the whole country into shires, the administrative division between the hundred and the kingdom. Many of the shires were of natural origin and were determined by the early settlement of the West Saxon tribes, or by the boundaries of the smaller kingdoms. Thus the Dorsætas, the Wilsætas, the Sumersætas gave their names to the districts which they settled, while the kingdoms of Kent, Essex, Surrey, Sussex, Middlesex, retained their autonomy after they passed under the yoke of Wessex. The shire organisation was extended to Mercia after its conquest by Edward the Elder; many of the divisions being artificially and arbitrarily formed round a town, which gave its name to the shire. In East Anglia and in Northumbria, the shires are of natural but late formation. Norfolk and Suffolk represent the two

Origin of the shire

divisions into which the Northmen divided their province of East Anglia In Northumbria, Yorkshire alone was organised as a shire before the Conquest, though the boundaries of the other counties were determined by their early history

Origin of the hundred.

The origin of the hundred as an administrative division is perhaps the most vexed of the many vexed questions of constitutional history. It cannot be dismissed as unsolved and unsolvable, though it is the one and it seems the other, because of the amount of controversy which the question has aroused. The generally accepted theory, that of Dr Stubbs, is one of the strongest arguments of those who maintain that the English constitution was brought over ready made from Germany in the ships of the invaders, and who assert the unbroken continuity of its development, from the days of the Germania onwards No mention of the name "hundred" is found in English documents before the Ordinance of the Hundred, which is generally ascribed to Edgar the Peaceful. But we have strong presumptive evidence that some such administrative division existed on English soil nearly three centuries earlier The laws of Athelstan speak of the "reeve" and his "maning" (district), those of Edward the Elder provide that every reeve shall hold his "gemot" once in four weeks The laws of Wihtræd of Kent dated about 700 A D, speak of a "scirerevan" and those of Ini of Wessex, Wihtræd's contemporary, refer to "scirman" and "shire," the word shire at that time being a "term of various application" Earlier still, the laws of Hlothere and Eadric of Kent provide that if one man make plaint against another he shall cite him to a "methel" or "thing" and that there right shall be done Moreover the Anglo-Saxon land-books, some of the earliest of which date from the end of the seventh century, contain references to "regiones" which have been identified with existing hundreds. Bede, too, speaks of districts which certainly were larger than the hide of the family and smaller than the administrative kingdom or shire.

If we try to trace the hundred farther back than this in our search for the place of its birth, there is nothing but analogies to guide us, and as often as not they mislead But there is a large consensus of opinion in favour of the immemorial antiquity of the thing, which in the tenth century we learn to call the hundred Dr Stubbs believes that it was originally the settlement of a hundred warriors With the help of the Frankish "centena" of the sixth century and the "mallus" of the fifth and fourth, he links the English hundred with the "pagus" of the Germania, in which the princeps with his hundred assessors, the former presiding, the latter declaring the law, administered justice

But M Fustel de Coulanges has argued that these links will not stand the strain of historical criticism He undermines the popular and local character of the system of justice described in the Germania by showing that the princeps and his hundred assessors were possibly itinerant officials, the former doing justice, the latter giving counsel and attesting his decisions In the "mallus" he likewise fails to discover any traces of popular judgment and he proves that it was a court which gave justice to Frank and Roman alike, layman and ecclesiastic, bond and free It was a royal court for all races and all classes it administered Roman as well as Frankish law. The "centena" is dismissed as a personal division made solely for police purposes.

Professor Maitland suggests that in the southern districts, which were the first to be settled, vill and hundred were identical in area and age. He holds that the vill, as such, had no court but thinks it inconceivable that an agricultural community should have had to appeal to outsiders to enforce its customs and its mode of tillage. The fact that at first the smallest of the districts which bore a name were probably comparatively large, while the hundreds of the South are small when compared with those of the Midlands and the North-West, favours the idea that hundred and vill were co-terminous in the districts first settled. It receives additional confirmation

from the existence of groups of villages with one common and one differentiating name, the latter being of more recent date than the former; thus we have Lyme Regis and Bere Regis, Langton Matravers and Worth Matravers. It is suggested that in these common names we have the witnesses to some process of subdivision which was at work, breaking up what had once been a single community and one large enough to have been co-extensive with the small hundreds of the South.

The large hundreds of the North-West could never have been agrarian communities. This Professor Maitland acknowledges. The average size of the hundreds in the South was two or three square miles, in Lancashire it was often three hundred. At the same time, these large hundreds have every appearance of being more modern than the small ones. It seems a good working hypothesis, that, as the lands of the folk grew wide through Conquest, the hold of the king of Wessex upon the new territories was tightened by the creation of administrative units, identical in organisation with their southern models, but larger, because of a scanty population, and with boundaries artificially defined.

These administrative units had at first no technical name. We find "lathes" in Kent, "wards" in the four northern-most counties, "wapentakes" in Yorkshire, Lincoln, Derby, Rutland, Northampton, Nottinghamshire and Leicester. They were all "shires," that is districts cut off from the surrounding country for certain purposes. Thus the seven divisions of the city of York were shires, so too were the administrative subdivisions of Cornwall, though the term was ultimately restricted to the smaller kingdoms and the larger administrative divisions of an united England, which were modelled on them. To the smaller divisions, hundred and wapentake came to be the two names almost universally applied, though sometimes local peculiarities of nomenclature survived. The name hundred was possibly suggested by the "centena" of the Franks; the name of wapentake

is probably a relic of the Scandinavian occupation : both were identical in organisation and served as units for taxation, justice and police

Courts of the hundred and the shire (1) Their competence

The court of the shire and of the hundred closely resembled each other in constitution and in competence : they differed in that the shire court had authority over a wider geographical area than the hundred court No appeal from the smaller to the larger court was possible, for the court only allotted the manner of proof ; the question of guilty or not guilty, right or wrong, was decided by Heaven and decided once for all. If the hundred court refused to come to any decision at all within a reasonable time, then the matter was taken to the shire court and ultimately to the king But one of the chief principles of Saxon justice was to force all suits back to the local courts. the Saxon kings did not aspire to be more than guardians of the justice of the folk : the local tribunals were competent to declare folk-right in every suit what chiefly interested the king was his share of the profits of jurisdiction

(2) Their composition.

The shire court met twice a year, the hundred court once in four weeks Over the former the sheriff presided as the representative of the king and Edgar provided that the bishop and the ealdorman were to be present. Over the latter presided a reeve or gerefa as the sheriff's deputy. In both courts, the whole body of suitors were the judges. For the composition of the two courts before the Conquest, almost the only authority is the "Leges Henrici Primi," the author of which made a gallant attempt to depict the so-called laws of Edward the Confessor as amended and enlarged by the Norman kings. According to this document all "lords of lands" and all the public officials of the locality were to be present. The expression lords of lands, "terrarum domini" is vague, probably it meant all freeholders. The greater freeholders could lawfully send their stewards in their stead and if lord and steward were both unable to attend, then the reeve, the priest and the four best men of each vill

represented all those who were not summoned personally to the local courts. Notice the circumstances under which representatives of the vills came to the courts of justice, for their presence there is the mainstay of the theory of "popular representation" in Saxon times By the light of the Leges Henrici, it looks as if the chief principle regulating the composition of the Saxon courts of law was that all the land of the district ought to be represented therein. it somewhat undermines the claim that Saxon institutions were invariably and primarily democratic. It might demolish it altogether, could we amplify or support the Leges Henrici by pre-conquest and native evidence As it is, argument and conjecture take us no further than that "all persons of distinction" were supposed to attend the local courts both in the days of Henry I and during that century before the Conquest, whose customs are very imperfectly set forth in the so-called "Leges Edwardi Confessoris" and "Leges Henrici Primi."

Dr Stubbs believes that, for the sake of convenience, the work of the suitors in the local courts was done by a "judicial committee" of twelve This belief he bases on the law of Edgar that all bargains and sales were to be transacted before twelve chosen witnesses, on the law of Ethelred that in every wapentake twelve senior thegns together with the reeve were to present for trial those of the district suspected of crime; and on the thirty-six "barones" who determined the suits of Ramsey and Ely in the East Anglian county courts. This evidence has been condemned as insufficient: the cases cited were probably customs peculiar to certain localities or temporary expedients to overcome particular difficulties in administration.

Effects of the Norman Conquest on the national courts.

The Norman Conquest brought considerable changes in the constitution of the local courts. The ealdorman ceased to preside in the shire court: eventually the bishop ceased to attend for William I drew a line between spiritual and temporal jurisdiction. This left

the sheriff unrivalled and the office grew proportionately in importance. In addition to his old duties, the sheriff became responsible for the feudal dues of the lesser tenants-in-chief: he led the fyrd to battle, while the minores also collected under his banner; in matters of justice and police his powers steadily increased during the next century. In consequence, the office was eagerly sought after by the barons and there was considerable danger of its becoming hereditary. A still greater change in the local courts was begun by the Conquest; ultimately, though the Norman kings jealously preserved them as a counterbalance to the seignorial courts, it was to lead to their overthrow. This change was the beginning of the direct intervention of the Crown in the provincial courts. Gradually the king monopolised criminal justice, by reserving to himself the "pleas of the Crown" while he sapped the strength of shire and hundred by evoking cases to the royal courts; by offering better and quicker justice to those who chose them and by fostering appeals against the decisions of the local tribunals.

(Increased importance of the sheriff)

After the Conquest the history of the hundred and of the shire court finally separate. They began to do so much earlier. Many of the hundreds had passed into private hands and in the place of the reeve there often sat the lord's steward. After the eleventh century, the multiplication of private courts must have left few free to attend those of the hundred. Henry II's reforms in judicial procedure transferred the more important civil cases to the shire court and criminal justice was becoming a royal monopoly; so that by the thirteenth century, the hundred court only heard small actions for debt and trespass, meeting for this purpose once in three weeks. But while the hundred court sank into insignificance, the activity of the shire court increased enormously. Instead of the six-monthly courts of the Leges Henrici, we find in the reissue of the Charter of 1217 a stipulation that the court shall not meet oftener than once a month and an ordinance of 1234 speaks of the shire

Decline of the hundred court.

Increased importance of the shire court.

court as meeting once in every two weeks during the reign of Henry II. Cnut and Henry I had both provided that the court, in case of need, might sit oftener than once in six months, but after the monthly sessions became usual, the larger meetings were distinguished as the "great counties" Both criminal and civil justice were administered by the sheriff and in spite of the gradual reservation of criminal justice and of certain forms of procedure on behalf of the itinerant justices, the civil suits which were brought before the shire courts kept them fully occupied until the clause in the Statute of Gloucester prohibiting cases worth less than 40/- being taken to the king's court, was interpreted to mean that all cases worth more than that sum were bound to go there. This signed the death-warrant of the local courts, feudal as well as national, and though 40/- was a good round sum in Edward I's day, as the value of money fell, so the competence of the local courts declined

Its subsequent decline

1278

The sheriff's tourn.

A certain amount of criminal justice remained in the sheriff's hands Twice a year he made his tour amongst the hundreds of the county, to see that all who ought to be were in tithing At the court summoned to meet him many besides the ordinary suitors were supposed to be present, including representatives of the vills and the chief-pledges of the tithings These periodic views of frankpledge were certainly as old as the time of Henry I, and Henry II gave to them a new importance. The assize of Clarendon provided in 1166 that inquiry should be made in every county and hundred by the justices and the sheriff, of twelve lawful men from every hundred and four men and the reeve from each vill, whether any of their neighbours were suspected of certain crimes. The sheriff made his inquiry in the great court of the hundred which was specially held for the view of frankpledge and which later became known as the sheriff's "tourn" or "leet." Probably he made use of existing machinery: the "duty of presenting one's neigh-

(1) View of frankpledge

(2) Presentation of suspects.

bours to answer accusations could well be converted into the duty of telling tales against them." The representatives of the vills presented the names of suspected persons to the jury of twelve lawful men of the hundred: they rejected or added to the preliminary presentments and presented the remainder to the sheriff. The sheriff was sole judge of which cases should be reserved for presentation to the itinerant justices and which should be dealt with immediately In the latter case, the suspects were let off with fines, fixed by suitors of the court chosen for the purpose Eventually, in matters of police, the sheriff was superseded by the Justice of the Peace, just as in judicial matters his functions passed to the itinerant justices The history of the rise and fall of the sheriff is one with the rise and fall of the local national courts

(Decline of the power of the sheriff)

Suit at the local courts rapidly became a burden on land. The holder of certain acres had to appear in the courts of the hundred or the shire and the division of those acres amongst several holders did not multiply the number of suits due from them, though, somewhat illogically, the amalgamation of estates was held to bring about a corresponding decrease in the number of suitors they sent to court Consequently a vast number of estates owed no suit at all Besides this, immunity from attendance was granted freely, not only to the tenants-in-chief but to their tenants: an estate was often said to be "quit of all shires": the charters given to boroughs almost invariably excused them from attendance at the local courts. Others had subtracted their suits and when their non-appearance had passed unnoticed for a time, immunity was claimed by prescription: their predecessors had done no suit, nor would they. Moreover for those who could claim neither chartered nor prescriptive immunities there were many alleviations in a lot which seemed hard by the side of that of their privileged neighbours. The tenants-in-chief had long been represented by their stewards or by deputations

Change in the composition of the national courts.

from the different vills. The Statute of Merton in 1236 allowed every freeman to appear by attorney and on the larger estates the duty of acting as attorney for the lord in the local courts soon became fixed in certain acres, which were otherwise free from all burdens. By the Statute of Marlborough in 1267, all above the rank of knight were exempt from attendance at the sheriff's tourn unless specially summoned But all exemptions vanished when the whole county was summoned to appear before the justices-in-eyre

Disappearance of the old national courts.

As a matter of fact, the attendance of a large and competent body of suitors at the ordinary local courts had ceased to be a matter of importance With the introduction of new methods of procedure the suitors were no longer the judges and little trouble was taken to enforce the appearance of those bound to come and "none to exclude those who had no claim to be present" The old courts dragged on an existence which became more and more useless until 1846 Then the new County Courts were created, which are courts for a district and have nothing to do with a shire The old courts were deprived of their surviving powers of administering civil justice. But the members for the shire continued to be elected before the sheriff in the old shire court and if sentence of outlawry were pronounced, and such a thing is still legally possible, it would have to be pronounced in the shire court, as of old.

1846

The Seignorial Courts

The seignorial courts were of two kinds, feudal and franchisal. In the former that civil jurisdiction was exercised which sprang from the relation of lord and man, landlord and tenant, in the latter, the right to administer criminal, in addition to civil justice, was conferred by the king. No private jurisdiction, apart from that based upon royal gift, seems to have existed in England before the Conquest, though the way was being

Seignorial courts before the Conquest.

paved for it by the responsibility of the lord for the appearance of his men in the Courts of Law. The case was otherwise with franchisal courts. In Domesday Book we find many hundreds in private hands · of the twelve hundreds in Worcestershire, the sheriff had no authority in seven and the monks of Battle Abbey owned the sake and soke of twenty-two and a half hundreds Mr. Adams maintains that this state of affairs was created by the "Norman-hearted" Edward and that on the eve of the Conquest a seignorial court was still a new thing—"a Norman precursor of the Norman Conquest." Certainly this is true of the Anglo-Saxon terms which conferred jurisdictional powers. the words "sake and soke" do not appear in legal documents with any frequency before the reign of Edward the Confessor and they are not found at all before the reign of Cnut. When they do appear they are accepted as conferring the right to jurisdiction and the profits of jurisdiction. But the "alliterative jingle" of which they formed part and whereby a large number of privileges were given to the immunist, is regarded by Professor Maitland as one which must have been familiar to the lips of the people, long before it found its way into writing Besides this, the appearance of the words clearly and indisputably conferring rights of jurisdiction coincides with the appearance of a new kind of document for the bestowal of immunities. The royal writ of the eleventh century was in the vernacular: its predecessor, the charter or land-book, was written in Latin. About five hundred of these exist and the authenticity of those of the ninth and tenth centuries is unquestionable.

A land-book described the land given and told who was the giver and for what purpose the gift was made. Usually it contained a clause conferring privileges or "liberties" and concluded with putting the gift under the protection of the Church's anathema. The donor was usually the king: the donee, the Church, while the lands were wide and given for the benefit of the king's

Land-books

soul To modern eyes this looks like the transfer of land; in reality it was the transfer of suzerainty. Even for the good of his soul, the king could not give away vast tracts of the lands which belonged to freemen: but he could give away his suzerain right over them. That he did so the clause conferring immunities bears witness. We find that nothing is henceforth to go out of the land by way of "wite"; that the land is freed from all secular tribute, all secular burdens; sometimes there are certain secular services such as the three military obligations, which came to be known as the "trinodes necessitas" from which, expressly, the land is not freed Now self-evidently, the king had no intention of granting immunity from worldly burdens to the freeholders on the territory with which the land-book was concerned What the king did give to the ecclesiastical immunist was some or all of the services and fines which hitherto had been paid to himself Of course jurisdiction and the profits of jurisdiction are very different But Professor Maitland points out that "even in the days of full-grown feudalism, the right to hold a court was after all, rather a fiscal than a jurisdictional right" Also it must be remembered that the suitors were the judges and that the sheriff or his representative only presided in the local courts and collected the profits of jurisdiction for the king Once the profits of jurisdiction were given away, the sheriff ceased to have any interest in the court The immunist was left to act as president and to collect the fines for himself; the court had passed into private hands, the lord's steward taking the place of the reeve or bailiff of the hundred

This interpretation of the franchises conferred by the land-books is strengthened by traditions of the twelfth and thirteenth centuries According to these, certain hundreds had been in private hands as far back as the days of Offa of Mercia. Moreover we have a long series of dooms, going back to the reign of Athelstan which give certain fines and forfeits to the "land-rica" or "land-

hlaford." Here were the two central ideas of feudalism, that there was "nulle terre sans seigneur," and that ownership of land and the administration of justice went hand in hand But neither idea was as yet fully established, for though sometimes, when a fraction of a hundred was given away the lord might set up a court for himself, in this case he was still looked upon as holding the soke of part of a hundred and those who did suit at his court were excused attendance at the court of the hundred often too he would content himself with claiming his dues through the hundred court itself At the same time, as Professor Vinogradoff has pointed out, there is little to distinguish these courts for fractions of the hundred from the later manor courts, while for a century before the Conquest the great immunists alienated portions of their franchises to their dependents, together with, or apart from a grant of lands, and a man might hold his land of one lord and be in the jurisdiction of another.

Imperfect development of seignorial justice in England before the Conquest.

Thus the Conquest found private courts in plenty and those of the highest kind. It introduced a new principle when it identified land ownership with jurisdiction : hitherto the two had co-existed, they were not necessarily inseparable Henceforth every lord might hold a court for his tenants and extensive subinfeudation meant the creation of a whole hierarchy of feudal courts It was largely accidental that the feudal courts in England were for the most part manorial. According to feudal principles the lord of many manors could hold a court for all his freeholding tenants and the petitions of the barons at Oxford in 1258 assume the existence of three feudal courts, towering one above the other. But a gradation of courts was rare in England, though honorial courts were by no means unknown. Their rarity is accounted for by the fact that though difficult cases might be reserved for the larger court, the king consistently drove or enticed them into the royal courts, while he successfully foiled all attempts of the baronage to secure an appellate jurisdiction over the

Changes effected by the Conquest.

(English seignorial courts were chiefly manorial)

courts of their tenants. Consequently an honorial court brought in little extra profit to the land-owner and little advantage was taken of the right of the lord to hold a court for his tenants, save by the immediate lord of each manor.

But the Conquest did not define or contrast the competence of either feudal or franchisal courts, nor did the former spring into being then At first, many lords of tenants must have had no court at all, while others exercised powers of jurisdiction, which properly belonged only to those to whom the king had granted them and which were not the outcome of the relations of landlord and tenant. It is impossible to distinguish feudal and franchisal jurisdiction before the reign of Henry II and by that time many had wielded extensive powers unchallenged for generations and so claimed a prescriptive right to them When Edward I demanded by what warrants his barons exercised their vast franchises, many, like the Archbishop of York, could but assert that their predecessors had possessed them from time immemorial or like Earl Warenne had no better title deed than a rusty sword. So many of the great immunists could only claim their franchises by prescription that Edward I was constrained to recognise continuous seisin from the coronation of Richard I as a sufficient title Henceforth however the franchises were defined and any usurpations were impossible, while they lapsed if they were not claimed each time the justices came round

Development of seignorial jurisdiction checked.

To the feudal courts belonged non-criminal and non-penal jurisdiction All actions for debt and trespass were decided in them and those for the recovery of lands But after the reign of Henry II, a royal writ was necessary to begin those connected with freeholds and the defendant could easily secure the removal of the case into the shire court. In suits concerning customary titles the lord's court had the last word, for about them the justices knew nothing. Moreover the lord could sue his tenants in his own court and he seems to have made use of a small pre-

Competence of the feudal courts.

senting jury to find out breaches of manorial customs and invasions of his own rights. There was nothing unfair in this, for the suitors were the judges in the seignorial as well as in the national courts. Coke said that the manorial court had two natures and implied that the lord of the manor held a "Court Baron" for his freeholding tenants and a "Court Customary" for his villains and that whereas in the former the suitors were the judges, in the latter the lord himself or his steward gave judgment But this distinction seems to be a late one and when feudal justice was at its height the free and the unfree apparently attended the same court and received the same kind of justice, that meted out to them by their peers Not until trial by jury found its way into the manorial courts do freeholders and customary tenants seem to have been dealt with separately The lord could compel his villains to take the recognitors' oath : he had no such authority over the freeholder, who could appeal to the royal courts. This emphasised the class distinctions between the various tenants of the manor, and while the lord continued to wield judicial authority over his customary tenants, he soon had only mediatorial powers amongst his freeholders In reality, the causes which were undermining the competence of the other local courts were at work here too : suit became a "real" burden and the number of suitors declined while the feudal courts lost all valuable jurisdiction save such as they exercised over the villain tenants.

(Distinction between Court Baron and Court Customary)

The franchises which were conferred by royal charter or which were exercised by prescriptive right, were of every sort and description. The smallest franchisal court was co-ordinate with the sheriff's tourn and came to be known as the "Court Leet." Sometimes to this right to hold view of frankpledge and to exercise the police jurisdiction connected with it, was added the right to hang upon the manorial gallows the thief who was caught red-handed. The larger franchisal courts enjoyed more extensive powers, but, except in extraordinary cases, certain crimes,

Competence of the franchisal courts.

(Court Leet)

which came to be known as the pleas of the Crown, were reserved for the administration and profit of the king. But after 1166 all franchises gave way before the itinerant justices: no private court could exclude them. At the same time, we occasionally find a great lord who had the right to sit side by side with the royal justices and who could compel them to hold their court within his territory. Thus the Justices-in-Eyre went to Beverley and Ripon for the convenience of the Archbishop of York, and to Knaresborough for that of the Earl of Cornwall, while at Dunstable the prior sat with the justices and was addressed as "Sir Prior, justice of our Lord the King."

The Palatine Earldoms.

The greatest of all the franchises were the Palatine Earldoms. Four were created by the Conqueror for defensive purposes. Shropshire and Chester watched the Welsh marches; Kent guarded the Narrow Seas; Durham held quiet the Scottish border. Later, Edward III created the county palatine of Lancaster for his son, John of Gaunt. Kent lost its palatine organisation after Odo's rebellion in 1082. Shropshire was forfeited by the treason of Robert of Belesme in 1102. In Chester the original line became extinct in 1237, then it was granted in 1254 to Edward as part of his marriage settlement, and became an endowment for the sons of the kings. Lancaster was reserved as royal property by Edward IV. The palatine earls exercised full royal powers, subject only to the suzerainty of the Crown. In Chester, Durham and Lancaster, the king's writs did not run and justice was administered in the name of the earls palatine. They had Common Law Courts and Chanceries of their own and until the reign of Henry VIII the judges were appointed by the earls. Chester was deprived of its palatine jurisdiction in 1830, but the Chancery Courts of Lancaster and Durham still exist; the other palatine courts were abolished by the Judicature Act of 1873.

The Ecclesiastical Courts

The ecclesiastical courts were the creation of the Conquest. Previously the bishop had sat in the national courts and declared the law in matters spiritual The separation of ecclesiastical and temporal cases resulted in considerable interlacing of jurisdictions, much to the advantage of the clergy, until Edward I's writ "Circumspecte Agatis" defined the sphere of ecclesiastical jurisdiction. The power of the Church courts over spiritual causes was unquestioned, though some of these were extraordinarily mundane. Besides this the ecclesiastical courts had jurisdiction over all lands held in frankalmoin and over the recovery of tithe and their decisions were in all cases enforced by the secular arm In criminal matters the immunity of those in holy orders from trial in the secular courts was fully recognised and the ecclesiastical courts meted out much lighter punishments than did the courts temporal.

Powers of the ecclesiastical courts

In this connection the quarrel between Henry II and Becket over the trial of criminous clerks needs explanation. The usual interpretation put upon it is that Henry in his zeal for establishing the equality of all men before the law proposed to remove the trial of clerks accused of temporal crimes into the royal courts, these same courts having previously decided whether or no the crime was a temporal one. Besides this with regard to spiritual crimes, it is often maintained that Henry proposed to send a royal official to view the doings of the spiritual tribunal Professor Maitland has reinterpreted the clause in the Customs of Clarendon upon which this view of the quarrel is based by the light of contemporary evidence upon the question. A clerk accused of a temporal crime was, like any other suspect, to be summoned into the king's court There he could plead that he was a clerk and claim privilege of clergy . whereupon, without trial, he was to be sent to the ecclesiastical court and if convicted there, was to be degraded and was liable to be handed over, as a layman, to

The trial of criminous clerks

the temporal court for punishment, sentence of death or mutilation being passed without any fresh trial. During the trial in the Church court a royal official was to be present in order to prevent the escape of the prisoner. With the trial of spiritual offences the king was not at this moment concerned and Henry II had no intention of subjecting the ecclesiastical courts to the humiliation of royal supervision. Becket's answer was that "even God did not punish twice" and he asserted that for a clerk convicted of murder, degradation was a sufficient punishment. The king maintained that for a clerk capable of committing murder such an indignity was next to no punishment at all, and he seems to have been urging the Archbishop to return to a good old custom of the Church when he insisted that the convicted clerk might be handed over to the temporal arm for punishment. Becket's plea, not Henry II's Customs of Clarendon, was possibly the innovation

Benefit of clergy

Benefit of clergy, that is immunity from secular jurisdiction in criminal cases, could not be claimed by those accused of treason, nor according to the Assize of Woodstock, by clerks suspected of any breach of the Forest Laws. It was at first restricted to genuine clerics but by a queer travesty of the fact that originally clerics alone could read and write, it was extended to all who possessed these accomplishments, and eventually to all who could recite a verse, known as the "neck verse," out of the Psalter. From the time of Henry VII onwards, benefit of clergy was repeatedly restricted, but it was not finally abolished till the reign of George IV.

The Municipal Courts

Origin of the borough.

Professor Maitland believes that the borough had a military origin, the great thegns of the district being responsible for the up-keep of a certain number of houses within it and thus providing it with a permanent garrison. Certainly many of the holdings in the boroughs were

charged with keeping the walls in repair; this was the origin of the mural houses at Oxford. But many writers suggest that some of the boroughs originated as trading centres and not as places of defence. While many of the Anglo-Saxon burhs were only fortified mounds or fortified houses with no settlement surrounding them, others were fortified settlements without a mound. Professor Maitland's theory is favoured by the fact that the inhabitants of the boroughs were often attached for jurisdictional purposes to distant manors but this fact is not wholly uncompatible with a commercial origin and Professor Maitland acknowledges himself that, as the boroughs grew less military and more commercial, the lords must often have let out their tenements at a money rent. In any case, at least a century before the Conquest many a "burh," both as a fortified place, and as a place where goods might be bought and sold, possessed a court of its own, wherein it dealt with the miscellaneous population gathered within its earthern walls Not every one within the burh was amenable to the jurisdiction of its court, for many owed suit to their lord's court, outside the burh, or if the lord possessed a sufficient number of tenants he might even hold a separate court for their benefit within the burh itself, thus creating a little "liberty" with its walls Probably the suitors of the borough court were in theory all the burgesses, that is all those holding by burgage tenure no matter of whom they held their lands. According to a law of Edgar's a court was to be held three times a year. But occasionally, since many matters came before the court and more frequent sessions were necessary, a permanent body of doomsmen was formed, such as the Lawmen of the Danish boroughs. Over the court a reeve presided, who was responsible to the sheriff and by whom he was probably appointed.

The first borough courts

Gradually the borough, with its tenurial heterogeneity and its geographical unity came to be treated as having no lord but the king. The claims of the various lords

to jurisdictional and other powers over its inhabitants were ignored and reduced to the level of the mere right to a money rent. During the twelfth and thirteenth centuries many new boroughs came into existence which were really enfranchised manors A borough was claimed to have been created if a lord abolished villain services and took instead a money rent, or if he allowed his tenants to "farm" the court and to elect the bailiff, or to farm the market, which he held by royal grant, 'in imitation of the "firma burgi," whereby the old boroughs commuted for a lump sum the moneys due from them to the king The summons to the boroughs to send representatives to Parliament checked effectually the increase in the number of would-be boroughs: the wages of two burgesses and the heavier rate at which the boroughs were taxed was too great a price to pay for the privileges and dignity of borough-ship

New boroughs.

Royal charters consolidated the judicial powers of both the old and the new boroughs A court, either in the form of a borough moot or an enfranchised manor court, they already possessed. No general description of these borough courts is possible: the franchise granted to each varied just as did those granted to the barons. Sometimes the burgesses were freed from pleading beyond the walls of the town, except for tenements lying elsewhere. Thus the last remnants of the seignorial jurisdiction was destroyed in those old boroughs whose lords were many Often the courts were protected from innovations in procedure such as trial by battle and trial by jury In fact "the group of burgesses was a franchise holder in a land full of franchise holders" and they had to submit to the rules which governed the other possessors of royal rights. The borough might have "the return of writs" and so be able to exclude the sheriff's officers from entering the town in order to "summons attach or distrain," or to seize the goods of any dwelling therein. But the king's writ was necessary in the borough court, as in the other courts of the realm,

Variety of borough franchises.

to make a man answer for his free tenement and appeal could always be made to the king's court by a writ of false judgment.

In criminal matters before the reign of Richard II the borough magistrates rarely had more than power to punish criminals caught red-handed, afterwards, the municipal charters often included the privilege of having justices of the peace of their own Unless the borough had been given the organisation of a county, it had to send twelve representatives to the shire court when the whole county was summoned before the king's justices-in-eyre. There they made presentments of all those suspected of crime and all towns, including London, had to submit to the visitations of the itinerant justices . from time to time, judges sat at St Martin's Le Grand to correct the errors of the London husting

Representation of the boroughs before the itinerant Justices

Some of the old municipal courts still survive Manchester and Salford together, have their court for the Hundred of Salford. Liverpool has its court of Passage and Bristol its Tolzey Court But with a few exceptions the whole country was brought under the so-called County Courts in 1846, for the administration of civil justice, while by the Municipal Corporations Reform act of 1835 the criminal jurisdiction of the borough courts was entirely reorganised Certain towns upon application, can be given a separate court of Quarter Sessions : over this a professional lawyer, the Recorder, presides and he is the sole judge of the court Otherwise the Act deprived the boroughs of their criminal jurisdiction and they passed under the jurisdiction of the county justices But every borough has at least two Justices of the Peace of its own, the mayor and the ex-mayor ; while many towns, including of course, those which have their own court of Quarter Sessions, have their separate Commissions of the Peace. These include the county justices, together with other justices of the borough's own, amongst whom, in boroughs with over 25,000 inhabitants, may be stipendiary magistrates, if the borough itself wish it. In

Surviving municipal courts

1846.

1835.

this case much of the petty sessional work is discharged by these trained lawyers.

The Forest Courts

A forest was not necessarily either woodland or pasture: many of the royal forests included extensive waste lands, but each was circumscribed by definite bounds and within it, the right of hunting was reserved especially for the king, while it was subject to a special code of laws administered by local as well as central officials. How and why the king secured the power to reserve the chase for his own enjoyment is not clear, but that he could do so was recognised at least as early as the end of the tenth century. The Norman kings were mighty hunters and after the Conquest vast tracts were afforested and hunting became exclusively the game of kings. William I made the New Forest and it is said that to do so, he recklessly destroyed churches and burnt down villages for the sake of the red deer which he loved as "though he were then father." Henry I, with the consent of the barons kept the forests which his father had made and added to them considerably. Stephen gave up Henry I's additions and John in Magna Carta surrendered the lands which he had afforested. By the Charter of the Forests of 1217, the child-king, Henry III had to submit to a perambulation of the royal forests and all those created since the accession of Richard I were disafforested. In 1300 Edward I was forced to submit to a similar indignity by the "Articuli super cartas."

The Forest Courts were the creation of the Conquest and they administered to all those dwelling within the boundaries of the forests, laws both harsh and burdensome. The first authentic forest code was the "Assize of Woodstock" issued by Henry II. This made the whole shire population subject to the jurisdiction of the forest courts at the summons of the Master Forester, while benefit of clergy could no longer be pleaded

The Assize of Woodstock.

by any who broke the laws of the Forest. Richard I insisted that the whole county should appear as a matter of course before the itinerant justices of the Forest, but Magna Carta did away with this and at the same time modified some of the penalties decreed against offenders in the Assize of Woodstock: mutilation and death ceased to be amongst the ordinary punishments inflicted.

Courts of the Forest. Woodmote

The Woodmote or Court of Attachment, sometimes called the "forty-days" court, was held by the "verderers," who were judicial officers chosen in the shire court. They received the presentments by the foresters of those who were suspected of doing any hurt to the trees or the beasts of the Forest. In the Court of Swainmote which met three times a year and was presided over by the verderers, the forest officials and the reeve and four men from each vill again presented offenders and these were convicted or acquitted by the testimony of their neighbours The convicted were reserved for judgment before the Court of Justice Seat, which met once in every three years, or when the king chose to issue a special commission. It exercised supreme civil and criminal jurisdiction over forest affairs As a preliminary to it, "regarders" inspected every part of the forest and reported upon enclosures of waste and encroachments by the building of houses or the like. The prerogative courts of the Forest are important because they withdrew wide tracts of country from the jurisdiction of the national and seignorial courts and from the operation of the Common Law. They have no parallel in English history: even the prerogative courts of the Tudors administered, at least in theory, the same law as the ordinary courts, though they amended it when they thought fit and supplemented it when they considered it insufficient

Swainmote.

The Court of Justice Seat.

Some of the old forest courts still survive, though like the surviving seignorial courts, they are in an attenuated condition. The verderers of the Forest of Dean and of the New Forest still hold their Swainmotes and though the venison is gone, they are charged with the preserva-

tion of the vert. In matters within their jurisdiction there is no appeal against their decisions and ordinary barristers cannot practise in these forest courts.

THE GROWTH OF THE COMMON LAW COURTS

The twelfth century found England "covered with a net-work of courts and conflicting jurisdictions" Over all towered the king's court, but as yet, as far as the doing of justice to ordinary folk was concerned, the local courts stood practically unrivalled. Moreover national municipal and manorial courts administered each their own customs The Common Law of England was only built up as justice was concentrated in the king's hands, either in the central courts or in the local tribunals, whither the itinerant justices carried the law and procedure which prevailed at Westminster Once the king began to monopolise the administration of justice, the supersession of the local courts by the royal courts was a comparatively easy matter It was effected partly by direct limitation of the powers of the local courts, but more often by the simple method of offering to both plaintiff and defendant a "better and stronger commodity" than was to be had elsewhere Thus the history of the decay of the local tribunals is bound up not only with that of the establishment of the three Common Law Courts at Westminster but with the introduction of a system of writs, whereby the transfer of cases from the local to the central courts was authorised, and with the introduction of new methods of judicial procedure; methods which the itinerant justices made accessible to every freeholder

Judicial powers (1) of the Witenagemot and the Norman Concilium,

We have seen that the king and the Witan exercised judicial powers and that these were wielded in like manner by the Norman kings, together with their court of great officials and great land-owners The king presided, the suitors delivered the doom But no suit might be taken before the Witan or Commune Concilium till justice had been asked in vain of the local tribunals. A litigant could only forsake the proposed doom of the local court

by charging with falsehood the doomsmen who uttered it. The result was that the Commune Cōncilium was practically only a court for the tenants-in-chief of the Crown. It was a court for great men and great causes.

But the king and his immediate advisers also exercised judicial powers. Suitors were encouraged to bring their grievances to the king's court, that undifferentiated "curia" from which sprang eventually the whole executive and judicial machinery. Often cases were ordered to be heard in the "curia." Actions begun in the local courts were removed there before judgment had been given; while with the introduction of the system of writs, the suitor, on the plea of false judgment, could secure remedial justice at the king's hands Thus it came about that by the time of Henry II the king's court was transacting a vast amount of judicial business and the cases which were brought before it were of every sort and condition. In 1178, therefore, Henry II set aside five members of his curia, two clerks and three laymen, to hear all the complaints of his people Any matters which they could not bring to an end were to be "presented to the royal hearing" and terminated as it should please the king and the wiser men of the realm" Dr Stubbs sees in this standing judicial committee the origin of the court of King's Bench, which eventually was to deal with all cases, civil as well as criminal, in which the king's rights and prerogatives were concerned Later writers believe it to be the origin of the Bench, the court of Common Pleas, where all suits between subject and subject were determined and from which appeal lay to the court of King's Bench

(2) of the king's court

1178

The exact position of these five judges is however very vague. They were "not to depart from the curia regis"; errors were corrected "coram rege"; all pleas were entered on one set of "de banco" rolls In the days of Richard I, this standing committee disappeared, to reappear in the time of John in a much more independent capacity We hear of Justices sitting at Westminster,

The Court of Common Pleas.

while others were administering justice "coram rege." Even when the king came to Westminster the two bodies of justices did not always coalesce, though they sometimes did so. On the other hand, both those judges who were sitting "coram rege" and those who were not, seem to have undertaken all classes of pleas and no individual judge was permanently assigned to one of the
1215 two divisions Magna Carta stipulated that the court of Common Pleas should be held in some fixed place and should no longer follow the king. This meant the creation of a permanent tribunal with a distinct organisation of its own But Henry III's minority closed up again this "well marked line of cleavage" which was beginning to appear in the king's court and one body of justices sitting at Westminster and supervised by the Council of Regency dealt with all kinds of cases In 1234 this line of cleavage began to reappear Henry III went on progress through the country with judges in his train and from this date we have two distinct sets of plea-rolls On the "coram rege" rolls were recorded all pleas heard by the judges, who journeyed round with the king, on the "de banco" rolls were entered those cases which were determined at Westminster. It was not however, until the beginning of Edward I's reign that we find the court of Common Pleas with its competence limited to suits between subject and subject, and organised under a Chief Justice of its own.

The Court of Exchequer.

A few years after the court of Common Pleas attained an individual existence the Court of Exchequer secured definite organisation as a judicial court: as a financial department it had been organised early in the twelfth century and its officials comprised all the great officers of state: it was indeed the curia regis sitting in its financial capacity, and not until the time of Henry III did it cease to be a "phase of the general governing body" and secure a body of officials of its own. The Exchequer was primarily concerned with the king's revenue, but cases which arose out of the financial business of the court were

determined before the Barons of the Exchequer. Now, the "Barons" had devised certain expeditious methods of dealing with such cases as came before them. In other tribunals the law knew many delays and consequently many suitors, in their desire to get speedy justice, brought what were properly common pleas into the Court of Exchequer. In the Articuli super Cartas this was forbidden, but almost immediately afterwards we find a Chief Baron of the Exchequer, and permission being given to suitors to take their pleas to the Exchequer, in order that they may reap the benefit of its summary processes. The result was that the Exchequer became one of the three Common Law Courts, while the Barons of the Exchequer were so jealous of their privileges, that their claim to amend all errors in their judgments in the Exchequer itself resulted in the creation in 1357 of a court which later became known as the Court of Exchequer Chamber. This court of appeal was made up partly of royal justices and partly of Exchequer officials and here the decisions of the Exchequer itself were revised

The Court of Exchequer Chamber

The court held "coram rege," until the end of the fourteenth century was unable to dissociate itself from the king's Council and we find records of pleas held "coram rege et consilio." Moreover, long after the Court of Common Pleas found a fixed home at Westminster, the court which decided the pleas of the Crown was liable to follow the king Its continued association with the king-in-Council is the explanation of the appellate jurisdiction which it secured over the Court of Common Pleas, a jurisdiction which it kept even when it was formed into a wholly separate court. As early as the end of Henry III's reign we find a chief justice with a committee of professional judges dealing with the pleas held "coram rege"; during the next reign the name of King's Bench began to be applied to it, to distinguish it from the Common Bench. But this court was liable at any moment to be afforced by the king and such of his councillors as he pleased to bring with him and king and councillors took their full share in

The Court of King's Bench:

Its long association with the Council.

the proceedings of the court. A plea might be started in either the larger or smaller phase of the court and be completed in the other without any breach of continuity. After 1290, the proceedings of the professional and of the afforced courts were entered on separate rolls. The afforced court became known as the "king in his Council in his Parliament" and eventually bequeathed its judicial powers to the House of Lords and the king in Council, whilst the Court of King's Bench became a separate tribunal, holding its pleas "coram rege" in fiction only.

The Use of Writs and the Development of Trial by Jury

Writs.

The issue of a royal writ as the preliminary to judicial proceedings was practically an innovation of the Conquest. At first the writ was simply a command from the royal court that right should be done to the plaintiff in the local tribunals, where for some reason or other, justice was not forthcoming. Soon these writs became the only appropriate beginning for a civil action and by means of them it was easy to get a case removed from the lord's court into the court of the shire and ultimately into that of the king. The use of the writ as a means of gathering all suits out of the local into the central courts is best illustrated by the history of the new forms of procedure with which it was most closely connected.

Origin of Trial by Jury.

The origin of trial by jury has been the subject of much speculation Modern historians have decided that it was not bequeathed to us by King Alfred or any of our ancestors. The belief of a French writer that "son origine se perd dans la nuit des temps" and of Blackstone that "it hath been used time out of mind in this nation and seems to have been coeval with the first civil government thereof" have been equally discredited. There seems little doubt that, in its origin, trial by jury is French and

not English and royal rather than popular, for this "palladium of our liberties" was created out of a prerogative right of the Frankish kings. The germ of the later trial by jury lay in that of trial by inquest or sworn recognition The recognitors swore to declare the truth, whatever the truth might be. They had no connection with the oath-helpers, who swore to the truth of their principal's oath, nor with the suitors of the local court who declared the dooms. In England the system of Inquest, brought over by the Normans, took root and prospered. In its native land it did not develop and was soon forgotten In 1070 William I discovered the customs of the English by sworn inquest In 1086 by the verdict of the shires, the hundreds and the vills, a description of the whole realm was secured and the Conqueror ascertained the amount of geld which every man had paid in the past and which he might be made to pay in the future. Moreover the jury of assessment of the twelfth century was the outcome of the same principle while in judicial matters the kings soon separated themselves from the general procedure and made use of the verdict of the neighbourhood when their own rights were attacked · occasionally they extended this privilege to private individuals With the nation at large the old procedure with the formal accusation and the formal denial, the downright "No," which came to be called the Thweit-utnay and the appeal to Heaven to decide between the accuser and the accused, was rapidly becoming inadequate and discredited. Then in 1215, a decree of the Lateran Council forbade the clergy to take any part in trial by ordeal. As a result, it rapidly disappeared in England though the "duellum" was legal till 1819 and oath-helping was only abolished in 1833.

Inquest or sworn recognition.

In certain cases Henry II offered his own special procedure of trial by sworn inquest to all those who desired it: he thus secured that the exceptional method of trial should become the normal one; he was the foster-parent, if not the father, of trial by jury. But as yet there was no jury in

the modern sense of the word, and the recognitors dealt with civil and not with criminal cases, while between the recognitors who spoke according to their previous knowledge of the matter before the court and the jurymen who judge of the cumulative effect of the evidence upon matters concerning which they must have no previous personal knowledge whatever, there is a wide gulf to be bridged Thus to understand the system of trial by inquest we must get rid of all preconceived ideas based upon our knowledge of trial by jury. Moreover we must learn to recognise trial by sworn recognitors under the name of the "assize" Properly speaking an assize was a session of the king and his ministers then it came to mean the ordinance made thereat, and finally the name was applied to the particular form of judicial procedure enjoined in the ordinance and to the body of neighbours by whom it was administered Besides this, we must bear in mind that there is a wide difference between possession and ownership—seisin and jus ; and that the law never attempted to decide the question of ownership against all the world, but only between the two litigants in court

The difference between trial by sworn recognition and trial by jury.

The Assise

Possessory Assizes

The four possessory actions in which trial by inquest could be claimed were the Assize Utrum, and the assizes of Novel Disseisin, Mort D'Ancestor and Darrein Presentment. They had certain features in common . they were not taken into the lord's court at all, but the aggrieved party secured a royal writ which ordered that recognitors should be summoned by the sheriff, to declare in the presence of the king's justices the facts of the case In all, possession was nine points of the law ; the right of the possessor to possess could only be challenged within a very few days after he entered into seisin ; at the end of the prescribed period his seisin became lawful and he could only be reached through the Grand Assize of Ownership.

(1) The Assize Utrum, 1164.

In the Assize Utrum of 1164 the question asked of the recognitors was whether certain lands were held by lay or eleemosynary tenure, for all litigation about lands given

as alms belonged to the ecclesiastical courts and there was constant danger of the Church defrauding the temporal courts by claiming that all its lands were acquired in this way In the Assize of Novel Disseisin, which was finally established by the Assize of Northampton in 1176, and which is said to have cost Bracton many wakeful nights, the king specially protected possession as distinguished from ownership B might be in possession of Blackacre and A claim that B had recently disseised him. If B denied the charge, the recognitors were asked whether A had been recently disseised and if the verdict was given for A, he was reinstated, though B might truthfully urge that his claim to Blackacre was better than A's. The Assize of Mort D'Ancestor was established by the Assize of Northampton in 1176. It ensured that if any man died in seisin his heir had the right of possession against all others: this was a blow aimed direct at the baronage, for the most likely person to seize the dead man's land, was the dead man's lord. Thus X might be in possession of Blackacre, Y might claim that his ancestor Z, died in possession of the estate. If the recognitors declared that Z died in possession and that Y was Z's heir, X would urge in vain that his claim was the better one; the court was not concerned with the question of ownership Finally when any dispute arose as to the right to present to a vacant benefice, by the Assize of Darrein Presentment a sworn committee of the neighbourhood declared who made the presentation on the last occasion, in order that he or his heir should present again For if the living remained vacant for three months the advowson passed to the bishop. The right of the owner was in nowise prejudiced by the decision of the possessory assize.

(2) The assize of Novel Disseisin, 1176.

(3) Of Mort D'Ancestor, 1176.

(4) of Darrein Presentment.

The defeated litigant in the possessory assize could always put himself upon the Grand Assize of Ownership. This was a much more solemn proceeding and was proportionately tedious. Originally questions of ownership were begun in the lord's court and were decided by

The Grand Assize of Ownership

battle But Henry II declared that no man need answer for his free tenement without a royal writ directing an inquiry into his title. Henceforth therefore, a claimant had to secure a "writ of right," which bade the lord do justice on pain of having the case removed into the king's court. Armed with this writ, the claimant appeared in the lord's court and offered to prove his claim by the body of a champion. The defendant might refuse this challenge if he chose and put himself upon the Grand Assize, whereupon the claimant would have to secure a second writ bidding the lord choose four knights of the shire who would elect twelve knights of the district in which the disputed lands lay Frequently, when the tenant put himself upon the Grand Assize, the case, by the writ "præcipe" was called into the king's court and the duty of summoning the recognitors passed to the sheriff. The verdict of the countryside decided for ever the question of ownership between the litigants and their heirs

The Grand Assize of Ownership was not nearly so popular as its younger brethren, the possessory assizes, for the choice of the Grand Assize was a lengthy proceeding The litigants might object upon various grounds to the four electing knights chosen by the sheriff or lord, while all sorts of excuses were urged by the elected recognitors for not attending Besides this, the defendant could always suspend the action by pleading exceptions and so postpone the evil day when the question of ownership would be finally decided. Exceptions might also be pleaded in possessory actions, but this happened less often, since the verdict of the countryside was not for all time and might be reversed by raising the question of ownership.

The "exception"

The exception needs further explanation, for through it, trial by inquest attained a wider range of activity and here at last was the nascent trial by jury. In proprietary actions before the assize had been summoned, and in possessory actions before it had been sworn, the defen-

dant could urge special reasons why the assize should not be held. To enlarge upon a previous example, A might claim that B had newly disseised him of Blackacre; B might answer that A's assertion was false, then before the recognitors were called upon to give the opinion of the countryside, B might urge as an exception that he was seised of Blackacre by A's own action: in the same breath the defendant denied the charge and then produced special reasons why the charge should not be proceeded with. B would then offer to submit this new plea to a jury and on pain of losing the case altogether A would have to agree to the suggestion As a matter of fact, the question would probably be submitted to the twelve men already secured for the assize But assize and jury were based on different principles. the assize was summoned by the command of the king, and at the petition of the plaintiff, the "jurata," at least in theory, could only be called into being on the mutual consent of plaintiff and defendant. The denial of the charge made before the assize, the downright "No," soon became a matter of form and the real crux of the action was the "exception." Thus the assize was gradually superseded by the jury, and the jury worked its way into actions other than those concerned with the possession or ownership of land. Before the end of Henry III's reign the two parties might, at any part of the proceedings, agree to submit to the countryside some question of fact which had been raised by the proceedings, and by its decision both parties were bound.

The Jury (1) In civil cases.

The early jury, just as much as the assize which it superseded, was supposed to answer out of the fulness of its knowledge The plea of ignorance was a valid excuse for refusing to serve. On the other hand the jurors were not witnesses in the modern sense of the word: they were not dealt with separately nor were they cross-examined: they were required to give a simple answer to a straightforward question, about which there could be no contradictory opinion and the answer which

they gave was not based upon their own convictions, but upon the common knowledge of the countryside But soon, since Hear-say would often speak in a contradictory manner and Truth seemed double-faced, it became the function of the jurors to collect and sort evidence and to state the net result in their verdict Eventually those whom they questioned were produced in open court, they were examined concerning the documents they produced and the facts they alleged By the close of the fourteenth century, or the early part of the fifteenth, jurors and witnesses became distinct factors in a trial, though the idea that jurors should have personal knowledge of the facts upon which they based their verdict died hard As late as 1543 six out of the twelve jurors had to be inhabitants of the neighbourhood, in order that they might inform the others It was not until the eighteenth century that the idea that a jury, to be impartial, must be a calculating machine, was fully assimilated

(2) In criminal cases.

While the jury was making its way in civil cases, it had also been making rapid advances in criminal procedure

(a) The Jury of Presentment

The Jury of Presentment may possibly have been of late Saxon ancestry Ethelred enjoined that twelve senior thegns of each wapentake should go out with the reeve, swearing to accuse no innocent and to conceal no guilty man. Possibly this practice was confined to the land of wapentakes Possibly it was known throughout England in ecclesiastical matters, for in this connection we find it on the continent and Edgar, as well as Dunstan, was a great lover of the orderly methods of the continental churches. In 1159 in Normandy and in 1164 in England, we find Henry urging upon the ecclesiastical courts that trials for heresy should be begun only upon the sworn accusation of a certain number of neighbours and he speaks of it as of a good old custom of the Church.

1166.

Whatever its origin, the accusing jury in criminal matters came into prominence in 1166. Possibly Henry, who was essentially an adapter of existing machinery

rather than an innovator, made use of the periodic views of frankpledge in order to secure the presentment of suspected criminals By the Assize of Clarendon, in the hundred and the shire courts, representatives of the hundreds and vills were to present to sheriff and justice all those accused by popular rumour of specified crimes. The Assize of Northampton in 1176 extended the number of subjects upon which inquiries were made. The procedure before the sheriff has already been described: that before the justices was an enlarged version of the sheriff's tourn All who were bound to do suit of court were there, together with the officials of the hundreds, the shire and the liberties, and representatives of the vills, the hundreds and the boroughs After 1194, the representatives of the hundred were chosen, not by the bailiff of the hundred but by four knights elected by the county court, who chose two knights to co-opt ten from their own hundred or wapentake: together these twelve men made up the presenting jury of the hundred On a certain day, the juries of the hundreds presented to the justices such of the presentments made by the vills to them as they approved and as the sheriff had not dealt with himself The justices then put upon oath the representatives of the four vills nearest to the one of which each suspect was an inhabitant. when they substantiated the accusation of the man's own vill and of his hundred, the accused had to repel the charge against him by going to the ordeal. But by the reign of Henry II so weak had grown popular belief in the efficacy of an appeal to the judgment of Heaven that the man of bad repute who came "clean from the water" had to abjure the realm, while the decision of the Lateran Council of 1215 forbidding the clergy to take any part in trial by ordeal condemned it to practical extinction. After this time there was really only one mode of proof open to the accused and this was borrowed from civil actions, namely the verdict of the countryside.

1176

Presentations before the itinerant Justices.

(b) Trial of the accused by (i) ordeal;

(a) jury.

But a jury could only be summoned if both accuser

and accused agreed thereto and a variety of expedients were resorted to, in order to compel the latter to submit to the summons of a jury In 1275 the statute of Westminster I ordained that a notorious felon should be kept "en la prison forte et dure" till he came to a more reasonable frame of mind This was the origin of the grim "peine forte et dure" by which the suspected criminal was slowly starved, or tortured to death and which remained legal till 1772. The motive for obduracy was that, should the suspected man die unconvicted, he saved for his children the lands and goods which otherwise would be forfeited to the king

If the accused did put himself upon the country, the hundred jury was called upon to decide the question of guilt or innocence Quite reasonably the jurors might acquit him: they had accused him because of public rumour and to save themselves from a fine, in case the suspicions abroad concerning him should reach the ears of the judges through some other channel If they found him guilty, then the representatives of the four neighbouring townships were sworn and sometimes the jury of another hundred and if they agreed with his own hundredors, sentence was passed

The Coroner's Inquest.

By the beginning of the fifteenth century we find coroners, who were first elected in 1194 as guardians of the pleas of the Crown, making inquest by four or even six vills. This they did when there was a sudden and unaccountable death and the person presented by the vills as suspect was arrested and put into gaol. When the elaborate procedure of the old eyres was altered, the indictment of the sheriff's tourn and the coroner's inquest became a sufficient reason for a man to be put upon trial before the justices without any representment by the hundred juries.

Subsequent development of trial by Jury in criminal cases.

The later history of trial by jury in criminal cases is somewhat obscure. Gradually the conviction that a man's accusers were not the fittest persons to judge of his guilt or innocence gained ground and a statute of 1352 actually

forbade that this should be. With the growth of this idea the old complicated system of corroborating or afforcing juries, centering round that of the hundred, both for presentment and trial was gradually superseded by the modern system of indictment by Grand Jury and trial by Petty Jury.

The Itinerant Justices

Royal progresses

The pleas of the Crown and trials by sworn inquest were held by the royal justices in their visitatorial courts. The idea of a travelling tribunal had been familiarised by the progresses of the later Saxon kings and the three great annual courts at which the Norman kings "wore their crowns in public." Between 1076 and 1079 a commission was sitting at St Edmundsbury to try all pleas reserved for royal jurisdiction and in 1096 there was one perambulating Devon and Cornwall to investigate the pleas of the Crown. After Henry I organised the fiscal system of the country, for the purpose of assessing the revenue he sent out the officials of the Exchequer, who were likewise members of the king's "curia." It would have been an easy matter to endow these commissioners with authority to hear locally those pleas which otherwise would have come before them in the central "curia." Probably this was done, but the exact powers of the itinerant Exchequer officials we do not know: possibly they dealt with those more important pleas of the Crown which were gradually being taken out of the sheriff's hands and reviewed the judicial as well as the financial proceedings of the country. Their efficiency was hampered by the irregularity of their visits, by their exclusion from the greater franchises and by the amount of local influence which often made the position of the sheriff unassailable.

The first itinerant justices.

Organisation of the system of itinerant justices.

Henry II gave form and order to the system of itinerant justices and thereby linked together central and local judicial machinery. From the assize of Clarendon visits of the royal officials became frequent and regular. In

1173 the principle of circuits was introduced and three years later the country was divided into six circuits in each of which three justices saw to the execution of the Assize of Northampton In 1177 twenty-one justices were distributed amongst four circuits By the Assize of Clarendon, no franchise, however privileged was to exclude the itinerant justices: ten years later by the Assize of Northampton all pleas of the Crown were put into the hands of the royal justices and Magna Carta reaffirmed this and also gave them charge of the assizes. To hold these, justices were to go round four times, and when by the time of the reissue of the charter in 1217 this provision had been found too generous, once a year.

1166 No franchise to exclude itinerant justices.)

The general eyres, which required the appearance of the whole county and every hundred and vill in it before the justices, were felt to be very burdensome and were only held at long intervals Between them, and by the time of Edward I instead of them, itinerant justices who later became known as Justices of Assize were sent round, commissioned to deal with certain matters specified in the terms of their commission. The chief commissions were those empowering the justices to deal with all breaches of the peace, to take the assizes, "oyer et terminer" all criminal cases and to "deliver" the gaols. The commission of "nisi prius" which was first issued separately in 1285, was intended to relieve the justices commissioned to take the assizes These were to be held at Westminster by two justices with one or two knights of the shire, and the juries empannelled for the trials were to be sent there, unless before (nisi prius) the date fixed for the trial, the itinerant justices came into the county: this as a matter of fact they always did. In 1300 the justices of "nisi prius" were empowered to deal with criminal cases.

Commissions of the Justices of Assize consolidated.

Edward I secured that the Justices of Assize should make their visitations at specified times and at regular intervals. The five different commissions issued to the various judges on circuit were amalgamated, while certain

of their duties were eventually allowed to pass to the Justices of the Peace In Tudor times the Quarter Sessions of the Justices of the Peace actually became serious rivals to the itinerant justices in criminal matters and even in certain civil suits. But by the seventeenth century it was customary to reserve cases involving a capital sentence for the Justices of Assize, though the respective powers of the two bodies of justices were not defined by statute till the nineteenth century With the creation of the new County Courts in 1846 the Justices of Assize ceased to exercise what little civil jurisdiction remained to them by the nineteenth century.

The Justices of the Peace

The State's "man of all work" was originally instituted as the keeper or guardian of the peace and though his duties have been and still are multitudinous, he is and always has been primarily a police official Before the advent of the Justices of the Peace there were a variety of more or less efficient methods of enlisting the community on the side of order. There was the responsibility of the kindred and of the lord, and the collective responsibility of the tithing This last became very general after the Conquest amongst free and unfree except in the extreme North Later the free were exempt on the grounds that their land gave them a sufficient stake in the community to guarantee their good behaviour, or in the event of any breach of the law on their part, to provide a remedy against them Edmund's "oath of fealty" demanded that no one should conceal treasonable feelings "in fratre vel proximo suo plus quam in extraneo." Cnut exacted an oath from every man over twelve that he would neither be a thief nor cognisant of theft, and under Richard I the experiment was repeated.

Early police measures

(1) Responsibility of kindred, lord and tithing

(2) Oaths of fealty

For the apprehension of fugitives from justice there were other provisions. An uncertain amount of police

(3) Hue and Cry

duty seems to have always been incumbent on the fyrd, while the duty of the whole population to pursue criminals from vill to vill and from hundred to hundred was at least as old as the days of Edgar. The reign of Henry III and Edward I saw the development of a system of police and its amalgamation with the old military duty of the freeman. A writ of 1233 for the conservation of the peace, which was elaborated in 1252 and 1253, provided that at least four men should watch from sunset to sunrise at the gates of every vill. They were to detain all strangers and after those who would not suffer themselves to be detained they were to raise the hue and cry from vill to vill until they were captured. Those who would not watch in their turn at the gates of the town were to be brought before the itinerant justices, while in 1252 it was provided that in each vill, a constable and in each hundred a chief constable, should be appointed, at whose orders all sworn to arms should meet and do what belonged to the keeping of the peace. The duty of watch and ward was therefore definitely amalgamated with that of service in the fyrd. The Statute of Winchester summed up the earlier writs for the maintenance of the peace and the successive Assizes of Arms. Henceforth the chief duty of the fyrd was the defence of the country-side against the fugitive and the malefactor. Every man was to have in his house "armure pur la pees garder." In every hundred and franchise two constables were to be chosen to view the armour twice a year, to raise the hue and cry, to deliver the malefactor to the sheriff, and to present defaulting freemen before the assigned justices.

(4) Watch and Ward.

1285.

Justices of the Peace.

These assigned justices who exercised a general supervision over the administration of the Statute of Winchester were the ancestors of the Justices of the Peace. Their genealogy can be traced nearly a century further back. In 1195 the oath exacted from all above the age of fifteen that they would keep the peace, had been received by specially appointed knights. In 1264 an officer called "custos pacis" was assigned in each shire to conserve

the peace, while in 1277 one was elected in each shire court. After 1285, the sheriff together with commissioners of "oyer et terminer" and of "gaol delivery" usually carried out the Statute of Winchester. But in 1327, good men and loyal were appointed in each county to keep the peace and the next year they were authorised to examine and punish evil-doers, while two years later they were empowered to receive indictments and to send those accused before the itinerant justices. By 1344 there seems to have been a permanent staff of nominated commissioners, ready upon occasion to be appointed "with others, wise and learned in the law" to hear and determine felonies and trespasses. Finally in 1360 "one lord and with him three or four of the most worthy in the county, with some learned in the law" were appointed to keep the peace, to arrest and imprison offenders and to hear and determine felonies and trespasses. Two years later it was enacted that they should hold their sessions four times a year.

Their relations with (1) the shire courts.

Thus the Justices of the Peace became a regular part of the shire machinery. For a century they worked side by side with the shire court. But the shire court, lessened in numbers and in dignity by the exemptions from attendance which had been given to the more weighty of its suitors, remained chiefly for the election of coroners, verderers and knights of the shire; while the petty criminal jurisdiction, which the growth of the Common Law Courts and of the powers of the itinerant justices had left to the sheriff, he was destined to lose to these specially commissioned but resident justices. More than this, the Justices of the Peace, assembled in Quarter Sessions soon rivalled the itinerant justices themselves, for they were empowered to hear and determine all pleas of the Crown save treason. In civil suits the justices had at first a limited jurisdiction, but with the decay of the local courts this power was so much augmented that here too the resident justices inevitably rivalled the itinerant Justices of Assize. In the seventeenth century all cases

(2) the itinerant justices.

involving the death penalty were reserved for the Assizes and in those days capital punishment was inflicted for a large number of offences: but the jurisdiction of Quarter Sessions over the most serious offences was not curtailed by law till 1842. It was not until the establishment of the new County Courts four years later that the justices were deprived of their civil jurisdiction in all except certain specified cases.

(3) the Common Law Courts.

In judicial matters the justices were subject to the supervision of the court of King's Bench. By the writ "mandamus," the justices could be ordered to hear all cases within their jurisdiction; by a writ of "prohibition" they could be forbidden to interfere in matters beyond their competence, while by the writ of "certiorari" the court of King's Bench could take to itself any case in which a failure of justice was likely. This supervision is now exercised by the High Court of Justice and though the powers of the justices are less extensive than formerly, about three-quarters of the total number of criminal charges are still brought before them.

Powers of the single justice.

The single justice as conservator of the peace has power to issue warrants of all kinds, to give orders to police constables and under the so-called Riot Act, to call out the military in extreme cases of disorder. Two justices acting together can appoint special constables and every able-bodied man, not specially exempt, is still liable to serve as constable in an emergency; a secretary of state can insist that even the exempt shall serve. As judge, a single justice, like the sheriff before him, can conduct preliminary examinations of persons arrested on criminal charges, though by a statute dating from Queen Mary's reign those accused of felony can only be let to bail by two justices in open sessions. The power of hearing and determining minor cases without a jury grew up in a curiously haphazard fashion. Numerous statutes gave to one or more justices the authority to inflict punishment for their breach, but they did not say when or how this justice was to be administered. Not till 1848

was the law as to the administration of this summary justice codified while only in 1879 were the innumerable offences which might be dealt with in this manner, reduced to such as involve not more than a fortnight's imprisonment or a fine of 20/-.

Petty Sessions.

Meetings of two or more justices out of Quarter Sessions are now known as Petty Sessions To a large extent their authority is parallel to that of the old hundred courts. But it was somewhat chaotic up to 1828 when it was reduced to order ; the justices assembled in Quarter Sessions were then empowered to divide the county into petty sessional districts In this way, a large number of the justices, though appointed for the whole county now do most of their work in the district in which they live. The scope of their jurisdiction in Petty Sessions is much the same as that of the single justices, but they deal with some cases which the single justice has no power to touch. Each petty sessional division has its chairman and regularly constituted Bench, as well as a court-house and a Clerk to the Justices, who is qualified to supply any legal knowledge which the justices themselves may not possess A Clerk of the Peace discharges the same function in the court of Quarter Sessions. Against the summary jurisdiction of single magistrates and of the Petty Sessions an appeal lies to the Quarter Sessions. These appeals are determined without a jury, otherwise cases are tried at Quarter Session by a petty jury, upon the presentment of a grand jury. The fact that comparatively few of the larger towns have availed themselves of their right to appoint a lawyer as a stipendiary magistrate, testifies to the efficiency of the unpaid and unprofessional Justices of the Peace.

Quarter Sessions

Commissions of the Peace

The number of justices appointed in each county was limited in 1388 to six besides the Judges of Assize, who were always included in the commission The limitation was soon disregarded and in Lancashire alone the magistracy now includes over eight hundred members. The total number is about 20,000, but many of these are

not active justices and are only named in the commissions as a matter of form. Thus all Privy Councillors are named in every commission, but only those who have taken the necessary steps to become acting magistrates can administer justice, though all can perform certain of the smaller functions of the Justices of the Peace in any part of the country. The inclusion of Privy Councillors in the Commissions is a survival of the close connection which existed between the local magistracy and the Tudor Council and accounts for the semi-political character of the office.

Qualifications of Justices of the Peace.

Richard II required that all Justices of the Peace should be "sufficient knights esquires and gentlemen." Henry V insisted that they should be residents of the county and Henry VI imposed a property qualification of £20. This was raised by George II to £100 Occasionally women seem to have acted as justices Under Henry VIII, Lady Berkeley of Yate in Gloucestershire sat on the Bench at Sessions and Assizes, girt with a sword and at other times she administered justice in person to the people of her neighbourhood. The justices held office during good behaviour and at the pleasure of the Crown: under ordinary circumstances therefore they held office for life. Now, as in the days of feudalism, much of the administration of justice is in the hands of the landed gentry. But the fact that their authority is, and always has been revocable, shows that from the first their jurisdiction differed from feudal jurisdiction. The one is a delegation, the other was a dismemberment of the authority of the Crown. In one case the limits of the jurisdiction were defined by those of the property of the administrator, in the other there was no necessary connection between the two. Justices of the Peace are commissioned for the whole county. At their head is the Custos Rotulorum or keeper of the records, who is, at the same time the lord-lieutenant of the shire.

Administrative work of the Justices of the Peace.

The administrative work of the Justices of the Peace was not less important than their judicial and police duties.

As the means of communication between king and people they took the place of the sheriff here, as they had already taken it in judicial matters Demands for purveyance and ship-money, benevolences and loans were addressed to them. They assessed and collected local taxes: they superintended their expenditure They settled wages and prices, and authorised the bestowal of Poor Relief. They enforced the laws against recusants and non-conformists They appointed all sorts of local officials. They were responsible for the maintenance of roads, bridges, prisons and public buildings of any kind Under the Tudors they became the rulers of the county, subject to the supervision of the King's Council and the King's Bench. Through them all statutes relating to police and social economy were carried out. Professor Maitland suggests that only under the letters of the Alphabet could their duties be classified, for their functions were as multifarious as those of the modern state or the Tudor Privy Council, whose instruments they were. In the days of James I, Lambard was convinced that their backs would be broken by the stacks of statutes with which they were laden The stacks were very much larger before, by the creation of the County Councils, they were relieved of much of their administrative work The act came into force in 1889 and while leaving to the justices "their judicial authority together with the general execution of certain licence laws and a share in the management of the county police" transferred to an elected County Council matters of local finance and local administration The supervision of the county Police force and the appointment of certain officials is left to a joint committee of the County Council and the Quarter Sessions.

THE COURT OF CHANCERY

The Chancellor

The history of the Chancellor dates from the reign of Edward the Confessor. He was the chief of the royal clerks and had charge of the Great Seal. His name he got from the "cancelli" or screen behind which he

worked and not, as one chronicler suggests, from the wrong decisions which he cancelled. From the first the office was of some importance. As royal secretary he was in the confidence of the king in all temporal affairs: as keeper of the Great Seal he necessarily took part in all formal expressions of the royal will, while as the chief of the royal chaplains he was the "keeper of the king's conscience." The secretarial work of the Chancellor must have been considerable and it included the drawing up of royal writs. In a manner he was "secretary of state for all departments" and Becket as Chancellor had fifty clerks under him. Both in the Curia and in the Exchequer the Chancellor was an important official and when the office of Justiciar was lost in that of the Chief Justices, he became the first political officer of the Crown.

Judicial powers of the Chancellor.

At first the Chancellor had no judicial powers, other than those which fell to him as president of the Council and as a baron of the Exchequer. Early in his reign Edward I provided that the Chancellor and the judges should examine all petitions, so that only those which could not be answered without the exercise of the royal grace and favour should be referred to him and his council. Later the king arranged that petitions should be sorted into five bundles, one of which was to contain those which were to be referred to the Chancellor. But this was rather a reorganisation of the work of Parliament and the Council than the creation of a new jurisdiction. The Chancellor's legal powers, like those of the later Privy Council, were the result of the residuary and inalienable judicial authority of the Crown and they had as yet no independent existence.

But from the reign of Edward III the Chancellor seems to have attended to judicial business regularly and in a court of his own. Only when he no longer formed part of the king's retinue could his judicial powers acquire a distinct character and from the beginning of the reign he had ceased to follow the king. In his court of Chancery the Chancellor administered both Common Law

and Equity. His Common Law jurisdiction was concerned chiefly with matters in which royal rights were concerned and with questions concerning the interpretation of royal writs and grants His Equity jurisdiction, despite the provision of 22 Edward III, that all matters of grace should be referred to the Chancellor, was exercised in close connection with the Council, which had not as yet, delegated to him all authority in such matters In the reign of Richard II Chancery was recognised as a distinct and independent court, and the Commons, usually hostile to its jurisdiction, delegated to it the redress of wrongs for which the Common Law gave no remedy. From the reign of Edward IV, the connection between the Council and Chancery ceased and the independent jurisdiction of the Chancellor was fully recognised

Chancery as a distinct tribunal.

Much of the Chancellor's equitable jurisdiction was concerned with civil cases wherein, because of too much might on one side and too much unmight on the other, ordinary justice could miscarry. The number of the "unmighty" was astonishingly large : possibly their desire for the elastic and efficient procedure of Chancery magnified the might of their enemies Chancery could summon the defendant by a writ of subpœna "to answer on certain matters" and it could examine him upon oath, so that matters were sifted with a thoroughness which appealed strongly to the plaintiff in a righteous cause The Common Law Courts had no power to conduct examinations upon oath. At the same time the Chancellor had no authority to summon a jury and if a question of disputed fact arose, it had to be referred to the King's Bench for decision. Besides this, Chancery could provide remedies for wrongs which the Common law ignored, while a large amount of jurisdiction was attracted to it because it recognised and enforced those "uses" of which the Common Law Courts refused to take cognisance.

Equitable jurisdiction of Chancery

The Common Law Courts bitterly resented the equitable jurisdiction of Chancery. But they themselves had provided the pretext for its creation. Austin says that

Chancery and the Common Law Courts

"Equity arose from the sulkiness and obstinacy of the Common Law Courts, which refused to suit themselves to the changes which took place in the opinions and circumstances of society." The lawyers early took up the view that their system was complete and that for every wrong a remedy existed in the form of original writs to suit all cases. Unfortunately for the Common Law Courts there were many wrongs, for the redress of which none of the existing originating writs could initiate proceedings As early as Henry III's reign the right of Chancery to create new writs was challenged and the provisions of Oxford required the Chancellor to swear that he would seal none save the usual writs without the command of the king in Council This made the unauthorised creation of new writs to meet new wrongs illegal and the judges assumed the right of deciding the legality of the writs, whereon the actions brought before them were based The Statute of Westminster II allowed the issue of writs falling under "like law" to those already in existence, but the jealousy of the judges made this concession a dead letter

The Common Law Courts had juster cause for complaint when Chancery claimed to supervise their judgments This it did by "injunctions" forbidding the plaintiff to proceed with the action in the courts of Common Law or to act on the judgments there obtained The injunctions were promulgated, when, in the Chancellor's opinion, the plaintiff's legal claims were not reconcilable with the dictates of conscience or equity, which according to a treatise of the days of Henry VIII "never resisteth the law nor addeth to it, but only when the law is directing itself against the law of God or the law of reason."

The Stuart lawyers tried to bring the matter to an issue. Coke disputed the right of Chancery to give relief against a judgment of the King's Bench which had been obtained by gross fraud and mis-statement. The Chancellor appealed to James who referred the question to Bacon, then Attorney General, and to other lawyers. The matter was

decided in favour of Chancery and thenceforth until 1873, it continued to supervise, in the interests of "conscience," the decisions of the Law Courts and the character of the suits entertained by them. "When the rigour of the law in many cases will undo a subject" said James I "then Chancery tempers the law with equity, and so mixes mercy with justice, as it preserves a man from destruction."

The kind of justice administered by Chancery

The justice administered by Chancery which according to Bacon was dictated "by the conscience of a good man" varied inevitably in quality But a certain uniformity characterised its decisions, which were largely influenced by precedents and by the dictates of the Roman and Canon Law. A contemporary of Bacon's said of the justice dispensed by Chancery, "Equity is a roguish thing 'Tis all one as if we should make the standard for the measure of a foot, the Chancellor's foot. One Chancellor has a long foot: another a short foot and a third an indifferent foot." The accusation was perhaps only half serious, but in 1675 the right to appeal to the High Court of Parliament against the decisions of Chancery was established and at the same time the introduction of new remedies into Common Law procedure diminished the reasons for interference by Chancery Soon after this, the character of Chancery itself was substantially modified. The eighteenth century saw definite limitations placed upon the Chancellor's discretion: his decisions henceforth were based wholly upon precedent and Equity, like the Common Law, became fixed and rigid, and could no longer modify in every given case the rigour of the law This became once again the peculiar business of the king and his Council. Henceforth therefore, Chancery and the Common Law Courts exercised co-ordinate powers, though they were based on such different principles and gave such different remedies that a man "might lose his suit on one side of Westminster Hall and win it on the other." The result was that, after the reform of Chancery in 1833 and of the Common Law Courts in 1852 and 1854, Common law and Equity were harmonised by the Judi-

cature Act of 1873. When the two codes were at variance, it was provided that, with certain exceptions, the rules of Equity were to prevail. The power of the Crown to temper justice with mercy which was the origin of the Chancellor's jurisdiction is now exercised by the Secretary of State for Home Affairs.

The Supreme Court of Judicature

The Supreme Court of Judicature. (1) The High Court of Justice.

The act of 1873 and subsequent acts consolidated all the existing central courts into one Supreme Court of Judicature. This consists of a High Court of Justice and a Court of Appeal. To the three divisions of the former was given the equitable jurisdiction of Chancery as well as the Common law jurisdiction of Chancery, Queen's Bench, Common Pleas and Exchequer and that of the courts created by the commissions issued to the Justices of Assize, together with the jurisdiction of the courts of Admiralty, Probate and Divorce. The judges who now go on circuit are deemed to "constitute a court of the said High Court of Justice": their competence is no longer limited by the terms of their commission, but is co-ordinate with that of the High Court itself.

(2) The Court of Appeal.

The Court of Appeal possesses the old appellate jurisdiction of Chancery and the Court of Exchequer Chamber in civil cases and is the court of appeal from the Divisions of the High Court. From it appeal lies to the High Court of Parliament. In criminal cases there was little regular machinery for the hearing of appeals, but by the act of 1873 an appeal in certain cases was allowed to the Court of Appeal and in 1907 an act was passed for the purpose of constituting a court of criminal appeal.

The Rule of Law

The supremacy of the law is one of the most characteristic features of the English Constitution. It comprises two principles or ruling ideas, which are closely

allied to each other. In the first place "Every man is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals"; and secondly "No man is punished nor can he be lawfully made to suffer in body or goods except for a distinct breach of the law, established in the ordinary legal manner before the ordinary courts of the land" For long these two principles were not recognised in England nor are they fully recognised in many European constitutions, which allow special rules and special courts to regulate the conduct of government officials. In France for example, there is a "droit administratif" and there are "tribunaux administratifs" which deal with affairs in which the government and its servants are concerned.

Equality before the law, irrespective of rank or profession; the meting out of the same justice to all sorts and conditions of men was secured in part by the triumph of the king's courts over courts national, feudal and municipal. By this, one common law came to be administered throughout England instead of the variety of customs, many of them purely local and decidedly antiquated which held sway in the local courts. But for a long time, certain classes of society were not subject to the ordinary tribunals nor to the ordinary law of the land In early times this was particularly true of the clergy who enjoyed many immunities; later it threatened to become true of the press, to control which rigorous measures were taken spasmodically. But in England government officials have never been able to claim that the control of their actions is beyond the sphere of the ordinary courts, though in early days the power which supported them was irresponsible enough to secure their immunity. Danby, in 1679 pleaded in vain the royal pardon as a bar to his impeachment by the House of Commons and no one, from the Prime Minister to the humblest of government employees, can plead the command of an official superior as a lawful excuse for illegal actions. This is abundantly illustrated by

Equality of all men before the law

the actions instituted by those arrested under the general warrant issued by the Secretary of State against the authors and publishers of No. 45 of the *North Briton*, against those Government officials who executed the warrant.

(General Warrants.) During the eighteenth century the right, claimed by the Secretary of State, to issue a warrant for the apprehension of the unnamed authors and publishers of obnoxious papers was a serious menace to the principle that all men are equal before the law It was originally based on certain clauses in the licensing acts "for the better discovery of printing in corners without licence," but it long survived the old censorship of the press, which finally ceased after 1695 The whole matter came to a crisis in the case of Wilkes In 1763 No 45 of the *North Briton* contained a violent criticism of the king's speech Lord Halifax, Secretary of State, issued a general warrant for the arrest of the authors and publishers thereof Forty-nine persons, many of them innocent, were arrested Subsequently Wilkes brought an action against Lord Halifax and obtained £4,000 damages, while from the Under-Secretary, Wood, he secured £1,000 damages Leach, a printer, got £400 damages against three of the king's messengers and Entick brought a successful action for trespass against Carrington, another king's messenger because, under a general search warrant he had entered his house and carried off books and papers on the assumption that he was the author of a seditious libel The Chief Justices of the King's Bench and of the Common Pleas declared emphatically against the legality of general warrants for the apprehension of either persons or papers and by a resolution of Parliament in 1766 their decisions were confirmed.

Personal liberty of the subject. That "no man can be arrested or imprisoned except in due course of law" is not set forth, as Professor Dicey has pointed out in any specified document, but is one of the first principles of the constitution by virtue of the accumulated decisions of the judges of the law in individual cases. Even article thirty-nine of Magna Carta

and the declaration in the Petition of Right record what the existing state of affairs ought to be if the law were duly observed; they do not create new liberties.

Origin of the writ of Habeas Corpus.

Means of redress against unlawful detention were provided with the introduction of the system of writs. Thus the prisoner, or some one on his behalf could secure a writ "de odio et atia" ordering the sheriff to inquire whether there were reasonable grounds of suspicion against a prisoner accused of murder, or whether the accusation was prompted by hatred and malice. In the latter case the prisoner was liberated on bail till the next eyre of the justices, when he was brought up for trial. John extorted huge sums for this writ, hence Magna Carta provided that the writ of "inquest of life or limb" should be one of the writs of course, obtainable by any applicant, free and without power of refusal. The writ of "main-prize" commanded the sheriff to take sureties for the appearance of prisoners accused of less serious offences and another writ enjoined that the prisoner should be released, on bail being given. The writ of Habeas Corpus superseded and amalgamated all these other writs. By it the gaoler was "to have the body" of the prisoner before the court in order to let the court know the grounds for the prisoner's detention. The judge could then liberate the prisoner on bail, or bring him speedily to trial.

Its evasion by the Crown.

The writ was issued as a Common Law right upon the application of the prisoner, or of some one else on his behalf and was known long before 1679 But by a variety of pretexts it was made of no avail against arbitrary imprisonment by king and Council. Tudors and Stuarts asserted successfully their right to imprison whom they chose. If to the writ of Habeas Corpus the gaoler returned that the prisoner was detained by the special command of the king, it was held to be a sufficient answer. In 1627, in the case of the Five Knights, this return was made to the writs of Habeas Corpus for which they applied. It was argued on their behalf that the

cause of their imprisonment must be shown upon the anwer to the writ in order that the judges might decide whether or no bail could be given. The judges gave a verdict for the Crown and then salved their consciences by refusing to put on record their decision that the Crown could imprison without cause shown.

The Petition of Right protested against the illegal imprisonment of subjects The act which abolished the Star Chamber forbade the refusal of the writ of Habeas Corpus even to those committed by the special command of the king In spite of this, after the Restoration the writ was only given after such lengthy delays that it was practically useless, while prisoners were secreted in distant places, so that they were unable to secure any remedy. In 1679 the Habeas Corpus Act was passed. This provided that every one imprisoned on any charge but that of treason or felony must be produced within twenty days at latest either for trial or for liberation on bail. Every one accused of treason or felony must be tried at the next "gaol delivery" unless the witnesses for the Crown cannot be procured in time In this case the prisoner must be liberated on bail and if not tried at the next gaol delivery he must be discharged Imprisonment beyond the seas was prohibited. The Bill of Rights provided that excessive bail should not be demanded, while an act of 1816 extended the remedies of the Habeas Corpus Act to all those deprived of liberty upon other than criminal charges and authorised the judge to examine into the truth of the facts set forth in the return with a view to bailing, remanding or even discharging the prisoner. In times of great political disturbance the Habeas Corpus Act can be partially suspended by Act of Parliament. That is, all those accused of conspiracy are denied the benefit of the writ As soon as those thus imprisoned are liberated, they are free to seek redress by due course of law. In consequence, acts of Indemnity have occasionally been passed to protect those who would thus have been brought to account. Here is the strongest testimony to the universality of the Rule of Law.

Habeas Corpus Act, 1679.

1688.

1816.

CHAPTER XII

THE CHANGE IN THE BALANCE OF POWERS WITH THE GROWTH OF THE CONSTITUTION

Absence of political unity before the Conquest

UNTIL the Conquest, England was a collection of loosely connected units, ready at any time to resume an independent existence. The Romans had secured some measure of superficial unity, but it vanished with them, and for about a hundred and fifty years the country was overrun by independent tribes of Jutes, Saxons and Angles The settlement of the tribes was accomplished by about 600 A D. The next two centuries were filled with the struggles of the three great kingdoms, Mercia, Northumbria and Wessex, for supremacy. Ultimately the victory went to Wessex. She had everything in her favour ; room for expansion, physical compactness, ethnological unity. In constitutional organisation she was far ahead of her neighbours and by the eighth century she held both London and Canterbury, the one the commercial, the other the ecclesiastical centre of the country. The beginning of the ninth century saw Egbert proclaimed father and lord of England, from Tamar to Thanet and from Southampton Water to the Firth of Forth. But he was suzerain, not sovereign : he had no central machinery wherewith to control the enormous realm over which, in theory, he held sway : he could not make his supremacy a reality and his successors could not even claim his unsubstantial title.

The real unification of England began when Alfred welded together Wessex and western Mercia. Edward

the Elder and Ethelfleda effectually secured England south of the Humber. But though, in 954 Northumbria was also incorporated with the English kingdom it was only as an addition to the ealdormanries which Athelstan and his successors were compelled to establish, and which continued to exist until they were swept away by the Normans. Moreover, there was nothing to weld together Angle, Saxon and Jute into one folk, obeying one law. Communications were difficult and provincial feeling strong; the Danish settlements introduced yet another element of disruption The Church, the one exponent of national unity, though it took a large share in the life of the people and though bishop and ealdorman sat side by side in the shire court, could not, single-handed, effect consolidation.

Weakness of the Saxon system

The root of the evil lay in the Saxon system itself: both its strength and its weakness was its local self-dependence Economically, socially, politically, its power of cohesion grew less as the area widened. The hundred had less power of combination than the township, the shire than the hundred, while the kingdom was fatally weakened by those disruptive tendencies which a strong local government and a feeble central administration generated The battle of Hastings bore overwhelming testimony to the real impotence of the Saxon king The men of Wessex and the royal huscarls had to face the Norman invader alone, for Edwin and Morcar held back their forces, though only a few days earlier Harold had saved the North from Tostig and Harold Hardrada.

Changes effected by the Conquest.

William of Normandy did his utmost to make the Conquest as little of a catastrophe as possible. Posing as the lawful successor and near kinsman of Edward the Confessor, he submitted his claims to the Witan and was duly elected and crowned. After this, he claimed that he fought but to subdue his rebellious subjects, whose lands he confiscated for the unpardonable crime of treason but for whose laws and customs he professed the utmost

reverence. Consequently the immediate constitutional changes introduced by the Conquest were few. The Forest Courts, a few changes in legal procedure, an ordinance which ultimately separated the spiritual from the temporal courts of law, certain provisions which defined the limits of papal power in England, make up the sum-total of the innovations for which William the Conqueror can be held directly responsible. But the ultimate effects of the Conquest were far-reaching and all-pervading. It infused a new spirit into England; it invigorated existing institutions: it united a divided kingdom and so made possible constitutional growth: it supplied formative and organising power for the building up of a strong central government: eventually, it gave to England a single central law, emanating from and administered by the king, a gift for which other countries had to wait for centuries.

(1) Immediate.

(2) Ultimate

The power of the State over its members, which, under Saxon organisation had been weak because it was dissipated amongst various local institutions, was thus concentrated after the Conquest, in the hands of the Crown. The king claimed to be supreme over all persons and over all causes He was the source of honour, of profit, of authority, and though his real power sometimes fell short of this theoretic supremacy, it was not because he was claiming more, but because he was receiving less than his due. William I and his successors were determined to have none of that local independence of great men which was the curse of continental feudalism. The Norman kings had set themselves no easy task; it was more than two hundred years after the Conquest before the disruptive tendencies of feudalism were finally checked. After the last feudal revolt in 1173 there was small danger of their predominance in governmental matters, but not till the reign of Edward I were they eradicated.

After the Conquest, Supremacy of the Crown secured by—

(1) The elimination of feudal principles from the government.

The repression of the Norman baronage was effected chiefly through the elaboration of the central machinery.

(2) The development of central machinery

Henry I and Roger of Salisbury together organised the Exchequer and thus secured for the Crown a more or less regular income, while the Exchequer officials, both when the court was sitting and when the "barons" went on circuit through the country, exercised a general supervision over local administration. The predominance of the central authority was further ensured by judicial reforms. Amidst conflicting customs Henry II made the custom of the king's court prevail over all others and it gradually crystallised into the common law of the land. Royal writs became the only appropriate beginning to every suit. In 1178 a special committee was created to deal with cases brought to the king's court, while by means of the itinerant justices, royal justice was made accessible to every sort and condition of free man. The special methods of trial obtainable in the royal courts were so speedy and efficient in comparison with older methods that royal justice was eagerly sought after and local courts were doomed in consequence to practical extinction. The absentee kingship of Richard I and the fact that the government was left in the hands of Henry II's ministers, favoured the consolidation of his work By the end of the twelfth century, though the evolution of the Common Law Courts had barely begun, the final triumph of the Common Law was definitely secured.

(3) The growth of a common law.

The elaboration of central machinery added enormously to the power of the Crown. Few kings have wielded greater powers than those which passed into the hands of John at the time of his accession. John was no fit custodian of these powers, but the time was ripe for a check to royal absolutism A generation earlier the combination of forces which secured the Great Charter would have been impossible. But the years between the last feudal revolt and the signing of the Great Charter saw a vast change in the relationships of the different classes in the State. At first the Church had worked hand in hand with the Crown and in spite of the quarrel between

Support given to the Crown (1) by the Church.

and insisted that the Chancellor, Treasurer and Privy Seal should be unhampered in the discharge of their duties Moreover, the Commons petitioned for annual Parliaments and for the proper election of knights of the shire, while they declared that the king was unable to annul statutes which had received the sanction of Parliament

Next year, John of Gaunt undid all the work of the Good Parliament and it left no permanent reform as a record of its labours. Nevertheless it was epoch-marking in the history of the Legislature. It showed the maximum advance made by it during the first century of its existence : the fact that it had realised its possible constitutional position was more important than its failure to make good its claims. The true value of the Good Parliament lies in the precedents which it established : its work, like that of the Lancastrian Parliaments was foredoomed to failure . it was but a further example of constitutional progress outrunning administrative order.

Richard II's attempted absolutism 1398

The revolution of 1399, like that of 1688, was a conservative reaction. Richard II had secured from the Parliament at Shrewsbury, before it resigned its powers to a committee of eighteen, the customs for life and a recognition of the undiminished and indefeasible power of his prerogative. This was a resolute attempt to destroy the limitations which for nearly two centuries the baronage, and later, the nation united in Parliament, had been labouring to impose on the Crown. In consequence, Henry IV came to the throne as the champion of constitutional government and his parliamentary title ensured the triumph of the Legislature The Commons secured full control over taxation with the recognition of their right to initiate money bills and to audit accounts, and they used this control to insist that redress should precede supply. Over legislation they had considerable influence, at first because of their share during Henry VI's minority in nominating the Council, and later because it became customary to legislate by bill instead of by

The triumph of Parliament

petition. During the same period we find the germs of parliamentary privilege, while greater efficiency was secured by the regulation of elections and by the definition of the franchise Above all, ministerial responsibility became permanent instead of spasmodic and until 1437 the Council was largely under parliamentary supervision. After that date, the king nominated absolutely to the Council; the supremacy of Parliament rapidly declined and Henry VI, by keeping in office unpopular ministers and by tampering with the liberties of Parliament, defied the constitutional restrictions which his predecessors had accepted, until parliamentary predominance vanished amidst the turmoil of the Wars of the Roses

Failure of the Lancastrian experiment.

The triumph of the Legislature had been premature. The Constitution in its growth had outrun the capacity of the nation The supremacy of Parliament was of no practical value to a people who could secure neither peace nor justice. Local machinery was paralysed by the factions of the local nobility Private warfare waged unchecked Royal officials were defied. Parliamentary elections were at the mercy of the magnates of the neighbourhood; so too were the juries, while the judges of the fifteenth century, in spite of their vaunted learning, acquiesced in the perversion of justice. Against this anarchy the central authority could do nothing for it was starved for lack of funds, while it was dominated by the very class which, locally, made all efforts at administration a farce.

Supremacy of the Executive

The Yorkists were stronger than the Lancastrian kings, but they did not rule better. The old evils were unchecked, riots and robberies filled the land, justice was perverted and the court was filled with favourites. During the twenty-five years of Yorkist rule, only seven Parliaments were elected and the matters which were submitted to them were insignificant. The Executive, which in 1437 had begun to free itself from the trammels imposed on it by the Legislature was again supreme with the accession

(1) under the Yorkists

of Edward IV. It remained for the Tudors to make that supremacy of a quality acceptable to the nation at large. Henry VII combined the interests of the rival Roses. As well, he combined their policies, and while observing, with the Lancastrians, the forms of the Constitution, with the Yorkists he established an absolutism which was none the less real because it was disguised under a strict respect for law. Henry VII was the least conspicuous of the Tudor sovereigns, but in the art of government he stands unrivalled. He identified the interests of king and people; he made peace at home and abroad, he fostered commerce and industry, he stamped out social anarchy by putting down livery and maintenance, he bridled the nobility through the Star Chamber and through that official nobility, which he raised as a counterpoise to the old hereditary class Above all, he made the Crown financially independent of Parliament and so suspended, for a time, the traditional antagonism of Legislature and Executive. After 1529 however, Parliament was called with comparative regularity, and opposition, though rare, was by no means unknown. But as a rule, Tudor Parliaments were pliable though much of their pliability was due to sympathy between Crown and people, rather than to Tudor skill in packing the Houses At the same time, individual insubordination received such summary treatment that it inspired Parliament with a wholesome respect for the Executive It is said that Bell, who had spoken against licences and who had urged that redress should precede supply, returned from an interview with the Council "with such an amazed countenance that it daunted all the rest."

(a) under the Tudors

The Executive unquestionably defied all constitutional checks upon its power. It secured money by forced loans, benevolences, the sale of monopolies and various other nefarious devices.* It reduced ministerial responsibility to a farce, for it substituted for impeachments, bills of attainder and these latter were practically the weapons of the Crown and not of Parliament. Royal proclamations

(a) Its financial independence

(b) Immunity of its officials from responsibility to Parliament.

(c) Its legislative powers. (d) Its judicial powers.

were found to be an excellent substitute for parliamentary legislation, while in judicial matters the Council often usurped the place of the Common Law Courts, sometimes in the interests of speedy justice, but often in order to secure a verdict after its own mind. Yet the Council which made use of these methods was pre-eminently successful and its success was its justification. By local councils, by specially appointed commissioners, by Justices of the Peace and Lords Lieutenant, it stamped out disorder and kept every corner of the kingdom in touch with the central power. The government was never caught unprepared and the efficiency with which the plans to meet the threatened French invasion of 1545 and the Spanish invasion of 1588 were drawn up, was characteristic of Tudor administration: its incomparable grasp of detail left no room for failure.

(e) Its control of local government

Growing antagonism of Executive and Legislature

The defeat of the Spanish Armada was at once the vindication of Tudor methods and the signal for their overthrow. Earlier, whenever the grasp of the Executive weakened, as it weakened during the reigns of Edward VI and Queen Mary, the Legislature had grown restive. But so long as England was in danger from the Catholic powers of Europe there was little likelihood of Parliament entering into any trial of strength with the Crown. After 1588 England's position in Europe was secure and foreign policy ceased to be the most burning question of the day. The religious, social and constitutional problems, which it had kept in the background, became all-important and with such matters Parliament felt fully competent to deal. Elizabeth was too clever a diplomatist to come into collision with Parliament. Where she could not win her own way, she yielded with a grace which successfully disguised her unwillingness to do so, and which transformed a popular demand into a royal concession.

(1) under Elizabeth

(2) under the Stuarts.

In hands less capable than the Tudors, their system of government proved disastrous. The Stuarts parodied Tudor methods at a time when the Tudors themselves would have ceased to use them. Every expedient for

securing the independent action of the Executive in all departments of government the Stuarts made use of in an exaggerated form, and at singularly inopportune moments. Moreover they added to the Tudor weapons, a subservient bench of judges, an addition which served to attract public attention to the irresponsibility of the Crown. In a sense it is true that the Stuarts reaped the harvest which the Tudors had sown, but the Tudors would never have allowed that harvest to ripen The foreign policy of the Stuarts and their religious policy were alike unpopular and when Parliament asserted its rights and privileges, they retorted with definitions of the prerogative which were incompatible with national liberty A nation whose self-reliance had been fostered by religious changes and successful wars, by perilous voyages and by commercial prosperity was not ready to believe that foreign politics, the choice of ministers and ecclesiastical affairs were above its comprehension, while, as one thing after another revealed the Crown's determination to be financially independent of Parliament and its resolve to rule without a Parliament altogether, if that body proved restive, a trial of strength between Legislature and Executive became inevitable. The privileges and powers of Parliament might have been secured without civil war, but when Laud definitely associated himself with the unconstitutional rule of the Crown, when the doctrine of passive obedience was preached in matters ecclesiastical as well as civil, compromise became impossible Religious enthusiasm nerved the nation to oppose unconstitutional government backed by ecclesiastical tyranny.

Constitutional experiments of the Commonwealth

From 1642 to 1660 the Constitution was practically in abeyance and 1660 saw an unconditional restoration of the old dynasty But the political thoughts of the Commonwealth became the materials with which later generations built. The period was a veritable storehouse of political ideas and advocates were found for the disestablishment of the Church, the removal of religious disabilities, equal electoral districts, freedom of the press

and free trade. The grant to the Executive of a minimum fixed revenue, the right of Parliament to examine accounts, the provision for frequent Parliaments, which formed part of the constitutional reforms of the period were retained at the Restoration. But the work of the Protectorate in securing the redistribution of Parliamentary seats, the disfranchisement of rotten boroughs, the enfranchisement of large towns, and the inclusion of Irish and Scottish representatives in the Parliament at Westminster was swept away after Cromwell's death, to be gradually reinstated many years later. Other constitutional experiments of the Commonwealth failed entirely. Its attempt to introduce certain "fundamentals" into the Constitution, which could not be touched by the ordinary legislative authority, and to substitute a written for an unwritten constitution, had they succeeded, would have left Executive and Legislature as wholly independent of each other, as they are now in the United States, and would have destroyed the constitutional growth of centuries As it happened, Parliament showed itself so eager to assert its sole authority and so determined to pull to pieces the new constitutions, that the efforts of the reformers to balance the powers of Executive and Legislature against each other were frustrated Successive Parliaments were summarily dismissed and until his death, Cromwell was practically supreme. A period of confusion followed. The old machinery would not work when dissociated from its historical antecedents, and people were loth to part with the old machinery. In consequence, Parliament resolved in 1660, that "according to the ancient laws of the kingdom, the government is and ought to be, by King, Lords and Commons," and Charles II was recalled amidst universal rejoicings.

The Restoration

Royal supremacy, the Privy Council, Parliament and local government were in 1660 re-established as they had existed under the Tudors. But neither the Star Chamber, the Court of High Commission nor the Council of the North were revived. The Crown was thus restored to its

old position, but it no longer possessed those weapons of absolutism which the Tudors had forged. Here was the basis for a good working compromise. The temper of the nation was intensely loyal. The attitude of Parliament towards the Crown was irreproachable. The last two Stuarts had everything in their favour and they had only themselves to thank for the final catastrophe Charles II because he had the instincts of a gambler, James II because the material prosperity of those of his own faith outweighed all other considerations, challenged the Constitution anew, or rather, sought to undermine it—for arbitrary taxation and unparliamentary legislation were practically things of the past, while the Commons' right to impeach was allowed as well as their right to initiate money bills and to regulate expenditure Charles and his brother secured financial independence by selling themselves to France. They robbed ministerial responsibility of its sting by a skilful use of the royal right to prorogue and dissolve Parliament. By reforming borough corporations, they were able to secure the nomination of juries and the election of desirable members of Parliament, while, under the iniquitous treason laws, political opponents were condemned on wholly inadequate evidence. Habeas Corpus had no power to secure a fair trial for those whom the Crown was determined to convict. Moreover, the censorship of the press muzzled all free discussion and the small standing army which had been kept since the Restoration was a constant menace to constitutional government. James II, when he tried to secure the admission of Roman Catholic officers into its ranks was also trying to secure for the Crown a weapon wherewith it could force its wishes on the nation.

Unconstitutional government of Charles II and James II.

Nevertheless, if Charles II and James II had not quarrelled with the Church, there would probably have been no Revolution. It was an age which demanded religious persecution, and the wealthier classes, who were mainly responsible for the Restoration were eager to exclude both Roman Catholics and Puritans from political

power. To the imposition of the Clarendon Code, which penalised nonconformity, Charles was indifferent. But French money was poured into his pocket on the understanding that he should ameliorate the condition of the English Roman Catholics and in 1662 and 1672 he issued Declarations of Indulgence for their benefit. Both these declarations Charles had to withdraw, and Parliament
1673. answered the second with the Test Act. Charles II accepted this check with comparative equanimity, but James II, when he came to the throne, set to work resolutely, on behalf of Roman Catholicism. He re-established the Court of High Commission under Jeffreys. He attacked the Universities He suspended and dispensed with the penal laws, and he issued two Declarations of Indulgence Against the reading of the second the bishops petitioned. Seven were tried for libel, in spite of all precautions they were acquitted and their acquittal was the signal for James' downfall. Immediately a letter was sent to William of Orange, urging him to vindicate the liberties of the people James, panic-stricken, restored displaced officers and gave back the charters to the towns; he dissolved the ecclesiastical commission and removed the leading Roman Catholics from his Council. But when William III landed at Torbay, the North rose in his favour, many of the officers in the army, amongst them Churchill, deserted to him, bringing over their troops with them and before the end of the year, James had fled from the kingdom.

The Revolution. The Revolution of 1688 completed the work of the Great Rebellion, for it vindicated the supremacy of Parliament. But in practice, that supremacy was not fully established until after the accession of the Hanoverians.

(1) Its conservative character. The crown which was offered to William and Mary was unburdened by any definite limitations of the royal prerogative. The Bill of Rights was recapitulary rather than revolutionary. It was a vindication of the ancient and undoubted rights of the people, rather than the establishment of new rules and privileges. It condemned the

illegalities and usurpations of James Stuart, but it asserted no new doctrines—and it was not even considered necessary to transcribe those fundamental principles, which the late king had defied and endangered: it was taken for granted that they were known to every one. But though the Revolution was regarded by contemporaries as preservative rather than destructive or creative, in succeeding years, decisive blows were struck at the discretionary power of the Crown. These were made inevitable by the one genuine innovation of 1688—the change from an hereditary to a definitely parliamentary title. Even this innovation was disguised for the moment by Mary's relationship to James II. It was the Act of Settlement which brought the fact home to Legislature and Executive.

(a) Its effect on the royal prerogative.

It was in financial matters that the first blow was struck at the royal prerogative. Both Whigs and Tories ascribed the disasters since 1660 to the unwise liberality of Parliament. Consequently customs were given for four years instead of for life, as had hitherto been the practice. Part of the money voted for the support of the peace establishment was set aside for the Civil List: this was to be spent at the discretion of the Crown, but to meet other expenses, supplies were voted according to the estimates of future expenditure presented yearly to Parliament. By thus regulating the appropriation of supplies, the grip of the Legislature on the Executive tightened and in 1693 it even contemplated challenging the royal right of veto, when William III refused his assent to the Place Bill. This project was wisely dropped however, when the momentary excitement had cooled and it was not until the accession of the Hanoverians, that the king's right to veto laws carried by both Houses was allowed to lapse.

The Triennial Bill of 1695 still further emancipated Parliament from royal control and limited the discretionary power of the Crown. Hitherto the king, though bound to hold frequent sessions by the terms under which the Triennial Bill of the Commonwealth was repealed, had been able to keep a subservient House in office as long as

he pleased. Henceforth by the provision for frequent general elections, the independent character of the House was ensured, while public opinion, already stimulated by the new freedom of the press, gradually began to take a share in marking out the lines to be followed by Executive and Legislature. Moreover, the Act of Settlement of 1701, passed be it noted, by a Tory ministry, permanently deprived the Crown of two vital branches of the prerogative Judges were to hold office henceforth, not at the royal pleasure, but "quamdiu se bene gesserint" and were only to be dismissed upon the petition of both Houses, while in future, no pardon under the Great Seal could be pleaded in answer to an impeachment. By the expedient of a six monthly and subsequently a yearly Mutiny Act, Parliament secured the control of the army and at the same time made it inevitable that a session should be held at least once a year The Executive was thus practically disarmed. The Bill of Rights had definitely decided outstanding questions against the Crown: the Act of Settlement took away the last probability of its interference with the Common Law Henceforth the king might mitigate the law; he could not defy it, and Parliament was able to secure, if not the control, at least the supervision of the prerogative.

Parliamentary supremacy results in —

While the relations of Executive and Legislature were readjusting themselves, the character of the Executive itself was changing It was through the ministerial government of William III and Anne that the transition from the Executive supremacy of the seventeenth century to the parliamentary predominance of the eighteenth was made. William III chose his ministers from the members of the two Houses in order that he might bring as much influence as possible to bear upon Parliament. Both he and Anne ultimately chose them all from one of the two great political parties into which the House was gradually dividing itself, in order to secure whole-hearted support for their policy. Thus in 1696, William filled the great offices with members of the Whig party, because they

(1) the development of party government under William III and Anne.

were eager to carry on the war. Anne, for the same reason agreed to the wish of Godolphin and Marlborough for a number of Whig colleagues and then a few years later, secured peace by the substitution of an equally complete body of Tory ministers.

(a) the development of Cabinet government under the Hanoverians.

But that the ministries between 1688 and 1714 were occasionally of homogeneous opinions, was accidental rather than a matter of principle, and any idea of corporate responsibility they repudiated The accession of a king who could speak no English and who took little interest in English affairs made Cabinet government inevitable. George I did not preside at the Council and in consequence he could no longer be regarded as responsible for the policy of the Executive. At the same time, the individual responsibility of ministers was not compatible with efficiency and at such a price few would have accepted office It was gradually recognised that the only safeguard against a timid Executive was that the whole Cabinet should be held responsible for the policy of each of its members. The essential corollary to this—homogeneity of political opinion—was easily established, for the circumstances of George I's accession led him to put himself unreservedly into the hands of the Whigs and he thus drove the Tories into Jacobitism and pledged them to the cause of the Stuarts. With the development of Cabinet government and the practical elimination of the king's personal wishes from the motives governing the policy of the Executive, the subordination of king in Council to king in Parliament was no longer regarded as derogatory to the royal dignity.

The discretionary powers of the Crown under a system of Cabinet government.

The eighteenth century saw the gradual working out of the Cabinet system and the evolution of those constitutional conventions which regulate the present use of the royal prerogative. The prerogative itself became in most cases a reserve of power in the hands of the Cabinet of the day and the Executive became responsible to the Legislature for every use of the royal discretionary power. Some of the old prerogative powers of the Crown such as the right

to veto legislation had already been suffered to lapse: the scope of others, such as the right to summon Parliament at the royal discretion, had been considerably curtailed. But the Crown's right to decide when Parliament shall be dissolved became a means of appeal from the Legislature to the constituencies, on behalf of the government of the day. The Crown's refusal of a Prime Minister's request for a dissolution would be tantamount to dismissal and the Crown has still the right to refuse on its own initiative, though the new ministry must be prepared to hold itself responsible for the action of the Crown

The King's power to choose his own ministers.

The Crown's prerogative of choosing its own ministers was the last to pass out of its hands During much of the eighteenth century, the king still had real freedom of choice in appointing the chief officers of state By a variety of devices a parliamentary majority could nearly always be secured for the minister the king favoured, while he could exclude from power those of whom he personally disapproved George III at the beginning of his reign discarded Lord Chatham and many years later he would not allow Pitt to coalesce with Fox After the Reform Bill of 1832 only tattered fragments of this prerogative were left to the Crown Henceforth the Cabinet, as a committee of the Legislature, was practically chosen by the Commons, for no ministry can exist without a majority in the Lower House at its back and the Reform Bill destroyed the old illicit means of securing such a majority Nowadays if no one member of the predominant party is looked upon as its undoubted chief, the choice of the Prime Minister still lies with the Crown. Other ministers are appointed by the Crown with his advice, but they can only be chosen from amongst those who, by their position in Parliament are entitled to a place in the government The king and the Prime Minister together are concerned rather with determining which man shall have which place, than with deciding who shall be included in or excluded from the ministry. One objector can occasionally overthrow the whole scheme. In 1845

Lord Grey would not join Lord John Russell's projected government if Lord Palmerston were Foreign Secretary. Lord Palmerston would be Foreign Secretary and nothing else and in consequence the ministry was not formed, for both men were essential to it.

Amalgamation of executive and legislative functions in the hands of the Cabinet

During the nineteenth century as an outcome perhaps of that Cabinet government to which the predominance of Parliament gave rise, legislative and executive functions gradually amalgamated To the committee which the Legislature put into power that it might carry on the work of administration was relegated that of initiating legislation. Under a fully developed system of party government, such a relegation is practically inevitable. it is too, peculiarly appropriate for many of our laws are concerned with the improvement of administrative machinery. Nowadays therefore, at the opening of each session of Parliament the legislative programme of the Executive is outlined in the speech from the Throne. Every important measure brought before the Lower House and nearly every measure which becomes law, is now the work of the ministry It is backed by the government majority. It is forced quickly through the Lower House with the help of the "closure," a means of shortening debate and hastening decision of which the government has the sole and practically unrestricted use. Only on very rare occasions does the opposing minority fail to protest, vehemently but ineffectually against the bill in detail and in principle and the members of the House vote for or against it, according as they belong to the government or to the opposition.

This is the reality. Nevertheless in theory, a minister brings in a bill, not in virtue of his office, but as a member of Parliament Every member has the right to initiate, but the private member, no matter on which side of the House he sits, has few opportunities for doing so. According to the parliamentary time-table, the government has precedence at every sitting throughout the session, except the evening sitting on Tuesdays and

Wednesdays, when priority is given to private members' notices of motions, and the afternoon sitting on Fridays, when precedence is given to private members' bills. But after Easter the government takes the Tuesday evening sittings and after the Whitsuntide recess, it appropriates all the Wednesday sittings and all the Friday sittings but two Moreover the "twelve o'clock rule" is often suspended in the interests of government business, but in matters in which the government has no concern, a determined opposition, even though it be a small one, can easily talk a measure out Formerly many important measures were initiated by private members Gilbert's Workhouse Act of 1782 was no government bill; nor was Sir Francis Burdett's Roman Catholic Emancipation Bill of 1825, which passed its third reading in the Lower House.

The meaning of the sovereignty of Parliament

The monopoly of legislation held by the Cabinet, the improbability of important government measures being thrown out by the House of Commons, the fact that amongst the bills which the Executive initiates are money bills, and measures which may effect fundamental changes in the system of government, inevitably raises the question whether the sovereignty of Parliament means now, what

(1) legally

it meant in the eighteenth century Legally it undoubtedly means the same Parliament expresses its will in acts which are sanctioned by King, Lords and Commons. Directly that will is uttered, it becomes subject to the construction put upon it by the judges, who are the interpreters and the guardians of the Constitution. They know nothing about the will of the nation unless it is expressed in an act of Parliament It matters nothing to them if that will is diametrically opposed to the policy expressed in the acts which they are called upon to enforce. Moreover the legal supremacy of Parliament, as a branch of the Constitution is emphasised by a seeming contradiction—the restrictions put on individual assemblies. For though each Parliament has the right to make and unmake any laws whatsoever, it can never so bind its

successors by the terms of any statute as to limit their discretion. Could it do so, Parliament would no longer be legally supreme: it would have abdicated in favour of certain of its creatures.

(a) practically (a) in the eighteenth century

In practical politics, the supremacy of Parliament meant in the eighteenth century, the supremacy of the House of Commons. The House of Lords was essentially the "other House," though as a matter of fact, the individual members of it exercised enormous power over the Commons. The unreformed Lower House, with all its faults, was an assembly in which the decision of questions followed and did not precede their discussion. The eighteenth century was an age of great orators and their eloquence served the very practical purpose of expounding to Parliament the matters submitted to it, and of securing on those matters a decision founded on the deliberate judgment of the two Houses. Though bribery and corruption often presided over the division lists, great measures and great men could call forth a large amount of political honesty, while there was always a certain minority which voted according to its individual convictions.

(b) between 1832 and 1867

During the period between the first and second Reform Bills, the practical political sovereignty of Parliament was emphasised by the fact that nearly every ministry resigned because of a defeat in the Commons. The eighteenth century ministries, with the exception of Sir Robert Walpole's in 1742 and Lord Shelburne's in 1783, had come and gone at the pleasure of the Crown.

Moreover, during the whole of the period between the accession of the Hanoverians and the passing of the Second Reform Bill, the electors put unreservedly the whole business of government and the decision of the policy of the nation into the hands of their representatives. The constituencies chose as members of Parliament those whose personal characters and general political views they approved, but no specific promises were demanded of them. Burke, when speaking to his constituents at Bristol, summarised the position of the

individual member: "Your representative owes you not his industry only, but his judgment and he betrays instead of serving you, if he sacrifices it to your opinion" . . "I know you chose me to be a pillar of the state and not a weather-cock on top of the edifice"

(c) since 1867.

Since the second Reform Bill, party organisation has tended to make the division of parties in Parliament rigid Hence it is that the defeat of the government on any vital question is unlikely The Cabinet's certainty of its majority has altered the balance of power in the Constitution in favour of the Executive. Like the Tudor Council, the modern Cabinet practically dominates the State It can legislate, it can tax, it can discharge all the functions, ordinary and extraordinary of Legislature and Executive So long as it is in office, the Cabinet, in virtue of its control of the dominant party in the Lower House, is practically the immediate sovereign power It is the will of the ministry which the people obey from day to day and so strong is that will that the government is able to effect a "one man" modification of the law, such as Mr Herbert Gladstone effected in the Aliens Act of 1905 and Mr. McKenna effected in the Education Bill of 1902

The Cabinet as the immediate sovereign power

The question of ultimate sovereignty

But the Executive has paid a heavy price for its practically rigid majority in Parliament and its temporary political sovereignty. The electorate is now the power behind the throne and whereas once it only called into being the body which ruled the state, it now supervises if it does not dictate its policy. The party organisations which have brought about the predominance of the Cabinet have also transformed the representatives of the people into delegates. According to Burke, members of Parliament are no longer pillars of the state, but weather-cocks: they serve to show which way the wind blows: they do not support the structure itself.

As early as the eighteenth century Wilkes advocated the practice of demanding pledges from candidates for seats in Parliament, but only recently has the practice become almost universal Candidates pledge themselves

to vote rather for men than measures and a member who has voted against a bill, brought forward by the party he was pledged to support, not unfrequently offers to resign his seat. This is government by the people, as well as for the people. It is not, strictly speaking, representative government Burke would say that, under the present system, one set of men deliberates and another decides and that determination precedes discussion To a large extent this is true. The programme of each potential government is put before the country at a general election, while with regard to the details of a bill, Lord Salisbury acknowledged at Edinburgh in 1894 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." As soon as the government has made a measure its own, its triumph, at least in the Lower House, is assured and its originators can, if they choose, ignore criticism.

At the same time, election pledges, the keen eye with which the electorate watches the day-by-day policy of the government and the remembrance that upon its approval depend the results of the next general election combine to make the government very susceptible to every breath of public opinion. This does not conduce to a vigorous and consistent policy, for public opinion is proverbially capricious and long before a ministry goes out of office, the party programme, by the help of which it won the general election, is out of favour and in many cases has to be either modified or abandoned. The permanent Civil Service is an invaluable check on the possible vagaries of party government. The chief safeguard against precipitate legislation is the power of the Lords to send back to the Commons for reconsideration, measures of which they disapprove—for the rejection of a government bill by the Upper House is equivalent to this. The chief safeguard against the potential omnipotence of the Cabinet is the fact that sooner or later the electorate will be able to give practical expression to its opinion of the policy of

the government. It is a curious fact that the verdict of the electorate is nearly always unfavourable. A general election usually results in the return of a majority in favour of that party, which in the last Parliament, was in the minority

Thus the Executive, when it became the Dictator of the Lower House, passed under the yoke of the constituencies and though the pressure of that yoke is only felt occasionally, the remembrance of it is always present. Ultimate sovereignty now lies with the majority of the electorate : it is their wishes which prevail in the long run, and which all the citizens of the state ultimately obey. But they do not do so till the wishes of the legal sovereign, Parliament, have been brought into conformity with them It is then the business of Parliament to indicate the ablest exponents of those wishes and having secured their being put into power, to keep them to their work : one of the most important functions of the modern Parliament is that of training and choosing the ministers of the future.

The balance of power in the state has thus passed from the Crown to the Legislature and thence through the Commons to the Cabinet. The Cabinet is responsible to the constituencies rather than to their elected representatives and Cabinet responsibility and authority centres in the Prime Minister, whose position, since he is barely recognised by the Constitution is curiously anomalous. It would seem as though there is in the state a legal sovereign which derives its inspiration from an immediate and an ultimate political sovereign Between the claims of the two latter for predominance there is apparent rivalry : as to how far this rivalry is real, no final decision seems possible. The one is transitory ; the other is permanent. Yet, during its brief reign, the Cabinet, if it likes to defy the future can do what it wills, while the electorate, though it can only speak authoritatively at irregular intervals and at other times can only exercise an indirect and unofficial influence, is yet the power which exterminates both Cabinets and Parliaments. On the

other hand, Parliament can force a Cabinet to resign, while Parliament itself rarely dies a natural death, but is dissolved on the advice of the Cabinet. It is the ministry of the day which arms the electorate against itself. It is the ministry of the day which, within certain time limits, can keep the electorate impotent.

APPENDIX

LOCAL ADMINISTRATION (POOR RELIEF AND MUNICIPAL SELF-GOVERNMENT)

THE administrative work of sheriffs, Justices of the Peace and County Councils, the share of hundred and shire, borough, manor and vill in the maintenance of law and order and the administration of justice have already been dealt with, but two important branches of local government, Poor Relief and the development of self-government in the towns, must be summarised here.

POOR RELIEF

Mediæval legislators were concerned rather with vagrancy than with the relief of the poor There were comparatively few of the actually destitute who could not look for succour to guild, or family, or manor, and these few found relief in hospitals and monasteries and great men's houses, or were easily provided for out of the portion of the tithes set apart for the poor and impotent The vagrant, often a runaway villain or a labourer in search of work or higher wages, was regarded with suspicion . he became only too easily a "sturdy beggar" and a danger to the public peace When the Black Death stimulated vagrancy, Parliament attempted to check it by "Statutes of Labourers," which fixed wages and forbade migration, but these statutes were never efficiently administered, nor did they provide really efficacious checks on vagabondage.

By the time of the Tudors, the machinery for coping with both the able-bodied and the impotent poor was quite inadequate. The unorganised almsgiving of monasteries, guilds and great men, was responsible for armies of idlers. At the same time, the substitution of sheep farming for agriculture and the making of manufactures on a larger scale and for a wider and less stable market than the local markets of the Middle Ages resulted in

a lot of genuine unemployment. Moreover, with the passing of the days of Feudalism and of "Chivalry," wars became less frequent and this, together with the breaking up of baronial retinues by the legislation of Henry VII deprived the born vagabond of his only chance of congenial employment. In consequence England was flooded with beggars, who, as Sir Thomas More testified, being "destitute of service, either starve for honger or manfullye playe the thieves" The dissolution of the monasteries made some measure for the help of the impotent poor essential, for though they had fostered beggary, they had also provided relief

The Tudors made the "parish," the ecclesiastical equivalent of the vill, the unit for the management and relief of the poor and in the general revival of local government under them, its "vestry" took the place of the sheriff's tourn and the old manorial organisation for civil purposes. The Poor Laws of the sixteenth century distinguished sharply between the impotent and the able-bodied poor and insisted that each district should be responsible for its own, though it was not until the reign of Elizabeth that contribution towards their maintenance was made compulsory for all householders.

In 1531 Justices of the Peace were bidden to assign areas within which the impotent might beg, while they were to see that all able-bodied vagrants were whipped and sent back to the locality where they were born, or where they had last resided for three years, and there set to work. In 1536 the mayor of each town and the churchwardens of each parish were instructed to apprentice vagrant children and to form a fund in each locality to which all voluntary alms were to go and from which the impotent were to receive relief: any surplus might be used to keep the able-bodied to continuous labour. In 1547 the building of cottages for the impotent was authorised, while the "sturdy beggar" was to be branded, given as a slave to any one who demanded him and put to death if he attempted flight a second time: these ferocious regulations were repealed the next year. The Act of 1551 ordered the appointment of two "collectors" in every parish, who at certain times should "gentellie aske" persons to contribute towards the relief of the poor. In 1563 Justices of the Peace were authorised to assess recalcitrant householders at Quarter Sessions and to compel payment by imprisonment, while in 1572 the justices in the country and the mayors in towns were empowered to assess directly and to appoint "overseers" of the poor who were to take full responsibility for their relief. At the same time very

severe penalties, ranging from whipping to death, were decreed against the idle vagabond, who was to be "holden to work" by the overseers In 1576 Justices of the Peace were authorised to establish "Houses of Correction" in every county and to provide a stock of materials on which the poor might be set to work. The Houses of Correction, were unfortunately, soon abandoned

The acts of 1597 and 1601 consolidated previous legislation. Provision was made for relieving the impotent and setting the able-bodied to work, for apprenticing poor children and erecting Houses of Correction; for removing the vagabond to his own parish and for levying a compulsory poor rate. The change made at this time was that the initiative, save as to Houses of Correction, was transferred from the justices to the overseers The later laws, in comparison with earlier measures, are much more concerned with the relief of the poor and much less with the punishment of sturdy beggars · since 1572 the State had begun to realise that vagrancy was as much due to lack of training and lack of work, as to idleness or wickedness. In conjunction with these laws the Privy Council carefully regulated the price of corn and stimulated the wool trade, so that high prices and unemployment might be avoided as far as possible.

The Elizabethan Poor Laws seem to have been fully carried out up to 1644 but the system only in part survived the Civil War. Their guiding principles were "to provide work for those who could work, relief for those who could not and punishment for those who would not," and in 1722 these were amplified by an act which authorised the building of "Workhouses," and the refusal of relief to all who would not be lodged and kept in them. The appalling condition of affairs, revealed by the report of the Poor Law Commissioners in 1834, was due, it is generally acknowledged to departure from the principles laid down in 1597 and 1601. The later laws of settlement aggravated unemployment, for they were made unreasonably severe at the instigation of the richer parishes which feared being burdened with the needy from those parishes, which could not sustain them. By a law of 1662 new-comers could be ousted and compelled to return to any parish where they had resided continuously for forty days, unless they could give sufficient security that they would never become chargeable upon the parish. The law proved unworkable and was subsequently modified, but even so it and its fellows proved a very serious check on the free circulation of labour. In 1691, owing to complaints that overseers and churchwardens, for private reasons, gave relief to an unnecessary

extent, it was ordered that a register should be kept of those receiving aid, which should be examined yearly by the vestry, and that no additional relief should be given except with the authority of the justices The result was that the justices superseded the overseers and often ordered relief at their own discretion and without the knowledge of the parish officers. they became, in fact, "charitable gentlemen to whom the oppressed poor could appeal against the tyranny of the overseers."

During the eighteenth century the belief steadily grew that it was the duty of the state to provide a sufficient subsistence for its labouring classes Much legislation was passed on their behalf and in 1782 "Gilbert's Act," while it authorised the formation of "Unions" for the provision of workhouses, decided that only the impotent need go to them. Finally in 1795 the magistrates of Speenhamland in Berkshire decided that, in view of the high prices occasioned by the French War, assistance should be given to every poor family in proportion to its numbers and the price of bread. At the same time employers were urged to give higher wages. In 1796 the plan was sanctioned by Parliament and its application became general. The results were deplorable. It was now more profitable to be dependent than self-supporting; and since relief was given as a supplement to wages, farmers gave the minimum wage and so threw part of the charge of cultivating their land on the rates. At the same time rates rose so that in some places they exceeded the rent, and whole tracts of land passed out of cultivation, while the poorer ratepayers were drawn down into the gulf of pauperism Paupers married paupers and received a larger dole as their families increased and the "workhouse test" was altogether abrogated. The result was that in 1817, England, with a population of eleven millions was paying eight millions in Poor Relief.

The Poor Law Amendment Act of 1834 reverted to the principles of 1601. All relief to able-bodied persons save in well-regulated workhouses was to gradually cease. an exception was made to this rule in 1839 for "those cases of distress which are of most frequent occurrence," such as temporary unemployment in case of illness Outdoor relief was to be allowed to the aged and impotent poor, and provisions were made for dealing with vagrants and workhouse children. The business of reorganisation was entrusted to three Poor Law Commissioners, who divided the country into administrative districts. Large towns and well-populated parishes remained separate districts, but

rural parishes were authorised to form "Unions" for the provision of workhouses, though each parish remained chargeable for its own poor, until a series of acts, passed between 1846 and 1865 transferred the responsibility from the parish to the Union. The granting of Old Age Pensions in 1909 has put part of the burden of Poor Relief directly on to the shoulders of the state.

The grouping of rural parishes into Unions was made without any reference to existing areas, and further increased the patchwork character of English local government the confusion was only partly remedied by the County Councils Act of 1889 Unions are administered by Boards of Guardians, unpaid officials, elected by the ratepayers By the Act of 1894 Parish Meetings and Parish Councils were created in rural districts and Rural and Urban District Councils were set up ; these took over the power of appointing overseers from the Justices of the Peace and certain duties and powers connected, not only with Poor Relief, but with the general administration of the locality hitherto discharged by churchwardens, overseers, guardians, and the vestry The modern Poor Law Parish does not coincide with the old ecclesiastical or civil parish in either area or authority Except in urban parishes, which were practically untouched by the act of 1894, the vestry has been relegated to its old ecclesiastical duties, while only in the urban districts does the separate Board of Guardians still survive for Poor Law purposes, elsewhere the rural district councillors are also guardians

As the central authority for the administration of the Poor Laws, the Commissioners of 1834 were replaced by a Poor Law Board in 1847, and this was merged with the newly created Local Government Board in 1871.

The administration of Poor Relief has proved a difficult problem and the laws have been considerably modified by their administrators during the past fifty years The original intention of the act of 1834 with regard to outdoor relief has been relaxed, and the exception to the rule that able-bodied persons must only receive relief in workhouses, conceded in 1839 has been interpreted with gradually increasing leniency by the local authorities, so that in the interests of the temporarily disabled, who would work if they could, it has become more and more difficult to distinguish and to enforce the law against those who can work and will not. At the same time, though outdoor relief is often given too readily, in really suitable cases the amount allowed is frequently quite inadequate, while general workhouses have proved undesirable. Moreover, the exercise of local discretion, allowed in the interests of the unfortunate has led not only

to maladministration but to an almost infinite variableness of administration. The reports presented by the Poor Law Commissioners of 1909 show that much reorganisation is essential, and that the great fault of the existing system is that "it deters the wrong class, the class who really need help, while making things too easy for the confirmed loafer."

(For reference, in addition to books already quoted, see "The Early History of English Poor Relief" by E. M. Leonard, "The Poor Law" by T. W. Fowle, "English Local Government" by E. Jenks, "The Poor Law Report of 1909" by H. Bosanquet.)

Municipal Self-government

The first efforts of the towns in the direction of self-government had for their object freedom from the financial and judicial control of the sheriff. Even before the Conquest, some towns, such as Chester, had secured the right to pay a lump sum in lieu of the rents, tolls and wites which hitherto the sheriff had collected from the burgesses, while later the amount due as the "firma burgi" was often fixed by charter. Soon other privileges were won, the charter granted to London by Henry I virtually giving the city the organisation of a shire, being for long the ideal charter in the eyes of other boroughs. To the citizens of London was given the right to elect their own sheriff and justiciar, to keep their own pleas of the Crown, to farm the shire in which the city stood, and to pay the "firma burgi" direct to the Exchequer. Moreover no citizen could be compelled to plead without the walls for any plea. The charter conceded various other privileges, but its main object was that the citizens should be amenable to their own courts and magistrates alone. In this respect London was exceptionally privileged, though royal charters often overrode the rights of the feudal lords of the burgesses.

Under the Plantagenets the granting of charters to towns became very general, but the privileges given to the boroughs were never allowed to interfere with the general administrative system of the country. The judicial powers of the borough courts, were, as we have seen, strictly limited. The boroughs had to appear by representatives before the Justices in Eyre to present those suspected of crime, and all towns, including London, had to submit to the visitations of the itinerant justices. Moreover the sheriff collected "tallage" from the burgesses and supervised their military array, while no local rates could be levied without the king's leave and the burgesses, as a body, were

liable to be fined in the shire court or before the justices. It was only from those few boroughs which were given shire organisation that the sheriff was entirely excluded.

There was for a long time no idea of corporate possession or liability in the chartered towns there was no body having rights and duties which were not the rights and duties of the individual members thereof. The privileges given to the towns applied individually to each burgess; the responsibility for the "firma burgi" was joint and several, and each burgess was regarded by the sheriff as having agreed with him for the payment of the whole of the sum due The possession of franchises and of a common seal served to emphasise the unity of the borough before strangers, but the privileges conceded were usually such as could be easily divided up among individual citizens, so that the corporate idea only emerged very slowly. Even the gift of a "communa" such as London secured in 1191 hardly gave it definite form, though the possession of a governing body of mayor and aldermen was a long step towards the creation of a corporation It was the possession of land which finally transformed the borough into an organisation with rights and duties which were not the rights and duties of the individual burgesses and we do not find boroughs in the possession of land until towards the close of the fourteenth century, then, through the generosity of lord or king, they frequently became the owners of the meadows over which the burgesses had hitherto enjoyed common rights of pasture.

The constitution of the early chartered towns was democratic; citizenship was easily obtained, and the local officials were elected by and responsible to the whole community. But sooner or later a wealthy ring gradually monopolised the government. The grant of a "communa" usually marked the triumph of an oligarchy and was frequently followed by violent class quarrels: in London in 1196, in Gloucester in 1260, in Oxford in 1293, in Bristol in 1317, we find bitter complaints that the poorer citizens are made to pay more than their just share of taxation and that there are no means of securing redress.

The growth of oligarchies in towns was probably due partly to the reluctance of the ordinary citizens to be saddled with the business of administration, partly to the share often acquired by the merchant guild in the government of the town. The individuals who urged the towns to seek self-government, and who secured the chief offices once the charter was won, were undoubtedly of the same class as those who, earlier, had agitated for the right to form a guild, though it is questionable whether

the guilds, as guilds actually purchased the charters or administered the government. We do sometimes find guild and governing body identical, but more often they were quite distinct, while some of the largest towns, notably London and Norwich, never possessed a merchant guild at all The dislike for municipal duties sometimes resulted in the election of twelve or twenty-four citizens to act as a committee for the whole community, even where the right to a "communa" had not been conferred by charter, and the plan was legalised by the granting of charters of incorporation, a practice begun by Henry VI in 1439 in the case of Kingston-upon-Hull.

The usual result of these charters of incorporation was that the governing body in the towns became narrower and narrower, while sometimes the committees transformed themselves into permanent self-electing bodies. The Bill of Rights, when it freed the boroughs from arbitrary interference with their charters by the Crown, seems to have closed the eyes of the State to the rapid increase of these "close corporations" The Commissioners of 1834 reported the "just dissatisfaction of the majority of the inhabitants of the boroughs with municipal institutions," whereby practically irresponsible and exclusive committees wielded great judicial, political and municipal powers and controlled a large amount of property.

The Municipal Corporations Act of 1835 provided for all boroughs enumerated in the act a uniform constitution, consisting of mayor, aldermen and councillors The ratepayers elect the councillors, who hold office for three years, one-third retiring yearly. The aldermen, like the mayor, are elected by the councillors. They are in number one-third of that of the councillors, and hold office for six years, half retiring triennially. The mayor holds office for one year. This constitution was made compulsory for all boroughs in 1882, with the exception of the city of London, which had been passed over by the earlier act of 1835 on the understanding that it was to be dealt with by special legislation later. The city still retains its old unreformed corporation.

The administration of justice in the boroughs was reformed by the Municipal Corporations Act of 1835, and by the act passed in 1846 creating County Courts.

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