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A CONSTITUTIONAL  
HISTORY OF ENGLAND  
VOL IV. 1642-1801

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OF ENGLAND

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# A CONSTITUTIONAL HISTORY OF ENGLAND

1642 to 1801

*by*

MARK A. THOMSON

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London*



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TO  
MY FATHER

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## GENERAL PREFACE

WHILE, DURING the present century, the publication of source material and of specialised researches upon various aspects and problems of English Constitutional history has advanced with ever-growing volume and speed, there have been few attempts at a general synthesis of the results of this research, and none at all seeking to cover, on the scale of the present series, the whole story of English Constitutional development from the earliest times to the present day. Yet the quantity of material now available in monographs and articles, and the highly technical character of much of this work, make essential an attempt at synthesis on a fairly large scale if readers whose interests are not specialised are to have any clear understanding of the results achieved by the scholarship and labour of the last two generations. Nor is it merely a question of correcting and supplementing details in the great works of the past: at least one new aspect of constitutional studies, the study of administrative history, has come to maturity in recent years, while the rapid advance of technique and achievement in economic and social history, and the progress made in other fields such as the history of law, ecclesiastical history, and the study of the development of political ideas, have all exercised important influences upon our understanding of constitutional matters and even upon our conceptions of the nature of constitutional history itself. The primary aim of the five volumes of the present series will therefore be a synthesis of recent work directly or indirectly concerned with English Constitutional history. The separate volumes will accordingly be based primarily on the researches of others, and will seek to fuse and weld together this mass of material in a manner which will make available to all students of history the results of past work in this field. To this end, the authors will aim at avoiding unnecessary technical phrases and at explaining such technicalities as cannot be avoided;

and although the varying amounts of reliable secondary material available for the different periods will make uniformity undesirable, footnotes will generally cite the monographs and articles used rather than the original source material on which these more specialised works were based, and the student who wishes to pursue the argument further will be referred in full bibliographical appendices to the monographs, articles and other works which form the basis of the present series. The aim of the series is to define the present position of our knowledge in the field of English Constitutional history, stating the matters on which there is general agreement, and reviewing, as impartially as possible, the points where opinions differ or where theories are still too new to have been subjected to decisive discussion.

Apart from this common aim, no uniform plan is imposed on the five volumes, for the problems presented by each of the five periods differ considerably and are not amenable to uniform treatment. Some periods of constitutional history have been much more fully studied than others, and both the bulk and the character of the secondary material on which these volumes are based vary greatly from period to period. More fundamental still, the very content and nature of the subject change with the political, social, and moral ideas of the successive ages. But while each author has necessarily been left free to interpret in his own way the common purpose of the whole work, that purpose remains the same for all, and in so far as it is achieved, the series will need no further justification.

R. F. TREHARNE



## AUTHOR'S PREFACE

I WISH to express my gratitude to all who have assisted me in the preparation of this work. Dr. R. A. Humphreys has read the whole in manuscript; Mr. E. S. de Beer has read the first two parts; to both I am indebted for a number of valuable suggestions. I have also received advice and information on various points from Professor L. B. Namier, Professor N. Sykes, Mr. G. Parsloe, Mr. G. E. Manwaring, and Mr. G. F. James. To all these my warmest thanks are due. For all errors in this book I am, of course, alone responsible. I am also indebted to the Librarian of University College, London, for his kindness in making it easy for me to use the great collections of pamphlets in the College. To the rich resources of the London Library and to the unfailing courtesy and helpfulness of its staff I owe more than I can say. I am greatly beholden to Mr. J. W. Archbold and to Mr. S. T. Bindoff for their kindness in reading my proofs. Finally, I wish most gratefully to acknowledge my debt to Professor R. F. Treharne, the general editor of this series, for much wise counsel on many points.

M. A. T.

*University College  
London*



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# **PART I**

**THE TIME OF TROUBLES, 1642–60**





# I

## INTRODUCTION

IT IS nowadays a commonplace that no constitution can be static. Attempts have indeed been made at many times and in many countries to set forth a constitution in a document, and several of these attempts have had great apparent success. But, in fact, no 'written' constitution has long survived that has not been subject to frequent modifications. Such modifications, however, have often escaped general notice because they have taken the form of an alteration, not of the written instrument, but of a constitutional convention. For every constitution largely consists of conventions, and conventions are essentially flexible. But if this is obvious now, it has not always been so. Constitutional disputes have often taken the form of a controversy as to what a particular constitution already was, when the real issue was whether or not it should be altered. In England, particularly, reform has again and again been represented by its partisans not as innovation but as maintenance or restoration.<sup>1</sup> Never has this tendency been more clearly manifest than in the seventeenth century.

When James I succeeded Elizabeth, the great majority of Englishmen regarded the constitution of their country as excellent. Yet it would have been difficult to give a precise description of that constitution. The majority professed and felt loyalty to the Crown, to Parliament, to the established Church, and to the Common Law, and these various loyalties were regarded as thoroughly compatible with each other. There were, however, many doubtful points from which disputes might arise. What powers did the Crown possess in virtue of the prerogative? What was the function of Parliament in the body politic? Was the Common Law supreme or could it be overridden either by a statute or by the prerogative?

<sup>1</sup> I use the word 'reform' simply to denote constitutional change, not as a term of eulogy.

A further cause of controversy was the desire of a part of the nation for changes in the liturgy and rites of the Church. In point of fact all these questions were connected with that of sovereignty. Few then held that there must be a sovereign in the state. The existing constitution, whatever it might be, was thought of as substantially unalterable; it was as it were—to use a phrase not yet current—a fundamental law. The problem, therefore, since the constitution was in many ways ambiguous, reduced itself to one of interpretation. Who, then, was the proper interpreter? <sup>1</sup> To this question there were three possible answers. The King alone, the King in Parliament, and the judges of the Common Law courts. Each of these answers was made and supported by reasons and precedents. None found a general acceptance. Yet, since there was continual friction between King and Parliament, the need for an accepted answer became more and more pressing. When the Long Parliament met in 1640, matters had come to a crisis.

At first it seemed that the Long Parliament would settle the outstanding controversies. For the laws made during the first months of its life radically altered the King's powers. James I and Charles I, with the support of many lawyers and others, had claimed and exercised a two-fold prerogative, absolute and ordinary. They maintained that the Crown was possessed not merely of certain known and definite powers, exercisable in specific legal ways, but also of an absolute prerogative, a power, that is, to provide for the welfare of the state in emergencies. Such a power, it was argued, in matters of state necessarily belonged to the King in his political capacity. For it must exist somewhere, and the King was obviously the person to hold it. Moreover, besides the political maxim, '*salus populi suprema lex*,' there was also a constitutional maxim, 'the King can do no wrong,' to be adduced in support of this contention, and the latter maxim was made to mean that whatever the King did was right. Granted that the judges never went so far as to hold that the King was *legibus solutus* or to treat him as a sovereign in the Austinian sense, yet in virtue of the prerogative thus understood and exercised he had been becoming something very much like a sovereign. If he

<sup>1</sup> To a certain extent the power to interpret law carries with it the power to make law. But that power falls short of sovereignty.

could not make a statute, he could issue a proclamation, which was treated as having the force of law.<sup>1</sup> If he could not levy a subsidy, he could collect ship-money. If he could not abolish the Common Law courts, he could in many matters enforce his will through the prerogative courts without interference from the former. To this conception of the prerogative and these methods of its exercise the Long Parliament was strongly hostile. The great majority of the Lords and Commons admitted, indeed, that according to the old constitution the King possessed certain inalienable prerogatives, which he could exercise, or refrain from exercising, as he pleased, even though some of them could only be exercised in certain definite ways. With regard to the exercise of these prerogatives he had an absolute discretion. He could, for instance, declare war and make peace, nor was there any legal way of compelling him to do or refrain from doing either. But to concede this did not involve the further admission that the King had an absolute unrestricted prerogative in matters of state. The prerogative, in a word, was, on this view, unrestricted within a restricted sphere, not absolutely unrestricted. The early legislation of the Long Parliament was, accordingly, designed to secure the triumph of this interpretation of the prerogative.<sup>2</sup>

Meanwhile Parliament professed to be conservative, to be loyal to the principles of the old constitution. That profession, however, though not wholly insincere, cannot be taken at its face value. The fact was that a change in political circumstances had made it imperative to face problems which had not been acute during the Tudor period. Of these problems the King and his opponents proposed different solutions. Both undoubtedly had a case in law, and, according to the judges, that of the King was the better.<sup>3</sup> What the Long Parliament

<sup>1</sup> In 1611, it should be said, James I had consulted the judges as to the force of proclamations. Their opinion had been that a proclamation could not 'change any part of the Common Law or statute law or the customs of the realm.' This opinion eventually came to be accepted as good law. But neither James I nor Charles I acted in accordance with it.

<sup>2</sup> *E. g.* the Star Chamber was abolished; the Privy Council was deprived of its jurisdiction in English cases; non Parliamentary taxation in all forms was made illegal.

<sup>3</sup> It must not be believed that the judges who had decided for the King, in the great constitutional cases of the previous generation, were corrupt. But they were appointed by the King, and those whose conduct was not pleasing to him were dismissed. This fact robbed the decisions of the courts of much of their authority with the public.

had done was not to win a victory for conservatism, but to secure the triumph of its own solution of certain problems. Its victory had decided that in a constitutional controversy a statute could override a judicial decision.<sup>1</sup> It seemed, then, that the final interpretation of the constitution was to rest not with the courts nor with the King alone, but with the King in Parliament. But a further problem arose therefrom. What was to happen if King, Lords, and Commons could not agree? For the concurrence of all was required to make a statute, and none could legally be coerced. Nor were the conventions which had regulated their relations in the Tudor period any longer acceptable.

Trouble was made inevitable by the fact that the Commons, with some support from the Lords, now proceeded to make new demands. It must be remembered that Charles's relations with the Long Parliament were never cordial. Necessity had made him summon it and assent to several unpalatable bills, but it had always been plain that he was desirous of crushing the Parliamentary leaders. These, accordingly, had struck first and secured the attainder of Strafford, the King's ablest counsellor. But Strafford's death was far from giving security to his enemies. It was certain that the King would seek revenge, and their knowledge of this led the majority of the Commons to try to control the King's choice of his counsellors. If all the King's advisers and chief servants were men approved by Parliament, the King would be wellnigh helpless. But how was this to be brought about? The King had a perfect right to choose his counsellors and Ministers. Only a statute could restrict it.

Here was one cause of the coming quarrel; but it was not the only cause. Ecclesiastical questions in the seventeenth century divided the nation just as much as, if not more than, purely political questions. Indeed, while the majority held that there could only be one visible organized Church in a state, ecclesiastical questions were political questions. To all but a few isolated thinkers and a handful of schismatics, toleration, at the beginning of this period, seemed neither desirable nor practicable. Heresy and schism were to the majority both damnable sins and dangers to the very existence of the state.

<sup>1</sup> For instance, the Act declaring ship-money to be illegal.

But though there was only room for one Church—the established Church—in the country, there was plenty of scope for controversy as to its nature and constitution. Was episcopacy to be preserved? And if so, in what form? Was the Prayer Book to the left unaltered, to be revised, or to be abolished? These questions might be looked upon in very different ways. Staunch supporters of the Elizabethan settlement contended that, since, at the worst, there was nothing positively sinful in the organization, doctrines, and liturgy of the Anglican Church, it was the duty of all loyal subjects to adhere to it as it was. To others reforms appeared needful to make the Church conform to the will of God. To a third school of thought change seemed desirable for a different reason. Since there were many who disliked the then system might not a few alterations in ‘things indifferent’ be made to conciliate them? Such an indulgence to ‘tender consciences’ found a good deal of support in Parliament, and was not wholly repudiated by the King.

During the early months of the Long Parliament the ecclesiastical controversy centred upon the episcopate. For the policy of the Primate, Laud, and the majority of his suffragans had been peculiarly irksome to the Puritan section of the Church. Further, the Courts Christian had made themselves highly unpopular. Causes purely political accentuated the dispute; for the votes of the Bishops in the House of Lords were usually at the King’s command. Moreover, Convocation, in 1640, had drawn up a series of canons, some of which maintained the divine right of kings and of episcopacy. The Bishops, therefore, seemed to many a menace both to Parliament and to the state, since they at once supported the Crown as against Parliament and the independence of the Church from the state.<sup>1</sup> But, though the current of opinion against the Bishops was strong, it was not easy to determine what should be done. Perhaps a law modifying their powers would at one time have solved the problem. Support, however, for such a scheme was tepid, while the extremists clamoured for the total abolition of episcopacy. Their zeal only served to widen

<sup>1</sup> I do not mean that the Bishops consciously worked for such independence. But the canons of 1640, none the less, were a just cause of alarm to Erastians.

the breach between the King and the majority of the Commons. For Charles was a staunch episcopalian and, as such, became the rallying-point of all who dreaded a drastic change in the old ecclesiastical polity.

Towards the end of 1641 it became plain that the chances of a peaceful settlement were small. Charles had made great concessions, but one thing he was determined not to do, to let himself become a puppet in the hands of counsellors chosen by Parliament, and this resolve was strengthened by the division in that body. The demand that Parliament should control the King in his executive capacity and, still more, the proposed ecclesiastical changes had won the support of a strong minority for Charles.<sup>1</sup> Yet the very strength of the reaction in the King's favour made it more difficult for the leaders of the majority to yield. To them a triumphant reaction might mean imprisonment or death. The fate of Strafford was proof enough that an act of hostility might be disguised as an act of law. Fear was accompanied by mistrust. Charles was thought the more dangerous because his word could not be relied upon. The King, on his part, had likewise his fears. He dreaded the impeachment of his wife. Seeking to avert this, he made the vain attempt to arrest the five members, and after his failure left London.

Charles's departure from the capital marks the beginning of a long period of civil strife. Henceforth the Long Parliament begins to resemble a revolutionary government. Because it could not make statutes, self-preservation compelled it to claim that 'Ordinances'—that is, bills passed by both Houses—had the force of law. An attempt was indeed made to prove the legal validity of Ordinances by mediaeval precedents, but only those who wished to be convinced can have regarded it as successful. No pretence could now really conceal the fact that Parliament was aiming at a radical change in the constitution. Charles was soon compelled to treat Parliament as a body of rebels. He, who had refused to let them choose his counsellors, was all the more determined to resist them when they renewed the demand and joined with it other requirements even more distasteful. The negotiations between

<sup>1</sup> The Grand Remonstrance was carried by only eleven votes in the Commons.

King and Parliament during the first half of 1642 could not but fail.<sup>1</sup> Since the King would not give way, nothing remained for him but an appeal to arms; for it must be remembered that in the previous year he had given his assent to a bill prohibiting the dissolution or prorogation of the Long Parliament without its own consent. Charles, when he called upon his loyal subjects to take up arms on his behalf, proclaimed that he was fighting to maintain the old constitution, and among those who trusted him his appeal found a great response.<sup>2</sup> But, though Charles had precedent on his side in resisting some of Parliament's demands, and to that extent was truly the champion of conservatism, his professed programme of a return to the past was impracticable. The new problems had to be solved; they could not be evaded by a return to the old constitution, which presupposed their non-existence.

<sup>1</sup> The demands of Parliament are expressed in the Nineteen Propositions, presented to the King in June. These required that Privy Councillors, the chief Ministers, and the persons entrusted with the education of the King's children should be approved by Parliament; that the King should consent to such ecclesiastical reforms as Parliament advised; that Parliament should control the Militia; that all judges and officers of state approved by Parliament should hold their places *quam diu se bene gesserint*; that the King should enter into an alliance with the United Provinces; that no person subsequently made a peer should sit in the House of Lords without the consent of Parliament.

<sup>2</sup> Charles was also assisted by a blunder on the part of Parliament, which threatened to punish all who did not show themselves opposed to the King.

## II

### PARLIAMENT AND THE KING, 1642-46

WHEN THE Civil War began the position maintained by Parliament<sup>1</sup> was flagrantly illegal. Nominally they were contending for the preservation of the constitution; they still claimed to be loyal subjects; but they openly asserted they were the final interpreters of the constitution. Nor did they stop short here. Driven on by necessity, they exercised one power after another, regardless of the law. They legislated on all manner of subjects, they imposed taxes, they organized an executive of their own. Their justification was that Parliament was entitled to do whatever was necessary for the commonweal in time of crisis. That indefinite discretionary power, which they had striven to wrest from the Crown, was now declared to be vested in Parliament. '*Salus populi suprema lex*' could be quoted to justify the arbitrary rule of Parliament as it had been quoted to justify the arbitrary rule of Charles. And what was that Parliament? Of the peers only about a quarter continued to attend the Upper House; of the Commons a large proportion followed the King, and, though the majority were against him, the Lower House was none the less a much-shrunken body. Yet this did not prevent the champions of Parliament, at the beginning of the war, from proclaiming that, politically speaking, Parliament was the nation. The logical conclusion from this was that those who had adhered to the King had no rights and that Parliament was omnipotent, though that conclusion was, as yet, seldom drawn. It could not easily be admitted that power resided with the people; for it was by no means certain that the majority of the people, or even

<sup>1</sup> In accordance with common practice I employ the term 'Parliament' to designate the two Houses alone during the years 1642-48, during the years 1649-53 to designate the Commons alone, and during the years 1653-60 to designate such legislatures as were then in being.



of the electorate, sided with Parliament.<sup>1</sup> Some, indeed, argued that the result of the war would be the verdict of the people. But this was the counsel of despair; for it amounted to a profession of belief in the rule of the sword. The fact was that the Parliamentary leaders were men bent on carrying out a political programme by whatever means seemed best, legal or illegal. Naturally they invoked such constitutional and political theories as accorded with their designs, without troubling themselves very much about consistency.

In spite of their departure from legality and their implicit claim to sovereignty, Parliament had not yet wholly given up belief in a fundamental law. For they still thought that, when the war was over, government would once more be by King, Lords, and Commons, though it remained uncertain what the powers of the three separately and in conjunction would be. But each of these would be maintained by the final settlement, whether it were the result of compromise or of victory. However strong the feeling against Charles might be, there was as yet but little anti-monarchical sentiment. According to the official Parliamentary theory, Charles had been led astray by Papists and other evil counsellors and the Parliamentary forces were really fighting on his behalf. This theory cannot be accepted at its face value. It was largely devised to cloak the lawlessness of Parliament's proceedings; but, none the less, it reflects a genuine sentiment. The monarchy was still indispensable. Hence it is no matter for surprise that Parliament long hoped it would be possible to come to an agreement with the King, even though his forces had not been crushed.<sup>2</sup>

Charles on his part was also ready to negotiate. In a manifesto, issued in September, 1642, he professed only to desire the preservation of the old constitution in Church and state and announced his intention, when his authority over the whole kingdom should be re-established, to govern 'according to the

<sup>1</sup> It is worth mentioning that the idea of a dissolution followed by a general election was not seriously entertained.

<sup>2</sup> I have endeavoured briefly to indicate the ideas of the majority of those who took the lead in opposing Charles. These ideas were to some extent confused and self-contradictory, as the ideas of men engaged in a political struggle often are. I have tried not to exaggerate the confusion and inconsistency, but their existence can scarcely be denied.

known laws of the land and maintain the just privileges and freedom of Parliament'. Those who opposed him were described as a minority composed of Brownists, Anabaptists, and atheists.<sup>1</sup> Though this manifesto ignored the real constitutional issue and misrepresented his opponents, it was not ill calculated to appeal to moderate opinion. The support it brought the King, however, did not enable him to win a decisive victory. Charles, therefore, soon showed himself ready to consider some form of compromise. How much he was really prepared to yield it is impossible to say; but though he frequently implied his willingness to make considerable, if rather indefinite, concessions, he never consented to grant the minimum that would have been accepted.

The story of the fruitless negotiations between King and Parliament during the years 1642-46 can be briefly told; for their chief importance lies in the consequences of their failure.

During the first months of the war there were some abortive attempts at a settlement; but the first serious negotiation occurred early in 1643, when it had become clear that neither side could expect an easy triumph in the field. The terms then presented to Charles by Parliament indicate how wide was the breach between them. Briefly, Parliament demanded that control of the Militia be settled by statute and that certain judicial appointments be conferred on specified persons, who, together with all other judges, were to hold their places during good behaviour. Further, the King was asked to consent to bills for the abolition of Bishops and Deans and for the summoning of an assembly of divines, whose proposals for ecclesiastical reform, when adopted by Parliament, the King was to accept. These terms were far more moderate than those offered by Parliament before the outbreak of the war.<sup>2</sup> Parliament now seemed to give up their former claim directly to control the executive. But it is noteworthy that they did not suggest the repeal of the law forbidding a dissolution or prorogation without their own consent. This law, combined with

<sup>1</sup> Both Parliament and the King attempted to turn to their advantage the intense religious feeling of the great majority of Englishmen. Parliament said Charles was influenced by Papists; Charles denounced Protestant heretics and schismatics.

<sup>2</sup> I allude to the Nineteen Propositions, which contained several demands now omitted.

their control of the purse, gave them unprecedented power. So their concessions were perhaps more apparent than real. In any case, what they asked, particularly in regard to the Church, was far more than Charles would concede.<sup>1</sup>

The failure of this negotiation only served to harden Parliament's opposition to the King.<sup>2</sup> They proceeded to provide, on their own authority, for the meeting of an assembly of divines to deliberate upon ecclesiastical changes, a measure which was bound to increase the bitterness of the quarrel. The King's success in the field soon led Parliament to take an even more drastic step. They asked the Scots, not only to send deputies to the assembly, but also to assist Parliament with an army. The desired aid was granted, though at a high price. The concern of the Scots was, primarily, to safeguard their own ecclesiastical settlement, and the best way to achieve this end seemed to them the establishment of Presbyterianism in England. An agreement—the celebrated Solemn League and Covenant—was accordingly made for common action by English and Scots in certain religious and political matters. Though the English refused to bind themselves to copy the Scottish settlement in every detail, they pledged themselves to set up some form of Presbyterianism in their own country, and with this pledge the Scots were, for the time, content.<sup>3</sup> The consequences of this agreement were far-reaching. The victory of Parliament was largely due to Scottish military assistance; but the attempt to make the established Church in England Presbyterian was triply unfortunate. It made a settlement with Charles yet more difficult; it ultimately divided the Parliamentarians; it encouraged the Scots to intervene in English affairs.

The influence of the Scots was manifest in the propositions, presented by Parliament to the King at the end of 1644, and discussed at Uxbridge early in the following year. The terms then offered<sup>3</sup> were such as the King could never accept; for by so doing he would have reduced himself to a cipher. Parlia-

<sup>1</sup> The negotiation, which began in February, 1643, was known as the Treaty of Oxford. The term 'treaty' could then be applied to any negotiation, whether or no it resulted in an agreement.

<sup>2</sup> The Lords were always far more eager for a compromise than the Commons. But their weakness prevented them from being an effective check on the Lower House.

<sup>3</sup> See also *infra*, pp. 15 *sqq.*

ment demanded control of the appointment of the chief Ministers and of all the judges; war was only to be declared and peace made with their assent; the armed forces were to be placed under the direction of a body of commissioners chosen by Parliament; the King was to consent to the abolition of episcopacy, take the Covenant himself, sanction a law for its imposition on all his subjects, and accept the establishment of a Presbyterian Church; moreover, the Court of Wards was to be abolished and the King was to receive £100,000 a year in return; finally, certain categories of persons who had adhered to the King were to suffer various penalties. Charles, on his part, proposed a return to the old constitution; later he offered some small concessions, but there was never any prospect of an agreement and hostilities were soon resumed.

The war now turned into a series of disasters for the King, and by the end of 1645 Charles had lost all chance of defeating his enemies. He cherished, however, the hope that he might gain tolerable terms by dividing them. Could he not play off the Scots against the English? Or one section of the English Parliamentarians against another? Seeking to carry out some such plan, he betook himself to the Scots army in the spring of 1646.<sup>1</sup> For some months he remained their prisoner, while he negotiated with both Scots and English. The Parliament in London offered him terms substantially identical with those discussed at Uxbridge.<sup>2</sup> Charles, determined not to accept and unwilling to refuse outright, gave evasive answers and played for time. Meanwhile, he failed equally to come to terms with the Scots, who finally decided to hand him over to the English. With their surrender of the King begins a new state in the history of the period. Hitherto Charles's English opponents, though far from united, had yet managed to preserve a common front against the King. Now, their differences developed into fierce quarrels; quarrels of the utmost significance for the future.

<sup>1</sup> I say nothing of Charles's overtures to Parliament between his defeat at Naseby and May, 1646. Their importance was not great.

<sup>2</sup> The chief differences were: firstly, that Parliament now demanded to exercise control of the Militia for twenty years. After that bills dealing with the Militia were not to require the royal assent to become law, 'in all cases wherein the Lords and Commons shall declare the safety of the kingdom to be concerned.' Secondly, the consent of Parliament was not to be required for declaring war or making peace.

### III

#### PARLIAMENT AND ECCLESIASTICAL PROBLEMS, 1642-46

ONE OF the last bills to which Charles gave his assent was that forbidding any ecclesiastical person to sit in Parliament or to be a member of the Privy Council.<sup>1</sup> Within a few months of this civil war began, and thereafter it was certain that further ecclesiastical changes would be attempted. For the division of the nation was as much religious as political. Parliament soon showed themselves inclined to strong measures and, on the very eve of the negotiations at Oxford, carried a bill for the abolition of episcopacy.<sup>2</sup> But their policy could not be purely negative, and they soon began to show themselves favourable to the establishment of Presbyterianism. The task of drawing up a draft scheme for the approbation of Parliament was committed to an assembly of divines, which included delegates from Scotland and first met in July, 1643. The broad outlines of the future settlement were indicated in the Solemn League and Covenant, which was sworn to by Parliament. Parliament thereby pledged themselves to extirpate Popery and episcopacy, to support the Church of Scotland, and to set up in England and Ireland a Church resembling it. The proviso, however, that the doctrine and discipline of the latter were to be 'according to the word of God and the example of the best reformed Churches' allowed of such variations as might be thought desirable.

In both the assembly of divines and in Parliament there was a Presbyterian majority. But Parliamentary Presbyterianism was strongly tinged with Erastianism. The function of the assembly was only to make suggestions; the final scheme was to be imposed by Parliament, which would take good care

<sup>1</sup> The date was February, 1642.

<sup>2</sup> The actual Ordinance abolishing episcopacy was not issued till 1646.

that the newly constituted Church was not independent of the state. In the Scottish Church there was hierarchy of assemblies with wide powers of discipline and coercion.<sup>1</sup> Though ready to set up a similar organization in England, Parliament were resolved to retain the ultimate control in their own hands. Moreover, while regarding Presbyterianism, thus understood, as a desirable form of Church organization and government, Parliament never proclaimed it to be *iure divino*.<sup>2</sup> The Scots delegates, and with good cause, complained that the English religious settlement was to be a sadly imperfect copy of their own. The Houses of Parliament, moreover, did not hesitate to exercise, while the new settlement was pending, much of that jurisdiction which had belonged to the old Courts Christian. Clergy who were suspected of seditious or otherwise improper conduct were arrested at the order of either House, questioned, and, if found culpable, deprived. Nor were the laity exempt. Laymen who neglected to attend Church services or preached without being in holy orders were similarly liable to arrest and imprisonment. Parliament thus claimed to exercise a wide ecclesiastical supremacy.

Even in its attenuated English form Presbyterianism did not commend itself to all non-episcopalians. A small minority in the assembly and a large minority in the Commons held very different views and represented a considerable body of opinion. Among the Independents, as these men were called, the congregation, formed by an agreement among its members, was an autonomous unit. They did not wholly oppose synods; but they wished them to be advisory, not governing, bodies. This system, they held, could be plainly deduced from the New Testament and was, accordingly, *iure divino*.<sup>3</sup> To an Independent, therefore, Presbyterianism, as it existed in Scotland, was hateful. Hence, at first Independents and

<sup>1</sup> The Presbyterian hierarchy was organized as follows: Above the session of the parish was the assembly of the classis; above the assembly of the classis was the provincial synod; above this was the national synod.

<sup>2</sup> It was, indeed, not easy to demonstrate that Presbyterianism was the only system of Church government deducible from the New Testament. The view taken by the English was rather that it was not inconsistent with the will of God and was agreeable to right reason. The Elizabethan settlement had been defended by similar arguments.

<sup>3</sup> I give here the views of the extreme Independents; for they did not all think alike. I say nothing of the smaller sects, which were vociferous rather than important.

Erastians tended to work together against extreme Presbyterians. Their collaboration, however, could only be temporary. As their adversaries did not fail to point out, the Independents were disloyal to their principles when they asserted the supremacy of the state in matters ecclesiastical. Some of the Independents thereupon changed their standpoint, and by so doing, forced the state to face a new problem.

The few earlier advocates of toleration had had little influence. For, as long as the majority believed there could only be one Church in a state, arguments for toleration could not carry much weight. Now, over a Presbyterian Church it seemed comparatively easy for the state to assert its supremacy. In theory the Presbyterian Church, like its predecessor, the episcopalian, was to be all-embracing. The presumption was that every man, not a schismatic or under sentence of excommunication, would belong to it. On the Independent theory, no Church of this kind was possible. If the congregation was a voluntary association of righteous persons, and the congregation was autonomous, there could be no national organized Church in the old sense, and, in strict logic, no pretext was left for secular coercion in religious matters.

The idea of toleration was, as yet, far too revolutionary to be generally welcomed. To the Presbyterian it was sinful; to the Erastian anarchical. Nor was its advocacy among the Independents unanimous. Many doubtless failed to see whither their principles led them. Others, guided by prudential considerations, held the time was not yet ripe. Hence, in 1645-48, Presbyterianism was established by Parliamentary Ordinances. A hierarchy of assemblies was ordered to be created. But the power of the Church was kept under Parliamentary control. The basis of that power was the right to excommunicate, and this was strictly regulated. Excommunication could be pronounced by ecclesiastical bodies only for certain specified offences, and in all cases the party under sentence had the right of an ultimate appeal to Parliament. Jurisdiction over all other offences was reserved to a Parliamentary commission. A vigorous and not wholly unsuccessful attempt was made to bring the new system into being; but circumstances were too unpropitious for the achievement of lasting results. The Presbyterian organization never extended

over the whole country, nor did all incumbents take the Covenant—as the law required—or adhere to the Directory, which had been substituted for the Book of Common Prayer. Many incumbents were Independents rather than Presbyterians, and—especially after the establishment of the Commonwealth—little attempt was made to interfere with them. Loyalty to episcopacy and the Prayer Book, on the other hand, usually led to ejection. Opposition to Presbyterianism, indeed, far from diminishing, with the lapse of time tended to become more pronounced. The hostility between Independent and Presbyterian was deepened by the course of political events, while the supporters of the King remained obstinately loyal to episcopacy and the Prayer Book. The fundamental weakness of the new ecclesiastical system was that it had been adopted to obtain Scottish aid in the war, and not in response to the real wishes of the nation.



## IV

### THE RULE OF PARLIAMENT, 1642-46

WHEN THE civil war began, Parliament found themselves in an extremely dangerous position. The material resources of their supporters were, indeed, far in excess of those of the King; but they were of little use unless proper means for their employment could be devised. Nothing daunted by the magnitude of the problem, Parliament acted promptly and vigorously. Ordinances supplied the place of laws. Taxes were imposed and collected. But the greatest proof of Parliament's resolution and ability was the improvisation of an efficient executive. This, too, was done without the assistance of an organized civil service. Unhappily the administrative history of the period is still largely unwritten. But, though we do not yet know how the task was performed, there is no doubt about the magnitude of the achievement, which is all the more remarkable when contrasted with the deplorable incapacity shown by Charles and his advisers in the conduct of the war with France at the beginning of his reign.

Parliament appointed numerous committees for executive purposes, but, particularly in the earlier stages of the war, showed a strong tendency to keep them under strict control. For some time, moreover, they refused to delegate the task of co-ordination to any subordinate authority. A Committee of Safety was indeed created as early as July, 1642, with powers—nominally considerable—both of suggesting measures to Parliament and of implementing policies adopted by that body. But, in practice, the Committee never had much power.<sup>1</sup> The need for a more efficient body became apparent as the war went on, and one was accordingly created. The treaty with the Scots in 1643 led to the replacement of the Committee of Safety by the Committee of both Kingdoms, com-

<sup>1</sup> The Committee never made much use of its powers of suggestion.

posed of both Scottish and English members and possessed of wide powers for the conduct of the war.<sup>1</sup> Their appointment was disliked by the Lords, because it would weaken the authority of those peers who held military commands, and by the Presbyterians, because the proposed Committee had an Independent majority. But so strong was the case for the Committee, that a compromise was made. The Committee was appointed, though only for three months. When the time was up, the Committee was continued with increased powers, and henceforth played a great part in the management of affairs.<sup>2</sup>

The following year—1645—saw the establishment of the New Model Army and the passing of the Self-Denying Ordinance. Hitherto the Parliamentary armies had, on the whole, been neither well organized nor ably commanded. The former defect may be explained by the difficulty of hurriedly creating and providing for an army; for the latter there was a very different reason. The Parliamentary generals often lacked the will to victory. Believing that the ultimate settlement must be a compromise, they were none too eager to destroy the King's armies. As might have been expected, the Parliamentary forces suffered several defeats in the early stages of the war, and by the end of 1644 it was plain that victory could not be achieved without drastic changes in organization and command. The Commons, therefore, carried a resolution

<sup>1</sup> The Committee, when first appointed in February, 1644, consisted of seven peers and fourteen commoners, together with certain Scottish commissioners. It was empowered to 'advise, consult, order, and direct concerning the carrying on and managing of the war.' In negotiating with the Scots it could only propound what it should 'receive in charge from both Houses' and report the results to them. But it could negotiate with foreign states, though not with the King. Finally, it could 'advise and consult of all things in pursuance of the ends expressed in the Covenant and the Treaty' with Scotland.

<sup>2</sup> It was now empowered 'to order and direct whatsoever doth or may concern the managing of the war and whatsoever may concern the peace of His Majesty's dominions.' The Ordinance which continued the Committee was one that had been passed by the Lords, when the creation of the Committee had first been proposed. The Commons, who objected to the extent of the powers it gave to the Committee and to the absence of a time limit, did not then pass it. A more moderate Ordinance was substituted and passed by both Houses. Now the Commons passed the neglected Ordinance, because they could not agree with the Lords about the composition of the renewed Committee. Thus the Upper House was outwitted.

instructing the Committee of both Kingdoms to draw up a scheme for a reorganized army. Early in 1645 the Committee laid before Parliament a plan for a well-organized army, to be paid from the Parliamentary treasury and to be wholly under the control of Parliament.<sup>1</sup> After no long delay the plan was accepted. A little later the Self-Denying Ordinance was passed, a measure of even greater significance. The Ordinance required members of either House who held posts granted by Parliament to resign them within forty days.<sup>2</sup> The army was thereby freed from several incompetent commanders and Parliament from the reproach that its members thought more of their own interests than of the public good. It was true that reappointment was permissible, and that Cromwell, the great cavalry general, was forthwith made second-in-command of the New Model; but this was an exception. The New Model soon proved itself a great army; but it did not long remain the obedient servant of the Parliament, with which it had so few personal links.

Parliament, at the outbreak of the war, were deprived of the use of the Great Seal, which the Lord Keeper had carried with him in his flight with the King. This loss was a source of much embarrassment. In the spring of 1643, however, the Commons resolved that a seal be made and used under Parliament's directions. The Lords refused to concur. But the Commons continued to urge their point, arguing that innumerable mischiefs flowed from the lack of a seal, and that Parliament, 'the supreme court in England', had a right to the Great Seal, the seal which pertained to it. Eventually the Lords yielded—in November, 1643—and the seal which had been made for Parliament was placed in the hands of six commissioners, of whom two belonged to the Upper House and four to the Lower. These commissioners exercised the jurisdiction of a Chancellor, and as regards the sealing of grants and appointments, acted under the orders of Parliament.

In taxation Parliament were as resolute as in other matters.

<sup>1</sup> The Parliamentary armies had not as yet all been paid from central funds, but had sometimes depended upon local contributions.

<sup>2</sup> The date of the New Model Ordinance is February 17, 1645; that of the Self Denying Ordinance April 3. The Lords had previously refused to pass an Ordinance which would have excluded members of either House from holding posts without possibility of reappointment.

In November, 1642, Parliament imposed a direct tax upon the inhabitants of London and Westminster, which, before the end of the year, was extended to the whole country.<sup>1</sup> In 1643 Customs duties were increased and Excise duties, hitherto unknown in England, were introduced. The revenue raised by these various taxes was supplemented by that derived from another source—confiscation. Early in the war the estates of those ‘Delinquents’, as the active adherents of Charles I were called, were made liable to sequestration. In 1644, however, Parliament allowed certain persons to compound at a fixed rate, and in 1645 this permission was extended to all royalists who would submit. Nor was this all. The abolition of Bishops and Deans carried with it the forfeiture of the endowments of sees and deaneries. Though the total income at Parliament’s disposal did not suffice to meet their expenditure, yet no English government had ever before commanded such resources. Parliament must have been strong indeed to levy large direct taxes year after year, to maintain the Excise despite its unpopularity, and to extort huge sums from Delinquents.

Those subject to the authority of Parliament were not only liable to financial burdens. Their liberties might be restricted in many other ways. Recruits for the Parliamentary armies were largely obtained by impressment. In 1643 all men over eighteen were required to take the Covenant.<sup>2</sup> The Press was as strictly regulated by Parliament as it had been by the King. The Houses did not hesitate to order the arrest and imprisonment of any person they desired to punish.

In a word, the rule of Parliament was at once arbitrary and strong. On the other hand, the King, during these years, was grossly inefficient. Charles never succeeded in creating an adequate organization for the conduct of the war. He made little use of the Privy Council either as an administrative organ

<sup>1</sup> The date of the Ordinance is December 8; its provisions were vague and impracticable. But in February, 1643, another Ordinance was passed and executed. After this, Parliamentary taxation of the whole country, both direct and indirect, was regular.

<sup>2</sup> No penalty was imposed for refusal; but the names of those who refused were to be certified to Parliament. With regard to the Army much indulgence was shown. Even in the New Model only officers were required to take the Covenant. On the other hand, all royalists who compounded were required to do so.

or as an advisory body. The royalist forces were worse-disciplined than the Parliamentary and their commanders more often insubordinate. Granted that the poverty of Charles, who largely depended upon forced or voluntary contributions for money and other supplies, rendered it difficult to maintain discipline, yet the consequences were none the less serious. As the war went on the behaviour of the King's troops became more and more irksome to the civil population. Charles, however, never seems to have realized the damage his incapacity inflicted on his cause. Although the royal adherents in both Houses of Parliament met by his summons at Oxford, in January, 1644, he made no attempt to use this Parliament for administrative purposes. Nor, indeed, were they allowed to have any influence on policy. They were loyal enough, as was shown by the grant of an Excise; but they desired to end the war by a compromise. Whether or no compromise was then possible, the King's popularity would have been much increased by conciliatory legislation, especially in religious matters. But for this Charles had no desire. He prorogued Parliament in April and, though he summoned them to meet again later, he once more—and finally—put an end to these sessions, when they showed a desire for peace during the Uxbridge negotiations.<sup>1</sup> Charles was not only jealous of his authority; but he lacked a clear conception of the value of a definite and consistent policy. He listened, now to one councillor, now to another, and continually tried to carry out contradictory policies at one and the same time. Throughout the war there was confusion in both the King's plans and the King's administration.

Upon future constitutional developments the events of these years had an influence that was far from simple. Parliament, in 1646, still professed to desire a return to government by King, Lords, and Commons in some form, and there was a widespread hope that Charles would make the necessary concessions. But none could be certain of this. Thus Parliament was committed to a policy which it might be impossible to carry out. Defeated though he had been, Charles's obstinacy

<sup>1</sup> Charles, be it said, offered to concede a measure of toleration during the negotiations. His failure to promote legislation to that effect in the Oxford Parliament casts a doubt upon his sincerity.

could still prevent a settlement on the lines desired by Parliament. Moreover, as the prospect of an agreement with the King grew fainter, Parliament, so strong during the first Civil War, began to find themselves weaker. Parliament, indeed, were a very different body from what they had been at the beginning of hostilities. The number of peers who regularly attended the Upper House had fallen to a score or so; of the Commons, some had died and many others had forfeited their seats by their loyalty to Charles. These gaps were largely filled by bye-elections, held after Naseby; but the results of these elections were naturally not a perfect reflexion of electoral opinion. The House of Commons, thus composed, acted as if it were the supreme power in the land; for the Lords could not effectively resist it. Now, however, men began to ask why a majority in the Commons should rule England. That majority, though it might pay lip-service to fundamental law, really exercised an arbitrary power. Yet its authority could only be derived from the people. Radicals stressed this point and further argued that the individual citizen was possessed of certain natural rights, which Parliament was not entitled to infringe. To reply to these contentions was not easy; for it could hardly be admitted that the majority of the Commons were determined to pursue their policy, whatever the law or the state of public opinion might be. They refused, therefore, to face the issue, and made no substantial concession to their critics within or without the House. They controlled Parliament, and Parliament had hitherto prevailed over their enemies. Confident in this knowledge, they went on their way. Yet their position was highly dangerous. For the radicals were not alone in their opposition to Parliament. They had some support from all those non-episcopalians who objected to its religious policy. The union of the two currents of opinion was formidable. In the last resort the strength of Parliament depended upon the support of the Army, and Parliament themselves had set the Army an ill example, by proving that legality mattered little in comparison with power.

## V

### THE KING, PARLIAMENT, AND THE ARMY, 1647-49

WHEN THE Scots handed Charles over to the English in February, 1647, the King was far from thinking his position desperate, although he was determined not to make any permanent concessions of importance. His chief ground for hope was the attitude of the Presbyterian majority in the Commons, who now showed signs of desiring a compromise more favourable to the Crown. The principal motive for their change seems to have been fear of the Army. Among the soldiers were many whose religious views led them to oppose the establishment of Presbyterianism unless it was accompanied by a measure of toleration for dissidents. Others, again, desired political reforms of a radical nature. Since, too, the pay of the Army, especially of the cavalry, was greatly in arrear, every soldier had a grievance. Parliament, however, attempted to get rid of the menace from the Army without satisfying the soldiers' pecuniary claims. The men were asked to volunteer for service in Ireland, whither it was proposed to send a strong force. This invitation was the signal for active manifestations of discontent, which, at first, took the form of a petition to the commander-in-chief.<sup>1</sup> Parliament answered it in sharp terms, though it contained no request for changes in Church or state. But the men refused to be cowed. When it became plain that their original requests were not to be granted, their unrest increased, nor were the regimental officers able to suppress a movement with which they could not but have some sympathy. The men of each regiment chose two or more 'Agitators' to represent them.

<sup>1</sup> The petitioners asked for indemnity from punishment for any illegal act committed during the war, for payment of arrears of pay, for pensions for the widows of soldiers killed in the war, and for the exemption from impressment in future wars of those who had volunteered to fight for Parliament.

Parliament, on its part, commissioned its military members to pacify the men, but still remained obdurate on the points at issue.<sup>1</sup>

At this juncture the movement in the Army began to take on a markedly political character. The events that followed showed how weak had become the foundations of all authority save that based on force. Yet for force as such there was but little admiration. The advocates of the various constitutional proposals, put forward at the time, all appealed to law, though not the same kind of law. Conservatives maintained that the actual law of the land was on their side; radicals pointed to the law of nature in justification of their claims; yet a third section held that, according to the will of God, power should be in the hands of the righteous. The dominant fact, however, was the Army's refusal to remain the servant of Parliament. As long as the Army was at once a political and a military organization, no settlement was possible against its will. To a settlement acceptable to the Army, on the other hand, there could be no effective opposition, save one commanding superior military strength. Yet the leaders of the Army seemed at first less aware of this fact than those of the Parliamentary majority. Cromwell, who was among those charged by Parliament to pacify the troops, used his enormous influence with the men to moderate their demands; for he recoiled from the prospect of using violence against Parliament. But Cromwell could only influence the movement by putting himself at the head of it. By so doing he made himself the leader of an armed political party.<sup>2</sup> To a large extent he was able to impose his own wishes upon that party. But, in order to keep it together, he had to have a policy, and one in which the soldiers would acquiesce.

The first policy adopted by Cromwell was that of coming to terms with Charles. The combination of the King and the Army would not only have been irresistible; it would also have secured an appearance of legality for the settlement on which they agreed. The Army's Heads of Proposals differed remarkably from Parliament's proposals to the King in the

<sup>1</sup> The events here briefly mentioned occurred in March, April, and May, 1647.

<sup>2</sup> Cromwell, though in name only second-in-command, in fact now became the head of the Army.



previous year. According to the Army's scheme, Parliament was to be dissolved shortly. Subsequently there were to be biennial elections, and no Parliament was to sit for more than 240 days or—without its own consent—less than 120. The counties were to have a number of representatives proportional to the amount they paid in taxes, and some of the smaller boroughs were to lose their members. Members of the Commons, who found themselves in a minority on a division, were to have liberty to enter protests in the *Journals*. Command of the Militia for the next ten years was to be placed in the hands of persons chosen by Parliament. A Council of State, composed in the first instance of persons appointed for seven years, was to exercise a general supervision over the Militia and have the same powers as the old Privy Council for the conduct of foreign affairs.<sup>1</sup> The great officers of state were to be chosen by Parliament for the next ten years; after that Parliament was to propose three candidates for each post, of whom the King was to select one. More noteworthy were the proposals on ecclesiastical matters. The restoration of episcopacy was tacitly permitted. But Bishops were not to possess coercive jurisdiction. Neither the use of the Prayer Book nor the taking of the Covenant was to be compulsory, nor were penalties to be imposed for non-attendance at Church services.

These proposals are an illuminating commentary on the events of the previous years.<sup>2</sup> They virtually provided for the toleration of all Protestants. The suggested limitations of the prerogative were mostly temporary, and left the right of veto untouched, save for a proviso that no money bill was to be vetoed for two years. On the other hand, the demand for biennial elections reflects the prevailing distrust of the Long Parliament. Notable, too, were the proposed changes in the distribution of seats. The Heads were thus strikingly original; but they contain one curious omission. Some of the proposals were obviously intended to be fundamental parts of the new constitution. Yet there was no proviso that future Parlia-

<sup>1</sup> The functions of the Committee of both Kingdoms were very similar.

<sup>2</sup> The Heads of Proposals were prepared by the Council of the Army, composed of the generals and two commissioned officers and two soldiers chosen by each regiment. They largely reflect the ideas of Ireton, son-in-law to Cromwell.

ments should not repeal or alter them. Thus Charles, had he accepted the Heads, might well have been able to restore the old constitution in a perfectly legal manner within a few years.

The King, however, refused to accept the Army's terms; for he still hoped to make a more advantageous agreement with the Presbyterian majority in Parliament. Shortly before the Heads were presented to him he had offered to concede the establishment of Presbyterianism for three years and to surrender control of the armed forces for ten.<sup>1</sup> The offer, though it had not been accepted, had appealed strongly to many who disliked the Independents and feared the Army. Some of the Presbyterians had accordingly intrigued to bring about a settlement on these terms, with the aid of the City, which was on their side. These intrigues took effect at about the same time as the Heads were presented to Charles. A mob was raised, which forced Parliament by their threats to vote several resolutions disagreeable to the soldiers. The Independent members, however, took refuge with the Army, which promptly marched on London. A conflict was only averted because the City had no force capable of resisting regular troops. The fugitive members returned to their places and certain Presbyterian members thought it prudent to flee. Many of the troops wished to subject Parliament to a drastic purge. Cromwell, however, was able to restrain them. But this did not alter the fact that the Army had demonstrated its power. None the less, Charles remained fixed in his determination not to accept the Army's proposals, and turned to the Scots, with whom he came to an understanding at the end of the year. They were to restore him to his power as King—if necessary by force of arms—on condition that he established Presbyterianism in England for three years and refused toleration to certain unorthodox sects. This agreement was followed by a further outbreak of civil war, the result of which was to confirm the supremacy of Cromwell and the Army.<sup>2</sup>

It was in this same year—1647—that an attempt was made to bring about a constitutional settlement of a very different

<sup>1</sup> In his third answer to the Newcastle Propositions, written in May, 1647.

<sup>2</sup> The agreement between Charles and the Scots led Parliament to resolve not to negotiate further with him and to abolish the Committee of both Kingdoms. A purely English committee replaced it.

kind. None of the previous sets of proposals had been democratic. Though the Lower House was elected by a small minority of the nation, it was held to represent all the commons of England, nor had Parliament shown any desire to widen the franchise. During the first Civil War they had simply striven to increase their own power. After the end of that war, however, a new demand arose from the so-called Levellers. Neither Parliament nor the King—they said—but the people should possess supreme power. Such was the teaching of reason. These views were not widely held among the civilian population, but they had made numerous converts in the Army, and herein lay their importance. If the Army were completely won over, an attempt would certainly be made to carry out the programme of the Levellers. That programme provided for a wide extension of the franchise and declared the citizen to be possessed of certain fundamental rights, such as liberty of conscience, freedom from impressment, and equality before the law, which Parliament was not to be permitted to infringe.<sup>1</sup> Such a programme could not but be opposed by Cromwell and many other officers. Not only was it startlingly new, not only would its effective execution have caused a drastic redistribution of political power, but they must have realized—what the Levellers ignored—that a democratic franchise might well lead to the restoration of Charles to his old power; for the masses undoubtedly sympathized with the King. Compared with the proposed change in the franchise, the other planks in the Levellers' platform seemed of trifling importance. In October and November, 1647, came the decisive struggle between Cromwell and the Levellers for the control of the Army, and the Levellers were worsted.<sup>2</sup> When Cromwell entered on the campaign of

<sup>1</sup> The Levellers' programme in 1647 is contained in the first Agreement of the People. The clause as to the extension of the franchise is vague; but, apparently, the intention was to give the vote at least to every householder. It may also be noted that no proposal was made for the establishment of a court to safeguard the new constitution.

<sup>2</sup> Debates on the Levellers' plans were held in the Grand Council of the Army. They had no result save the appointment of a committee to prepare a scheme. Later the 'Agitators' were sent back to their regiments, and henceforth we hear no more of the Council of the Army in the old form. The Council of Officers replaced it as a military deliberative body. The scheme prepared by the committee resembled the Heads of Proposals. For the 'Agitators' see *supra*, p. 25.

1648 he was still the political as well as the military leader of the Army.

After the defeat of the Scots and of the English royalists, agreement between the Army and the King was most improbable, and, though negotiations were entered upon, they failed. Before the end of the campaign, Parliament, under the influence of the Presbyterians, had reopened negotiations with Charles. The possibility of a settlement favourable alike to the King and to the Presbyterians still further alienated the Army from Charles. A strong demand arose among the soldiers for the punishment of the 'man of blood'. At the same time their menacing attitude made the Presbyterians in Parliament still more conciliatory to the King. Cromwell, on his part, was reluctant both to execute Charles and to use force against Parliament, but their obstinacy left him no choice. He was the only man who could keep the Army under some sort of control and avert anarchy. But his authority over the troops could only be maintained by paying some regard to their wishes. On December 6, 1648, Colonel Pride, with a body of soldiers, 'purged' Parliament. Some 140 members were excluded from the Commons. Cromwell, though he did not know of the purge till it had taken place, gave it retrospective approval. Action of some kind against Parliament had previously been in his mind. The actual course of events, however, showed the weakness of his position.

The docile remainder of the Commons now passed an Ordinance for the creation of a court to try the King, and resolved that 'by the fundamental law of this kingdom it is treason in the King of England for the time being to levy war against the Parliament and kingdom of England.' When the Lords refused to concur, the Commons replied by resolving that they, as the representatives of the people, had full power to make laws, and carried a new Ordinance, for the creation of the court to try Charles. The court consisted of a large number of persons, who were to try issues of both law and fact. No judge was among their number. Before this court Charles was brought and accused of having traitorously levied war against Parliament, in order to carry out a wicked and illegal design of making himself absolute. Charles, very naturally, refused to acknowledge the jurisdiction of the court by pleading.

The court, however, sentenced him to death, and he was executed on January 30, 1649.

The beheading of Charles was doubtless impolitic; but it was no more illegal than countless other acts, committed since the outbreak of the Civil War. Cromwell was trying, just as Parliament had done, not to preserve the existing law, but to carry out a political purpose, whether the law was for him or against him. Yet Cromwell, again like Parliament, had certain conservative leanings and, in a sense, wished to see the rule of law restored. But though such a restoration might be his ultimate aim, the maintenance of order was an immediate necessity. In the crisis of 1648-49 Cromwell sacrificed law to order.

## VI

### THE SEARCH FOR A SETTLEMENT, 1649-60

AFTER THE death of Charles I, England nominally became a republic, in which the House of Commons possessed the chief power. They levied taxes; they legislated, not only for England, but also for Ireland and the Colonies; they committed executive power to various bodies. In fact, government depended upon the uneasy partnership of the Rump—as the purged Commons were called—and the Army. The republic, as established in 1649, was not a constitutional experiment; it was an expedient. The Rump did not represent the people, though they legislated for them. Moreover, not only was their power as illegitimate as that of a usurper; it was also extraordinarily weak. For, even from the first, most of its supporters did not really believe in the new form of government. It was simply set up because nothing better could be established. One great outstanding problem was quietly shelved. The Rump claimed to be indissoluble without their own consent, and the fear of dissolution continued to influence them far more than republican convictions. The Army wished to see a new Parliament. To them this was far more desirable than the preservation of the new constitution. Here was ample ground for a quarrel in the near future. Meanwhile convinced democrats, royalists, and legalists were all alike opposed to the new Republic. One service, however, the Commonwealth, temporary makeshift though it was, did render to the country. It provided a government, when the country was in danger of anarchy.

The organization of the new regime was simple. England was declared to be a Commonwealth governed by Parliament.<sup>1</sup>

<sup>1</sup> Act of May 19, 1649. Laws made by Parliament were now called Acts, the term 'Ordinance' being dropped. The Act of May 19 says, 'the people of England are and shall be and are hereby constituted, made, established, and confirmed to be a Commonwealth and Free State and shall

Acts formally abolished the monarchy and the House of Lords. A Council of State with wide executive powers was appointed. Later there followed other Acts, designed to safeguard the new constitution. The law of treason was recast and made more comprehensive. It became treasonable not merely to plot against the Commonwealth, but also maliciously to publish in speech or writing that 'government is tyrannical, usurped, or unlawful or that the Commons in Parliament assembled are not the supreme authority of the nation', or to stir up mutiny in the Army. Further, all men aged eighteen and over were required to take an oath of fidelity to the Commonwealth on pain of being denied justice by all the courts. All these Acts were essentially emergency measures, designed to strengthen the Commonwealth against its enemies at home and abroad. The most elaborate was that for the creation of the Council of State. For the need of a strong executive was obvious. The Council numbered forty-one persons, chosen for a year at a time by the Commons. Its chief duties were to oppose attempts at a Stuart restoration, to control the forces, to put down tumults, to conduct foreign affairs, and to encourage trade. It had also power to tender advice to Parliament on any matter. Finally, it could arrest persons and commit them to jail. Even with these wide powers, however, the Council had not complete control over all branches of the executive. It could not, for instance, give orders to the Parliamentary executive committees, which were still very important. The Council, again, had to report to Parliament on many matters. But, in practice, the Council was stronger than these limitations would lead one to think. Councillors were not necessarily M.P.s, and might be peers. But, as it happened, the majority sat in the Commons. Since the number usually present in the House was less than sixty, the Councillors had a great chance to make their influence felt, even though many of them were very irregular in their attendance both at Council meetings and the sittings of the

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henceforth be governed as a Commonwealth and Free State by the supreme authority of this nation, the representatives of the people in Parliament and by such as they shall appoint and constitute as officers and ministers under them for the good of the people, and that without any King or House of Lords.'

House.<sup>1</sup> Council and Parliament worked together in tolerable harmony, and, on the whole, the Council proved itself a very efficient body. It was not here that the weakness of the Commonwealth lay.

One great task Parliament undertook, which they were not able to complete. Scotland, after the execution of Charles I had adhered to his heir, Charles II. War between England and Scotland naturally followed. Scotland was eventually conquered, and the English Parliament appointed a body of commissioners to govern it. At the same time, however, they proclaimed their intention of bringing about a union between the two countries. An assembly of representatives of the Scottish shires and burghs was summoned, which gave its assent to the plan of a legislative union. A second election was then held, and the representatives chosen were bidden to send a delegation to London. From this delegation the English Parliament intended to secure such information as would assist them in drawing up an Act of Union. The Scottish delegates were not in a position to bargain, and found that scant regard was paid to many of their wishes. Thus Parliament intimated that Scotland would not be granted more than thirty members in the parliament of the united countries, though the Scots asked for sixty. But, before the Act of Union could be passed, Parliament was forcibly dissolved.

As long as the Army remained loyal, the Commonwealth was too strong for its opponents, foreign and domestic. One set of these, indeed, soon ceased to be a danger. The Levellers, never strong in the country, lost all effective influence over the Army in 1649 and rapidly became negligible.<sup>2</sup> Few understood their ideas and fewer still adopted them. The royalists, too, though numerous and discontented, were for the time being crushed. The Army, however, became more and more

<sup>1</sup> The Councillors were not always agreed, and to that extent their influence in Parliament was weakened.

<sup>2</sup> The document known as the fifth Agreement of the People presented to Parliament and ignored by it, in January, 1649, was a scheme drawn up by the Levellers in 1648 and modified by the Council of Officers. This compromise, however, was popular neither with the Army nor with the civilian Levellers nor with Parliament. Both the original and the revised scheme are interesting; but neither had much influence on actual constitutional developments. For this reason I forbear to discuss them in detail.



restive. The soldiers desired to see a new Parliament chosen. But the Rump shrank from the prospect of a dissolution. There was much talk of changes in the franchise and of a redistribution of seats, but the chief object of Parliament seemed to be to prolong their own existence.<sup>1</sup> Nor did the Rump attempt to conciliate the Army by meeting its wishes in other matters. There was a strong desire among the troops for a wide measure of toleration for all Protestants, for the abolition of tithe, and for law reform. But the only concession made by Parliament was the passing of an Act to abolish all penalties for not coming to church on Sunday. Cromwell wanted both a dissolution and a revision of the constitution. His ideas on the latter point were probably vague; but he seems to have desired a constitution 'with somewhat of monarchical power in it'. What he wanted most of all was to avoid a breach between Parliament and the Army; but, once more, he was forced to choose between the two. All his efforts to effect a compromise failed. In April, 1653, an attempt was made to pass an Act which would have perpetuated the rule of the Rump. It provided that elections were merely to be held to fill vacant seats. The Rump were to retain their seats and decide whether the newly elected were qualified to sit. When Cromwell heard of this scheme, he hesitated no longer, but forcibly dispersed Parliament. The Army had made the Rump the chief authority in the land; the Army likewise overthrew them.

The expulsion of the Rump left England without any governing authority that could claim even a pretence of legality. Cromwell became a virtual dictator, though he was careful to consult the Council of the Army on many matters. But a dictator in the modern sense he neither was nor desired to be. He had not been in any way chosen by the people; he had not been the leader of a party, as parties are understood nowadays. Thus Cromwell could not claim to be an emanation of the national will. He could, indeed, have made his leadership of the Army the basis of his power in theory as well as in fact. But Cromwell did not really believe in the rule of the sword, and never ceased to hope for a settlement acceptable to the bulk of the nation. He could not, however, allow a freely

<sup>1</sup> There was no thought of a democratic franchise among the M.P.s. Parliament's final proposals were for a uniform franchise with a fairly high property qualification.

chosen Parliament to act as it pleased. For he held that it would be sinful to permit a Stuart restoration. Cromwell, in fact, had a certain sympathy with the belief, then not uncommon, that the righteous should rule; a belief that could justify an otherwise unjustifiable government. Though a new régime could neither be grounded on law nor on popular consent, it could, said its advocates, be grounded on divine right, a divine right of a new kind. If God designated those who were to rule, to resist them would be sinful as well as treasonable. Cromwell never went so far as the more extreme advocates of this view, who soon came to look on him with horror.<sup>1</sup> But he now eagerly adopted a plan for a nominated assembly, composed of persons whose religious and political opinions were thought to make them acceptable to the Army. If this body were to show the strength that comes from wisdom and virtue, would not the divine origin of their authority be thereby demonstrated to an admiring nation? Accordingly, the Independent congregations were asked to submit the names of suitable persons. The list was revised by Cromwell and the Army Council, and some names were added. Cromwell then sent out writs, bidding the nominees assemble.

This body, which met in July, 1653, numbered 140 persons, of whom five had been nominated to represent Scotland, six to represent Ireland, and five to represent Wales. The rest had been summoned as representatives of English counties or groups of counties or of London—the only town to be represented. The distribution was so arranged as to favour those counties which paid the most taxes. To this assembly Cromwell nominally handed over the supreme power, till November 3, 1654, after which date they were to be succeeded by a similar assembly, chosen by themselves. Even the Council of State, created after the expulsion of the Rump, was subjected to their control. The nominees promptly assumed the title of a Parliament. By so doing they laid claim to an indeterminate, if not to an absolute, authority. Further, they elected a new Council of State, in which the civilians had a majority. In political sense, however, they were soon found wanting. They showed themselves eager for the abolition of

<sup>1</sup> These men believed that the fifth monarchy, the rule of Christ and His saints, was soon to be established.

the Court of Chancery, without realizing the difficulty of providing an adequate substitute. No less ill-advised was a proposal to codify the law.<sup>1</sup> It was, however, their attitude to ecclesiastical questions that brought about their fall. A resolution was carried for the abolition of patronage, and an attempt to abolish tithe was only barely defeated. Cromwell, with whom respect for the sanctity of property was strong, thereupon showed much irritation, but resisted the importunities of his friends to dissolve Parliament by force. These achieved their end, however, by a stratagem, to which Cromwell was not privy. Early one morning, when attendance was thin, a resolution was moved that the continuance of the Parliament would be contrary to the common weal, and that their powers be surrendered to Cromwell. No vote was taken; but the Speaker, followed by a number of members, sought out Cromwell and told him what had happened, nor did Cromwell refuse the burden laid upon him.<sup>2</sup>

A fresh experiment was now tried. A written constitution was drawn up and put into operation. The Instrument of Government was the product of consultations between Cromwell and the Army officers; it was not tendered for acceptance to the nation or to any constituent assembly. Though it limited Cromwell's powers, the limitations were as much in favour of the Army as of the people. Under this constitution there was to be a Lord Protector, whose office was to be elective. Cromwell was to be the first Protector. Legislative power was to be shared between him and Parliament, which was to meet every three years and to sit for at least five months. Special Parliaments, however, could be summoned on occasion and

<sup>1</sup> There was a very strong movement for law reform at this time. It would seem, however, that the reformers were not very practical. No lawyer sat in the nominated Parliament. Among the proposals there put forward and favourably received were those for the abolition of the Court of Exchequer and the transference of its jurisdiction to the Upper Bench—as the former King's Bench was now called—and for the abolition of the Palatine jurisdictions of Durham, Lancaster and Chester. It was also proposed to pay judges a higher salary and to do away with their right to fees. Another suggestion was to establish new county courts with both civil and criminal jurisdiction. See also *infra* pp. 40, 140, and 408.

<sup>2</sup> The date was December 12, 1653. Later the signature of a majority of members was secured for a deed of abdication. This Parliament is sometimes known as the 'Little Parliament' and sometimes as the 'Barebones Parliament.'

must be summoned in the event of a foreign war. Bills passed by Parliament were to be presented to the Protector for his assent; if he did not give it within twenty days, Parliament might turn bills into laws by resolution, provided they did not contain anything contrary to the Instrument. Whether Protector and Parliament could jointly modify the Instrument was left uncertain. But it is probable that the Instrument—or at least part of it—was intended to be a fundamental law. Over the executive Parliament had little power. That was vested in the Protector, assisted by the Council of State. The consent of a majority of the Council was required for almost every important act. This Council was to consist of not less than thirteen and not more than twenty-one persons, of whom fifteen were named in the Instrument. Power to appoint the other six before Parliament met was given to the Protector and Council. To fill future vacancies Parliament was to present six names, from which the Council was to select two for the choice of the Protector. Councillors could only be removed after conviction of misconduct by a special court. When the Protector died, the Council was to elect his successor. Protector and Council together had power to make Ordinances, before the first meeting of Parliament, which were to have the force of law until quashed by Parliament.

The provisions as to finance and the control of the forces were somewhat confused. There was to be a yearly revenue sufficient to provide for an Army of 30,000 men and for the Navy; besides the sums needed for these purposes, £200,000 was to be allotted to civil expenditure. The money was to come from Customs duties and other taxes agreed upon by the Protector and Council, nor could either the sum total be diminished or the method of raising it be altered, save by the consent of Protector and Parliament. This would seem to imply that the Protector and Council had a limited but independent power of taxation. On the other hand, it was declared that no taxes were to be raised without the consent of Parliament, save that the Protector and Council were to have power to tax for the above purposes, until Parliament met. The contradiction is real, and can only be explained by careless drafting. The obscurity, however, in the clauses relating to the forces may not have been wholly due to accident. The

Protector, said the constitution, was to 'dispose and order the Militia and forces both by land and sea . . . by consent of Parliament', when it was sitting. At other times the Protector was to 'dispose and order the Militia' with the approval of the Council of State; of the standing Army and of the Navy nothing was said in this connexion. Apparently, therefore, the Protector's powers were to be unrestricted.

The clauses dealing with religion are striking. There was to be an established Church. Tithes were to be abolished, as soon as a satisfactory substitute could be found. Toleration was granted to all Christians who dissented from the established Church, except Roman Catholics and Protestant episcopalians, provided they did not disturb the peace. The Agreement of the People, it will be remembered, had provided for complete toleration. Probably the framers of the Instrument were as much influenced by political as by religious considerations in making such considerable exceptions. Those excluded from the benefit of toleration would be almost all royalists, and it is a fair inference that they were excluded because they were royalists.<sup>1</sup>

The Instruments also provided for the legislative union of Scotland and Ireland with England. Each of the two former was to have thirty members in Parliament. This union was simply imposed on the three countries. But England's superior strength obviously made her the dominant partner, nor were any privileges or rights reserved to Scotland and Ireland. Even the distribution of the Scottish and Irish seats was left to be settled by the Protector and Council. On the other hand, the Instrument made detailed provision for the choice of the English representatives, who were to number 400. The seats were so distributed as to give the greater share to the counties. Many small boroughs lost their representatives. But seats were given to certain growing towns hitherto unrepresented. In the counties the qualification for the franchise was made the possession of property, real or personal, worth £200. In all constituencies Roman Catholics and supporters of the Irish rebellion were disfranchised for ever. Protestants who had

<sup>1</sup> Romanists were also distrusted, because they owed allegiance to the Pope, a foreign sovereign. In practice, however, Cromwell did not always enforce the laws against English Roman Catholics. His real love of toleration is shown by his subsequent permission to the Jews to settle openly in England.

fought for the King were forbidden to vote at the next four elections of triennial Parliaments.

The Instrument of Government is noteworthy, both in itself and as the first written constitution of modern times. It attempted, in a remarkable manner, to combine the old and the new. The position of the Protector resembled in many ways that of the King before 1640. As against Parliament, indeed, he was nominally stronger than the King had been; for Parliament's competence was defined and limited, albeit rather vaguely. Under the Instrument Parliament had only a limited control of the executive and, apparently, could not interfere with the considerable ordinary revenue. But in relation to the Council of State the Protector was weak. The King had neither been obliged to consult the Privy Council nor to follow its advice if consulted. The Protector needed the approval of a majority of the Council of State for most things. In this way the Instrument attempted to avoid conflicts between Parliament and the executive, without leaving the latter in the uncontrolled hands of a single person. The method was ingenious, but cannot be judged merely as a constitutional device. The Council of State was largely designed to represent the Army—fifteen members were named in the Instrument. But the Army had no legal right to assert itself as an independent political power. Cromwell, too, never forgot that he was a soldier, and knew full well that he would cease to be Protector if he ceased to be commander-in-chief. Hence the new constitution could not be considered solely on its merits. It still remained uncertain whether there was any effective power in the land save that of the sword. For this reason the Instrument was bound to prove a failure.

It is here convenient to mention certain Ordinances, issued by the Protector and Council before the meeting of Parliament. Early in 1654 the obligation to take the oath of fidelity to the Commonwealth was abolished, and it was made treason to publish a denial of the supremacy of the Protector and people in Parliament. A special court was created to try such offences. Another Ordinance dealt with the law; the procedure of the Court of Chancery was reformed, and its fees were reduced.<sup>1</sup>

<sup>1</sup> The Chancery Ordinance embodied many of the proposals contained in a bill which had been before the Little Parliament, when that assembly

There was also ecclesiastical legislation designed to secure the ejection of unworthy incumbents and the appointment of proper persons to future vacancies. Local commissions of 'Ejectors' were charged with the duty of removing 'scandalous and ignorant' ministers. Though patronage was not abolished, the nominees of patrons were required to secure the approval of a national commission of 'Triers'.<sup>1</sup> Of more importance than any of the above-mentioned Ordinances was that of April 12, 1654, for the union of England and Scotland. Henceforth Scotland 'was incorporated into' one commonwealth with England, and there was to be complete freedom of trade between the two countries.

The first Parliament of the Protectorate met on September 3, 1654. It soon became obvious that agreement between its members and the Protector would not be easy. Cromwell, in his speech at the opening, asked them to work for the achievement of national unity and invited them to take the Instrument into consideration. He doubtless hoped many would accept it as it stood; but he was disappointed. The members promptly exercised the right of free speech and discussed constitutional matters with much boldness.<sup>2</sup> Signs were shown of a disposition to abridge both the Protector's military powers and the degree of toleration. Cromwell then attempted to bring about a compromise. He informed Parliament that he would favourably consider any constitutional proposals, provided they did not affect four 'fundamental points'. Government must be by a single person and Parliament; control of the Militia must be divided between Protector and Parliament; Parliament must not have power to make itself perpetual; toleration must be maintained. Cromwell further endeavoured to secure his aim by requiring all M.P.s to sign a 'Recognition'

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came to an untimely end. The Ordinance was not a success. Indeed, two of the three commissioners to whom the Great Seal was committed refused to obey it and were dismissed. In 1657 an Act limited the duration of the Ordinance to that of the then Parliament.

<sup>1</sup> Cromwell wished Presbyterians, Baptists, and Independents all to be included in the national Church. But the use of the Prayer Book was still forbidden.

<sup>2</sup> Members were at first afraid they might be brought to trial for speeches in the House, under a recent Treason Ordinance. However, the Councillors in the House assured them the Ordinance did not affect the privilege of free speech.

pledging them to maintain government by a single person and Parliament, as settled in the Instrument. Those who refused were excluded from the House. The majority complied, and the constitutional debates were continued.<sup>1</sup> Eventually, the House agreed on the following modifications of the Instrument. Vacancies in the office of Protector were to be filled by Parliament, if sitting; otherwise, by the Council. Councillors of State were to be nominated by the Protector and approved by Parliament. No person was to remain a Councillor for more than forty days after the meeting of Parliament, unless approved by that Parliament. The Protector was to be granted a revenue of £1,300,000, till the end of 1659. War was only to be declared with the consent of Parliament, during its sessions; at other times, only with that of the Council. The numbers of the standing Army were to be determined by Protector and Parliament. After Cromwell's death, Parliament was to dispose of the Army. A future agreement between Parliament and Protector was to regulate the Militia. Toleration was to be maintained, except for Popery, prelacy, blasphemy, atheism, and certain damnable heresies, to be defined by Protector and Parliament. Proposals such as these, involving the subjection of the executive to Parliamentary control, could not be acceptable either to Cromwell or to the Army. Cromwell put an end to the controversy by dissolving Parliament, after it had sat for five months—lunar, not calendar, months.<sup>2</sup>

The dissolution of Parliament did not free Cromwell from difficulties. Some of the judges showed a tendency to doubt the legal validity of the Instrument, and were, in consequence, dismissed. Discontent was also rife in the country, and was dealt with by a further arbitrary measure. A special Militia was created and placed under the command of eleven Major-Generals, each of whom was entrusted with the preservation of order and the enforcement of the laws against immorality in a particular district. To defray the cost of this Militia a

<sup>1</sup> The House eventually ordered members to sign the 'Recognition'. They also resolved that subscription did not debar them from making any changes in the Instrument, provided government by a single person and Parliament was left untouched.

<sup>2</sup> The soldiers were paid by the lunar month. This fact gives a certain specious justification to Cromwell's action.



special tax was imposed on royalists. The old organs of local government were not abolished, but were placed under the control of the Major-Generals, whose powers were extremely large. Thus all local government was placed under rigid central control; for the Major-Generals took their orders from Cromwell. Had the new institution been permanent, the results would have been of prodigious importance; but this was not to be. Parliament met again, in 1656, and showed such hostility to the Major-Generals that Cromwell found it prudent to abolish them.

The reasons for the summoning of the Protector's second Parliament were mainly financial. In the middle of 1656 the Government was faced with a large deficit. The Protector was not unwilling to levy taxes illegally; but, in the face of the strong opposition to this course both in the Council and the Army, he dropped the plan and decided to call a Parliament.<sup>1</sup> Steps were taken, however, to ensure that it did not contain persons objectionable to the Government; for no member was to take his seat without the approval of the Council. This action was not, perhaps, against the letter of the law; for the Instrument could be so construed as to allow it; but it was certainly a restriction of the electors' right of choice. Parliament, it may be added, gave it retrospective approval. That assembly, however, proceeded to attempt a drastic change in the constitution. They thought the best way of arriving at a permanent settlement was to place the crown on Cromwell's head, provided he accepted certain conditions. This would, it was held, have several advantages. The nation, being accustomed to monarchy, would welcome its revival, even though the old dynasty were discarded. Again, the powers of a king, where the new constitution was silent, would be determined by the old law. Thus there would be less occasion than there had been during the last Parliament for disputes between a Parliament and the chief of the state. Moreover, those who had adhered to Cromwell as King *de facto* would be protected by the treason statute of

<sup>1</sup> Cromwell and the Council might and did claim authority under the Instrument to levy taxes for the maintenance of an Army of 30,000 and of the Navy. But Cromwell had 40,000 soldiers under arms. He had also, be it said, broken the law by not summoning a Parliament, on the outbreak of war with Spain, in the previous year.

Henry VII, in the event of a Stuart restoration. This last consideration seems to have been of very great weight.<sup>1</sup> Such were the reasons which induced Parliament to offer Cromwell the crown, and the Protector very nearly found them convincing. None the less, he twice refused the crown. He was far from averse to becoming King, and Parliament was urgent in its importunities. But opposition to a revival of the monarchy was strong in the Army, and Cromwell dared not go against the feeling of the soldiers. Once more in a crisis the will of the Army prevailed. Cromwell persuaded Parliament to be content with a compromise. He accepted the new constitution without the title of King.<sup>2</sup>

The chief points in this constitution were as follows. The Protector was given power to nominate his successor.<sup>3</sup> A second chamber was to be created, composed of not more than seventy or less than forty persons nominated for life by the Protector. To this House was given power to act as a final court of appeal in civil cases. The House of Commons was given sole power to try election cases and exclude persons elected. Parliament was to be summoned once at least in every three years. The revenue was fixed at £1,300,000, of which £1,000,000 was assigned to the upkeep of the forces. Taxation, without the consent of Parliament, was declared illegal. The holders of the great offices of state were to be approved by Parliament. No further persons were to be admitted to the Protector's Council, now called Privy Council, without the consent of that Council and the subsequent approval of Parliament. Councillors could only be removed with the consent of Parliament. Control of the standing forces was vested in the Protector and Parliament—when sitting. When Parliament was not sitting, the Protector was to act with the advice of the Council. There was to be an

<sup>1</sup> The interpretation then placed upon the Act of Henry VII is of doubtful validity. In the first place, the Act could have had no reference to offences committed against Charles I and Charles II, before the assumption of the Crown by Cromwell. In the second place, the Act contains the proviso 'that no person or persons shall take any benefit or advantage by this Act, who shall hereafter decline from his or her allegiance.'

<sup>2</sup> This constitution is embodied in two documents, the Humble Petition and Advice and the Additional Humble Petition and Advice. Cromwell accepted them in May and June, 1657.

<sup>3</sup> No such power was given to Cromwell's successor.

established Church; but toleration was granted to all, save Papists, Protestant episcopalians, Unitarians, and blasphemers. A confession of faith, to be agreed upon by Protector and Parliament, was to be published and recommended to the nation, and none was to be permitted to revile it.

The omissions in the new constitution were so numerous and important as to make future disputes inevitable. The Protector's powers were not properly defined. It was, for instance, uncertain whether he had a veto.<sup>1</sup> Again, though the judicial functions of the second chamber were specified, its legislative powers were left undetermined. Nor was any provision made for its recruitment after Cromwell's death. Of more immediate importance was the failure to regulate the future composition of the Lower House. It was merely provided that the number of M.P.s for England, Scotland, and Ireland and the distribution of seats were to be settled by the then Parliament. As it happened, no such settlement was made.<sup>2</sup> On the other hand, Parliament did proceed to deal with the thorny question of the validity of recent legislation. They resolved not to confirm the Ordinances and Acts of the Long Parliament, on the ground that they were undisputably valid and that, therefore, their validity would only be weakened by confirmation. The Acts of the Nominated Parliament and Cromwell's Ordinances Parliament regarded as needing confirmation, if they were to remain valid. Several, but not all of them, were accordingly confirmed by an Act.

When Parliament began its second session, in January, 1658, the defects of the constitution began to reveal themselves clearly. In particular, the position of the second chamber, which was now in being, was the subject of much controversy. The House of Commons, it must be added, now included those members who had been excluded from the first session by the Council, and they were particularly hostile to a chamber composed of Cromwell's nominees, many of them soldiers.<sup>3</sup> Cromwell intended the Upper House to be

<sup>1</sup> Cromwell assumed that he had and, on one occasion, used it.

<sup>2</sup> Parliament did confirm Cromwell's Ordinance for the Union of England and Scotland, but it did not confirm the Ordinance settling the distribution of seats. With regard to England and Ireland nothing was done.

<sup>3</sup> Under the new constitution power to exclude rested with the Commons alone. They admitted all who took an oath of fidelity to the Protector,

a revising chamber, which would likewise act as a barrier to hasty legislation and hold the balance between the Protector and the Commons. He wished it, in short, to have the title and the powers of a House of Lords. Those who desired that the second chamber should be weak, therefore wished it to be called the 'other House'—the term used in the constitution—not the 'House of Lords'. The debates on this subject in the Commons were prolonged and bitter. Cromwell's opponents, however, did not confine themselves to speeches. Some of them attempted to stir up discontent among the soldiers. To the Protector this was intolerable. On February 4 he brought Parliament's activities to an abrupt close by a dissolution. During the seven months of life that remained to him, Cromwell summoned no Parliament; but it would seem that, shortly before his death, he was entertaining the idea of calling a Parliament and accepting the crown which they would undoubtedly offer him. For it had become quite clear that Cromwell, while he remained Protector, could neither rule without a Parliament nor work with one. On September 3, 1658, however, he died, and his elder son Richard, whom he had named as his successor on his death-bed, was left to tackle the problem.

Richard Cromwell was able to succeed his father peacefully; but his troubles soon began. He and his friends wished for the continuance of the constitution of 1657; but others, and in particular a section of the Army, wanted to limit the Protector's powers. They demanded, among other things, that a soldier should have command of the troops, and that no officer be dismissed save by sentence of a court-martial. The Army would then have been largely independent of the civil power. Richard naturally refused to yield, and for the moment he had his way. A Parliament was promptly summoned, however, since he hoped for their support. As regards England, a return was made at the elections to the old county franchise and the old distribution of seats. But Scotland and Ireland were represented as they had been in Oliver's last Parliament.<sup>1</sup>

<sup>1</sup> When Parliament met, the right of the members for Scottish and Irish constituencies to sit in the Commons was debated, but the House decided to let them remain.

Parliament met in January, 1659, and the new House of Commons showed itself friendly to the Protector and to the second chamber, but hostile to the Army. The 'other House' was recognized as a 'House of Parliament' by the Commons, who even showed themselves willing to see such peers as were loyal to the new régime admitted to it. With the unrest in the Army they attempted to deal by resolving that no council of officers was to be held while Parliament was sitting, unless ordered by the Protector and both Houses. They also required every officer to pledge himself not to disturb the sessions of Parliament. But the Army could not thus be cowed. The discontented officers continued their meetings, and the men supported them. Richard found himself unable to rely on the troops in England, nor, in any case, did he wish to start a civil war. On April 22 he yielded to a threat of force and dissolved Parliament. With the dissolution his Protectorate virtually came to an end, though it endured in name for a brief time longer. In the following month he quietly returned to private life.

Richard's fall was followed not by an avowed military dictatorship, but by the return of the Rump. There were still a number of persons in the Army and outside it who regarded the Long Parliament as the only legitimate authority. So that body, from which those excluded in 1648 were still shut out, nominally became the chief power in the land. But friction soon developed between the Rump and the Army. There was much talk about a new constitution; but the real question at issue was whether the Army was to be subject to Parliamentary control. Parliament eventually enacted that all legislation—with a few exceptions—since their expulsion by Oliver Cromwell was null and void.<sup>1</sup> Thereby all the military and civilian supporters of Cromwell's government were left exposed to prosecution. The provocation was deliberate; for the officers had presented a petition to the Rump, in which they requested the passing of an Act of Oblivion for all offences committed since the expulsion of the Long Parliament and the confirmation of all subsequent

<sup>1</sup> This, of course, involved the dissolution of the union between England and Scotland. To such a union, however, Parliament were favourable, and a bill to bring it about was before them, when the Army put a stop to their sittings.

Acts and Ordinances. But Parliament felt that compliance would have been a kind of admission that their expulsion had been legal. The answer of the soldiers to Parliament's defiance was to prevent them sitting by a show of force, on October 13, 1659.

Government was now placed in the hands of a Committee of Safety, consisting of both soldiers and civilians. In a committee of this body proposals for a new constitution were discussed. The plan which eventually found favour provided for a Parliament consisting of a Lower House and a Senate, separation of executive and legislative powers, and a body of 'Conservators', to safeguard certain fundamentals; there was to be no King, no 'single person', and no House of Peers.<sup>1</sup> Before anything could be done to put this plan into operation the intervention of a new force gave an entirely different turn to events. Monk, the commander-in-chief of the troops in Scotland, proclaimed himself the champion of Parliament. Since the troops under other generals refused to fight him, the demand for the return of the Rump could not be denied, and it resumed its sittings at the end of December.

The return of the Rump was not so much a victory for the civil power as a triumph for Monk. Future developments were determined, not by the wishes of the Rump, but by those of Monk, who now marched to London. At his desire those members who had been excluded in 1648 were readmitted in February, 1660. Their return gave the Presbyterians a majority, and the Presbyterians were now, for the most part, royalists. At first, indeed, Parliament showed a desire to legislate on religious matters; but they soon proceeded, again at Monk's wish, to pass an Act for their own dissolution and the holding of a general election—an election, however, for England alone. Scotland and Ireland were not to be represented in the new Parliament. On the other hand, the Act contained a clause declaring that the House of Lords was a part of Parliament and that those peers who had not adhered to the King in the Civil War had a right to sit therein. The elections which followed resulted, as it had been plain they would, in the return of a majority favourable to restoration

<sup>1</sup> Numerous other schemes were advocated at the time. But their practical importance was small. Hence I forbear to discuss them.

of the monarchy.<sup>1</sup> When the new Parliament met there was communicated to them a Declaration, issued by Charles II, inviting his subjects to restore him. Charles, in this document, professed his readiness to pardon all save those who should be excepted by Parliament, to assent to an Act granting toleration to peaceful dissenters from the established Church, to have disputed titles to land determined in Parliament, and to pay the soldiers their arrears. The 'Declaration of Breda' was welcomed by both Houses. On May 1 the Lords resolved that 'according to the ancient and fundamental laws of this Kingdom the government is and ought to be by King, Lords, and Commons'. With this resolution the Lower House forthwith concurred. A few days later Charles was proclaimed by order of both Houses, and on May 25 he landed in England.

<sup>1</sup> It should be said that the government during this period was entrusted to a Council of State, composed of Monk's partisans. Monk himself had been made commander-in-chief of the land and sea forces.





PART II

THE PERIOD OF THE RESTORATION,  
1660-88



# I

## INTRODUCTION

IT IS not easy to discover what were the direct results of the struggles during the years 1642-60. The great constitutional statutes of 1641-42 remained in force, and their importance can hardly be over-estimated. Those that had made unparliamentary taxation all but impossible<sup>1</sup> and had stripped the prerogative courts of the best part of their jurisdiction were not to be repealed. Hence Parliament retained exclusive control of the purse, and could use this weapon as a means to extend its power. The development, too, of a great system of administrative law had been arrested, and was not to be resumed until the latter part of the nineteenth century, and then in very different circumstances. These were great gains for Parliament. Compared to the retention of these, it was of minor importance that in 1661 some of the ecclesiastical legislation of 1641-42 was repealed, though the repeal did not go so far as to allow the revival of the Court of High Commission. But all this had been achieved before the outbreak of the Civil War; that war had resulted in the death of Charles I, which had been followed first by the rule of an oligarchy, and then by a military dictatorship; the death of the dictator had precipitated a crisis, which had ended in the Restoration. What had been the effect of these events on the constitution? After the Restoration all Acts and Ordinances which depended merely on the authority of Parliament alone or of the Protector and Council were regarded as having been null and void from the first. As far as the constitution was concerned, one is tempted to say that the Civil War might never have been fought for all the difference it made.

<sup>1</sup> I say 'all but impossible' because James II was able to collect certain taxes without statutory authority during the interval between the death of Charles II and the meeting of his Parliament. But the circumstances were very exceptional. See *infra*, p. 98.

But such a statement would be only partly true, and therefore positively misleading. For account must be taken of feelings, tendencies, and conventions as well as of laws. Nor is there any doubt that the former had been profoundly affected by the events of the time of troubles.<sup>1</sup>

The Restoration was thought by contemporaries to be a simple return to the past. Men believed they could return to the good old constitution, as amended by the reforms of 1641. The events of the intervening years were to be, not forgotten, but remembered only as an awful example of error and delusion. But no return to the past is ever possible. The events since the outbreak of the Civil War could not be dismissed as an unpleasant interlude in English history. Nor could the constitutional problems left unsolved at the end of 1641 be permanently ignored after 1660. For a while, however, the illusion of a return in all essentials to the old constitution continued to obtain. Nor is this strange. The troublous times of 1642-60 had aroused in the majority of Englishmen a great fear of civil strife and a great hatred of a dictatorship based on the Army. To them the Restoration meant the return of the rule of law. This belief was not wholly true; but it was far from being wholly false. The Restoration, whatever else it may have been, was certainly a triumph of law. We need not wonder, then, that the old constitution was identified with the rule of law. Hence for some years there was a general tendency to shelve awkward questions, and Parliament showed no eagerness to determine the precise bounds of the prerogative.

The Restoration was just as much a restoration of Parliament as of the monarchy. Charles II was called back by a Parliament, that free Parliament which England had so long desired. It was the most natural thing in the world that King

<sup>1</sup> It is impossible to read the political literature of the Restoration period without feeling that the year 1660 marks a turning-point. The climate of opinion then underwent a great and sudden change. The atmosphere of political discussion became less theological, though it remained far more so than it was to become in the eighteenth century. It is much to be regretted that no thorough study of the political literature of the Restoration period—including the sermons—has yet been published. Such a study would certainly make clear much that is, as yet, obscure. For in spite of the Licensing Acts much was written and published concerning the questions that interested contemporaries.

and Parliament should work harmoniously together for a time, more especially as the election of 1661 resulted in the return of an ultra-royalist House of Commons.<sup>1</sup> In England there were many who did not distinguish between loyalty to the Crown and loyalty to Parliament. It was from the co-operation of the two that they expected stability and good government. To them a serious conflict between a good King and a good Parliament was unthinkable. Hence the King could not take advantage of the royalist reaction to reduce Parliament to a cipher. Nor did many years elapse before the Commons showed a tendency to criticize both policy and administration. By then they had at once proved their loyalty, and gained confidence and experience through carrying out a great legislative programme, most of which was acceptable to the King. Opposition from such an assembly was in a way more formidable than opposition from a newly elected House of Commons. Such was the situation that eventually confronted Charles II.

The political atmosphere, however, had changed greatly. Most of the men who were prominent in the Restoration period showed a certain suppleness and readiness for compromise. Charles II himself could make great concessions on occasion, and often recognized the general hatred of extreme courses. In the House of Commons, it is true, there were always many who were at once strong-minded and incapable of understanding the real issues. They were thus both easy to mislead and difficult to control. Hence several conflicts in this period ended in a makeshift solution, and for these reasons their significance is often hard to estimate.

One thing, indeed, is obvious: the great part played by fear in the shaping of events; fear of civil war and anarchy was long powerful. That fear led naturally to hatred of the Dissenters. The men who had been violent in opposing Charles I were, many of them, unwilling to adhere to the established Church after the Act of Uniformity. For all their protestations of loyalty, the Dissenters were still regarded as potential rebels. The established Church was all the more dear to those who looked upon her not only as excellent in

<sup>1</sup> This Parliament—the Cavalier Parliament—was not dissolved until January, 1679.

doctrine and discipline, but also as a bulwark against sedition, privy conspiracy, and rebellion. Between the Church and the Dissenters there was a great gulf, political as well as religious. For the bulk of the clergy taught the doctrine of divine right, to which they were all the more attached because the Church seemed safe only under a monarchy. While the King was its loyal member and head, the alliance of the Church with the monarchy was irresistible. But nothing could alter the fact that the Church had, in a sense, become an independent political force. For the Church was always ready to put pressure on the King, when it felt its vital interests were threatened. Whatever might be said about the divine right of Kings, the Church never forgot its own mission, which was also believed to be divine, and the Church was the strongest organization in the country. The Church, moreover, hated Roman Catholics even more than it hated the Dissenters. Anglican propagandists, indeed, were never tired of proclaiming that the principles of the Presbyterians were like those of the Jesuits. Than this there could be no greater reproach; to combat Popery and dissent was a cardinal duty of all Anglicans. What, then, would they do if their King was suspected of favouring Popery or was even himself a Papist? At the time of the Restoration such a contingency appeared impossible. The cause of the established Church seemed to be indissolubly united with that of monarchy. Charles I, Charles the Martyr, was thought by most good Anglicans to have sacrificed his life to loyalty to that Church. Hence the Church of England always stood by Charles II when his throne appeared to be in danger, and was at first ready to stand by James II.<sup>1</sup> Not until James became an active enemy of the Church did the loyalty of the bulk of the clergy begin to waver.

These considerations may help to explain the somewhat confused and complex constitutional history of the period. It is not really strange that the Convention Parliament omitted to take what might have seemed a splendid opportunity to

<sup>1</sup> The Bishop of Ely included a significant hint in the sermon he preached at James's coronation. He alluded to the Emperor Constantius Chlorus, who, though not a Christian, had shown respect for faithful Christians and scorn for apostates. The implication was that James had better not try to convert Englishmen to Romanism.

bring about a new ecclesiastical settlement and to find a solution for those other constitutional problems which had so long vexed the nation. They were too divided and above all too uncertain of their real wishes. Yet though the general reluctance to raise awkward questions might temporarily conceal, it could not permanently alter, the fact that the good old constitution, to which a nominal return had been so joyously made, was full of obscurities. These obscurities had to be dissipated and working solutions found for the outstanding problems if a radical remodelling of the constitution was to be avoided. But this, not unnaturally, was far from plain to contemporaries. Perhaps, indeed, they were wise in their own generation, and their refusal to face facts may have averted political chaos; for it is doubtful whether any need was then so pressing as the need for a period of tranquillity. But an acute crisis was bound to develop sooner or later. The curious thing was that ultimately innovation was to be the product of true conservatism. It was because the majority of Englishmen desired to save the substance of the old constitution that the Revolution occurred. What then happened was essentially an adoption—partial and tentative at first, no doubt—of a new set of conventions. Because these conventions worked and developed, the Revolution, though brought about by force and attended with many gross illegalities, yet saved a great part of the old constitution.

But it was not to be expected that those who sat in the Convention Parliament should realize that in the long run the country would have to choose between absolute monarchy, a complete change of constitution, and something like the Revolution settlement. For the reasons given above they were content, and probably rightly content, to do as little as possible. One thing, indeed, they did that which was of the first importance: they settled the question of the revenue. But it is worth noting that the legislation on that matter merely gave effect in a new form to an old conception. The other questions that required to be settled forthwith were settled by a new Parliament, the Cavalier Parliament or Long Parliament of Charles II. The proceedings of that body, which are in a sense more important than those of the Long Parliament of Charles I, were highly curious. The legislation of the

Cavalier Parliament during the first years of its existence was substantially agreeable to the wishes of the King, who himself promoted a good deal of it. But it would be a mistake to regard that Parliament as a subservient body at any time of its existence. Even when it did what the King wanted, Parliament was not a mere instrument in his hands, because Parliament, wanting the same things as the King, was acting of its own volition. In a word, the wishes of the King and of Parliament were for the time being largely concurrent.

When looked at more closely, the early legislation of the Cavalier Parliament reveals certain tendencies of great moment for the future. It did, indeed, decide certain great controversies in favour of the Crown. It declared that the King had sole and unlimited command of the forces; it restored the Bishops to their seats in the Upper House; it passed the Act of Uniformity, which settled various ecclesiastical questions in the manner then desired alike by the Bishops and by the King; it repealed the Triennial Act of 1641.<sup>1</sup> But in doing these things Parliament was also asserting its own authority and teaching the nation to look on it as an arbiter in most, if not in all, great matters. Moreover, the new Prayer Book was accepted by Parliament, because Parliament deliberately approved of it, not merely because the Bishops had revised it, and the King had expressed his approbation of the revised Book. Thus the ecclesiastical settlement was the expression of Parliament's policy, whatever else it may have been as well. In subsequent ages the Bishops and the Cavalier Parliament have often been taxed with gross adulation of the monarchy because one of the new prayers in the book of 1662 described the King as 'our most religious and gracious King', not a very appropriate description of Charles II. But it was not without significance that the prayer in question was a prayer for the High Court of Parliament. Even when it regarded the monarchy with the greatest reverence, Parliament was not prepared unduly to minimize its own functions and value.

<sup>1</sup> There is a distinction between the statements about the command of the forces in the preamble to the Militia Act of 1661 and the ecclesiastical legislation of 1661 and 1662. The preamble to the Militia Act was in substance, though not in form, declaratory of the law. Parliament is here acting as a court, so to speak. The ecclesiastical Acts were positive alterations of the law.



The very repeal of the Triennial Act of 1641 was accompanied by the requirement that Parliament should meet every three years; though the new law did not compel the summoning of Parliament, if the King did not call it together, yet an obligation was there laid upon the King, which he was expected not to disregard. Nor was the legislation regarding the forces, in spite of appearances to the contrary, wholly to the advantage of the Crown. The King was declared to have the sole command of all the forces, and thus Parliament, in the very act of giving Charles II what Charles I had always claimed, asserted its own authority.<sup>1</sup>

The events of subsequent years showed yet more clearly how many doubtful points there were in the constitution. Parliament continued to meddle with several matters that were not clearly within its competence. Just because the functions of Parliament were not plainly delimited it could make experiments in new spheres. Its right to intervene might be questioned, and, because it was questionable, its attempts at intervention might be unsuccessful. But the only way to prevent such attempts would have been to define its powers. Definition, however, would have been impossible except by a written constitution, which would also have defined the powers of the Crown. But there was little desire for a written constitution, since its establishment would have been equivalent to a revolution. So things were allowed to remain uncertain in order that the semi-fiction of a return to the old constitution might be retained. Hence Parliament, and in particular the House of Commons, continued to fight for the triumph of its own policy on certain matters and of its own interpretation of disputed constitutional points. The King by a number of ill-considered concessions did a good deal to encourage it to concern itself with foreign policy, and his weakness in this sphere cannot but have stimulated it to oppose him in questions of ecclesiastical policy on which the views of Charles II and the Cavalier Parliament became more and more divergent.<sup>2</sup> Where the Church was concerned the

<sup>1</sup> See *infra*, pp. 153-4. Parliament was then, in a sense, acting as a court with competence to decide constitutional disputes.

<sup>2</sup> For the sake of convenience, and in accordance with a common practice, I hereinafter often, though not always, use the term 'Parliament' to designate the two Houses alone. In law, of course, the King is part of parliament.

bulk of the clergy and the majority of those who sat in Parliament were for some time at one in their views, and since only at his peril could the King break the alliance between the Church and the throne, he could not veto the bills passed by the Houses. The Commons, again, were always bitterly opposed, not to the suspending and dispensing powers as such, but to their exercise with reference to penal statutes in matters ecclesiastical, and, while Charles II was on the throne, they secured more than one triumph. Most notable was their success in obtaining the cancellation of his Declaration of Indulgence in 1673. The meaning of that success was twofold. On the one hand, Parliament—for the Lords were here in substantial agreement with the Commons—then again virtually claimed to be a court for the determination of disputed constitutional points, and the King by cancelling the Declaration admitted, as it were, that in this case the claim had some force. Granted that no law was then made to declare the suspending power in any way illegal, yet Parliament's triumph, though to that extent imperfect, was none the less a very real one. On the other hand, the cancellation of the Declaration also meant that the King could only carry out his ecclesiastical policy in, and with the concurrence of, Parliament. His attempt to do in virtue of the prerogative what the prerogative may well have empowered him to do had failed.

Parliament, indeed, and in particular the House of Commons, often strove to interfere with the exercise of the prerogative. Yet, strictly speaking, that exercise was a matter for the King's discretion. Charles was perfectly entitled to resent and to oppose such attempts. But though he sometimes opposed them, and successfully opposed them, at other times he yielded. In the second decade of the reign, therefore, a strange situation arose. Parliament could so far control the exercise of the prerogative as to prevent the King from doing certain things, but it was far less successful in its efforts to compel him to use the prerogative as it pleased. It could not really control his choice of advisers, and the only way in which it could force him to dismiss a Minister was by having improper recourse to the clumsy weapon of impeachment.<sup>1</sup>

<sup>1</sup> As far as I know, the King could not be absolutely compelled to dismiss an impeached Minister, but his retention in office was a practical impossibility. Thus Charles II had to part with Danby in 1679.

It was even more difficult for the Commons to impose a foreign policy upon the King. Thus they strove in vain to make Charles declare war on France in 1677-78. Their failure in this respect was principally due to the fact that Charles possessed a large revenue for life. Had he been dependent on the Commons for annual supplies, they could, and doubtless would, have made use of their control of the purse to compel compliance with their wishes. However improper, constitutionally speaking, the employment of that control as a means of influencing the use of the prerogative may have been, there was nothing to prevent the Commons from so using it.

By the year 1678, therefore, relations between Charles II and the Cavalier Parliament had become very strained. It had been inevitable that questions should arise on which King and Parliament would tend to take different views. But in other circumstances a solution of the disputes more or less satisfactory to both parties might have been found. It was the distrust felt for the King that more than anything else prevented the evolution of a new set of constitutional conventions.<sup>1</sup> Granted that the Commons were sometimes unreasonable and lacking in perspicacity, yet had Charles been of a different character he might have worked fairly harmoniously with Parliament throughout his reign. But Charles, for all his undoubted ability, never seems to have realized that relations between the King and his Parliament must take on a new character if disaster was to be averted. He showed great skill in getting the better of the Commons on more than one occasion; but satisfied with occasional successes and ready to make occasional concessions, he never tried to carry out a really new policy. Nor can it be said that he was seriously and continuously endeavouring to make himself an absolute ruler. In a word, he was in this respect a clever tactician, but a poor strategist.

In these circumstances the country was thrown into a panic by discovery of the pretended Popish Plot, and for a space it seemed that England was once more to be plunged into civil

<sup>1</sup> Yet one important convention was apparently beginning to develop. Charles's very sparing use of the veto is significant. It is true that he had other methods of killing distasteful bills. See *infra*, p. 86.

war. Not only did lying tales about a great plot to murder Protestants in thousands find ready credence, but it was widely believed that James, Duke of York, the King's brother and heir presumptive, was implicated in treasonable designs. Englishmen, it must be remembered, were accustomed to hearing of plots; they had already been alarmed more than once by stories of real and imaginary Dissenting plots, stories that had rallied the nation to the Crown. Granted the general hatred of Roman Catholicism and the widespread distrust of the King, it is not really strange that Oates was able to raise a storm that shook the throne. For a time it seemed that the nation's fears could only be allayed by the exclusion of the heir presumptive from the succession. But there was no likelihood that this solution would be peacefully adopted. For fear of Romanism was counter-balanced in many by another fear—fear of anarchy. To exclude the proper heir from the succession was contrary to what appeared to be a fundamental law. It was not certain that it could be done even by Parliament. Exclusion, then, meant civil war, and in that war all who believed in law and order as opposed to revolution and anarchy would have rallied to James. Memories of the war between Charles I and Parliament were still painfully vivid; horror of a military dictatorship such as had resulted from that war was deeply implanted in many. Charles II saw that the cause of hereditary monarchy was not desperate, and made a great stand to save his brother's rights. He manoeuvred with superb skill and, careful to keep within the law himself, posed as a conservative. The House of Commons in the three successive Parliaments which considered the Exclusion question played into his hands by favouring extreme courses and, on occasion, by showing scant respect for the letter of the law.<sup>1</sup> The bulk of the clergy, with all their enormous influence, supported the King. Finally, when the Exclusionists had alienated a good many of their former supporters, Charles abruptly dissolved his last Parliament and confronted them with the choice between open rebellion and submission to the law. His action proved well-timed; there was no rebellion, the partisans of the King were jubilant, and for the rest of his reign Charles was able

<sup>1</sup> *E.g. see infra*, p. 92.

to rule without a Parliament. When he died, he was peacefully succeeded by his brother.

During the last four years of his reign, Charles's power appeared to have reached its apogee. There was no Parliament to criticize his policy or harass his Ministers. To the nation he represented himself, though not with perfect truth, as the champion of conservatism and stability; he professed to abide by the law, resolute to maintain the prerogative, but not to extend it. This correct attitude could not but contrast favourably with that adopted by the House of Commons during the years 1679-81, when it had, in the opinion of many, unwarrantably tried to go beyond its due bounds. Parliament, in fact, had somewhat discredited itself during those years. Hitherto, when the Commons had been in conflict with the King, they had been able as a rule to represent themselves, plausibly if not correctly, as the opponents of unconstitutional innovations. On this occasion it was they themselves who, beyond all doubt, had attempted to overthrow an old-established principle. Hence Charles II had an advantage, which he exploited to the full. He was even strong enough to disregard the law which required the calling of a Parliament every three years. Really, however, Charles's apparent triumph was but a splendid cloak for a great failure. The King who had saved hereditary right owing to the support of conservatives could not destroy, though he might temporarily dispense with, Parliament, an institution almost as much venerated, and deemed to be almost as old, as the monarchy. Sooner or later Parliament must meet again, and sooner or later the old problems, which Charles had not solved, must come to the front once more.

Nor can it be said that Charles had ultimately strengthened the Crown and weakened Parliament by his policy—vigorously pursued during his last years—of remodelling the corporations. All that he had achieved was the transference of power in certain constituencies from one group of men to another. This might well result once or twice in the return of a House of Commons with a majority of a particular political complexion, but it was certain that any possible House of Commons would have views of its own. It was not therefore of great moment that for a time there might be a King and a House of Commons

with concurrent views. Only if the King could have virtually nominated a majority at every election could he have permanently made sure of a subservient Parliament—and even that is not certain. Among those classes from which M.P.s and voters were drawn there was too widespread an attachment to political, legal, and religious principles—though not necessarily the same principles—for any changes in the corporations to have resulted in the permanent insignificance of the House of Commons.<sup>1</sup> Thus Charles's policy, though doubtless a shrewd tactical move, could not secure decisive results in the long run. Moreover, the attack on the corporations did something to weaken the belief that the monarchy was a bulwark of the rule of law. Though the Crown technically had a good case against the corporations, yet there was a certain feeling that it was taking an unfair advantage of technicalities. That feeling was at first far from universal. Political passions were powerful, and those who saw their cause strengthened by the granting of new charters to the corporations were not too prone to criticize the King's conduct. But when James attempted to employ the same means in order to tamper with the corporations a second time, nearly everybody came to look upon such proceedings with reprobation.

Charles II had not only failed to arrive at a method of working with Parliament, but his failure had left him very weak. Though during his last years he was able to manage without extraordinary Parliamentary grants, yet his income, even though supplemented by French subsidies, was barely adequate. Lack of funds forced him to evacuate Tangier. Lack of funds would have prevented him from carrying on a war for any length of time, unless he could have obtained additional supplies from a Parliament.

James II inherited together with the Crown the problem that Charles II had done so little to solve, and James was emphatically not the man to find the solution. The beginnings of his reign seemed auspicious. For the great loyalist reaction was still vigorous. James, too, on his accession gave and published an assurance that he would respect the rights and position of the Church of England. Men thought, therefore,

<sup>1</sup> Cromwell, it is worth remembering, had not found even the Nominated Parliament easy to handle.

that loyalty to James was the natural corollary of loyalty to the rule of law and of love of order. The Parliament, which need of supplies forced him to call, showed themselves anxious to support the throne, and so far from attacking his breach of the law against unparliamentary taxation, retrospectively legalized it.<sup>1</sup> Nay more, they showed themselves far more liberal to James than they had to Charles, and granted him a large, though temporary, increase of revenue. Being of this mind, they naturally regarded Monmouth's rebellion as a monstrous crime, and its speedy suppression was greeted with general rejoicing. James, however, soon found that the loyalty of Parliament and the nation was not a blind loyalty to himself, but loyalty to the monarchy as an institution upon which depended other things that Englishmen held dear—their system of law, their political institutions, and above all their religion.

Towards the end of 1685 James prorogued Parliament, because he wished to put a stop to the attacks of the House of Commons upon the employment of Roman Catholic officers in the Army. The Commons took the line, rightly or wrongly, that this employment was illegal. Thus before James had occupied the throne for a year he had fallen out with Parliament, which virtually accused him of assailing the rule of law. James, however, was blind to the implications of their conduct, and continued to act in a manner which was bound to make him odious in the eyes of the great majority of his subjects. He made such use of the suspending and dispensing powers that they began to fear that all the laws framed to protect the established Church would be rendered of no effect. He strove to propagate his religion in such a manner that he seemed to be the mortal enemy of Protestantism. At the same time attempts yet again to remodel the municipal corporations aroused fears of another kind.

By the middle of 1688 James had alienated almost every section of the community. The sons of many of those who had fought for Charles I had been turned out of their posts as

<sup>1</sup> Cf. *infra*, p. 98. But it is noteworthy that Parliament did authorize the collection of taxes as from the death of Charles II. This was doubtless agreeable to James, but also implied that the collectors of the taxes would have been punishable but for their action.

Ministers or officers or magistrates; several judges had been dismissed because they would not show themselves subservient to the royal wishes; numerous changes had been effected in the corporations; the clergy had become alarmed not merely by James's general religious policy, but by the creation of an illegal ecclesiastical court, which was used as an instrument of the King's policy. No doubt much of the feeling against James was due to personal reasons. But self-interest alone was not the cause of the general opposition to his policy. Those who cared for the established Church believed she was in danger; those who were attached to the rule of law feared that it would soon be totally subverted.<sup>1</sup> Nor did James strengthen his position by his attempts to rally the Dissenters to his side. The toleration which he gave them depended on his pleasure alone and was, in any case, of doubtful legality. The majority of the Dissenters felt little gratitude for this and other favours, and drew closer in sympathy with their fellow-Protestants of the Church of England. When the nation was thus seething with discontent, James ordered the prosecution of the Seven Bishops for having done what most Protestants regarded as their plain duty. Nor did their acquittal greatly diminish the unpopularity of James's act. The contrast between Charles I, who had stood by the Church till his death, and James II, who had endeavoured to make martyrs of the Bishops, was glaring.

James's position was thus highly precarious. He dared not summon Parliament until he could be sure of his power to pack the House of Commons, and of that there was little prospect. The vast majority of Protestants, whether Anglicans or Dissenters, were hostile to him; even though many of them were not prepared to rebel, they were equally unwilling to fight for James should a rebellion break out. James, then, being reluctant to change his policy, was forced to depend, and to appear to depend more and more, on the one great support that seemed to remain to him—the standing forces. He had already increased the numbers of the Army, to the alarm of

<sup>1</sup> In December, 1688, we are told, William of Orange complimented that veteran lawyer Serjeant Maynard, who was then presented to him, on having survived most of his contemporaries at the bar. Maynard replied that but for the Prince's expedition he would have survived the laws of England.



all those—and they were many—who disliked a standing land force. But at this time, fearing that Protestant soldiers might not be wholly trustworthy, he began to bring over Irish Roman Catholic troops to England. No greater blunder could have been made. James had already done many of the things which had rendered Cromwell's rule hateful. He had aroused a widespread fear that he wished to make himself an arbitrary despot whose power was based on armed force. But even Cromwell, though he had persecuted Protestant episcopalians, had been a champion of Protestantism and an opponent of Romanism. Was not James's rule, therefore, so men might reason, worse than that of Cromwell? Was there not a danger that the Irish troops might be used to cut the throats of good Protestants?

Perhaps, however, there would have been no revolution had not other circumstances conduced to it. James was in his sixth decade, and, had his wife not given birth to a son, the nation might have waited for his death, when a great change could have been expected to take place. For James had two adult daughters, both of whom were staunch Protestants, and the elder of whom was married to William III of Orange, the great champion of continental Protestantism. But just before the trial of the Seven Bishops the Queen had been delivered of a son. The boy would, of course, be brought up as a Roman Catholic, and English Protestants felt that their religion would be permanently in danger. It was no wonder that, when the country was in a state of feverish excitement, a story got abroad, and found ready credence, that their heir apparent was a supposititious child. That story was certainly untrue, but it so happened that most of the witnesses to the child's birth were persons who were not generally trusted. That the legend of the warming-pan should have been so widely believed is far less surprising than the success of Oates's falsehoods. When the nation was thus alarmed, an immediate remedy seemed imperative. Even if James was not to be deprived of the Crown, he must be induced to change his policy and an inquiry must be made concerning the birth of his pretended son. But a rebellion unsupported by a force of regular troops was highly dangerous, for James had a large Army, though it was far from certain that it would fight for him. The only person who

could give the required aid was William of Orange, and to him James's strongest opponents naturally turned.<sup>1</sup> William, on his part, was ready to take the risks of invading England, enormous though they were, since he would have been as much ruined by a victory as by a defeat. For Englishmen would never have forgiven a Dutchman for beating them. William, however, was induced by his religious opinions as well as by his political aims to embark on what, according to all ordinary calculations, was a foolhardy enterprise. After the 'Protestant wind' had enabled him to land his troops in England without an encounter with James's fleet, he is said to have inquired of a divine who accompanied him whether he did not now believe in predestination. As it was, the favour shown by the elements to William's expedition appeared miraculous in the eyes of many good Protestants, and this was not an unimportant factor in the shaping of the events that followed.<sup>2</sup>

William invaded England with a powerful army; but his object was not to conquer the country. Conquest, indeed, would have been impossible with the force at his command. His purpose was very different. He had been at pains to inform himself, and was well aware that the country was hostile to James and favourable to himself. He had, moreover, received a formal invitation from seven prominent Englishmen—one of them a Bishop—to deliver their country from tyranny. William was regarded not as a would-be conqueror, but as a Heaven-sent deliverer, come to restore the constitution, the law, and especially the Church. The Declaration which William published on the eve of his invasion makes the position very plain. It began by laying down the proposition that the peace and happiness of states could only be maintained if the laws and the liberties established by lawful authority were scrupulously respected; those concerned were under an

<sup>1</sup> William was married to James's elder daughter, Mary, and was the son of Charles I's daughter and of William II of Orange.

<sup>2</sup> Frequent allusions to this subject are to be found in sermons. Burnet, the divine to whom William's remark was addressed, makes this comment upon William's crossing: 'I never found a disposition to superstition in my temper; I was rather inclined to be philosophical upon all occasions. Yet I must confess that this strange ordering of the winds and seasons, just to change as our affairs required it, could not but make a deep impression on me, as well as on all that observed it.'

obligation to try to preserve these and, in particular, the laws relating to the established religion. William, to his regret, saw that the religion, laws, and liberties of England, Scotland, and Ireland were being overturned, and the people of those lands subjected to arbitrary government in the most flagrant manner by James's evil counsellors. With this end in view, they had maintained that the King could suspend and dispense with Acts of Parliament made for the welfare of the subject, whereas in truth only Parliament could make laws, and only a statute could suspend or dispense with them. Could the King exercise the suspending and dispensing powers, then his rule would indeed be arbitrary and despotic, and neither the lives, nor the liberty, nor the property, of his subjects would be safe. Nor was it of any weight that a packed bench had upheld the dispensing power; not only did a judgement from such a court command no respect, but in any case it was not in the power of twelve judges 'to offer up the laws, rights, and liberties of the whole nation to the King, to be disposed of by him arbitrarily and at his pleasure'.<sup>1</sup>

The Declaration went on to stress James's injuries to the Church of England. He had promised at his coronation to protect that Church. Yet what had his conduct been? He had, under the influence of evil counsellors, repeatedly disregarded the laws framed for the protection of that Church, which excluded all but Protestants from civil and ecclesiastical offices. He had set up an illegal court to exercise ecclesiastical jurisdiction. He had tolerated and even encouraged the open use of Roman Catholic places of worship and favoured the Jesuits. Those who advised him to do these things were evidently restrained by no rules of law, but were in favour of a 'despotick power' and 'arbitrary government'. It was these men, too, who had advised the King to turn out of their places all who were not in favour of a repeal of the Test Act and the other penal statutes in matters ecclesiastical. They were likewise responsible for the attacks on the Parliamentary boroughs and the attempts to remodel their charters.

The only remedy, when things had come to such a pass, was

<sup>1</sup> This passage is very significant. It seems to imply that it is not for the ordinary courts, but for the High Court of Parliament, to determine disputed constitutional points.

the calling of a free Parliament. But there was no likelihood that such a Parliament would be voluntarily summoned by James. On the contrary, his evil counsellors were endeavouring to foment divisions among Protestants, who should be all equally concerned to safeguard their common religious tenets, and to procure a packed House of Commons, which would acquiesce in their wicked designs. But their iniquity did not stop even here. They had contrived that a supposititious child should be represented as the son of James and his wife. Now, both James's elder daughter, Mary, and her husband, William of Orange, were affected by this, since each had rights to the succession to the Crown. William, therefore, both for this reason and because he desired to safeguard the laws and liberties of England, was moved to intervene. He had, indeed, been asked to do so by many of the clergy, nobility, and gentry. His intention was to land in England with such a force as would frustrate the designs of James's evil counsellors. But he would not endeavour forcibly to procure any advantage for himself. His aim was to secure the meeting of a free Parliament, in whose determination of all disputed points he would cheerfully acquiesce. In order that there might be a free and proper choice of members of the House of Commons, all recent charters by which 'the elections of Burgesses are limited contrary to the ancient custom' were to be considered as 'null and of no force'; moreover, all magistrates who had been unjustly turned out were to be restored, and none was to be allowed to vote at the elections or to be elected unless he was qualified by law.<sup>1</sup>

This Declaration was undoubtedly designed to discredit James as much as possible. Nor need William's professions of disinterestedness be taken at their face value. But it does not follow that the constitutional views therein put forward can be treated as mere unscrupulous propaganda. The

<sup>1</sup> The Declaration also referred to the illegalities committed in Scotland and Ireland. William professed his attention to secure the meeting of a Parliament in Scotland 'for the restoring of the ancient constitution of that kingdom'. With regard to Ireland William said: 'We will also study to bring the kingdom of Ireland to such a state, that the settlement there may be religiously observed and that the Protestant and British interest there may be secured'. The difference is worth noting. Ireland was treated as an English dependency.

Declaration was drawn up with great art, and was so worded as to appeal to English sentiment. It represented James as a law-breaker of the worst kind. For the attribution of responsibility for his acts to his evil counsellors was, though interesting to note, in this context simple lip-service to the old maxim 'the King can do no wrong'. In substance, therefore the Declaration was an appeal to Englishmen to uphold fundamental law. In this connexion the emphasis laid upon the story that the Prince of Wales was a supposititious child is especially significant. For to tamper with the order of the succession was, in the eyes of a staunch royalist, almost as great a crime as could be conceived. It was an act not merely beyond the lawful powers of the King of England, but beyond those of the despotic rulers of Western Europe.<sup>1</sup> Hence William's enterprise appeared not a rebellion, or even a revolution, but a conservative campaign.

<sup>1</sup> The *Parlement* of Paris quashed the will of Louis XIV because it contained provisions deemed to be contrary to fundamental law. Among these was one which affirmed that in certain circumstances his bastard sons would have a right to succeed to the crown of France.

## II

### THE KINGSHIP

WHEN CHARLES returned to England in 1660, he returned as one who had been King since the execution of his father. The claim that Charles I had reigned until his death, and that Charles II had immediately succeeded him, was accepted by the Convention Parliament, and has ever afterwards been recognized by the law. The Restoration did not make Charles King; it merely removed certain unlawful impediments to the full exercise of his kingly power. From this, various consequences naturally flowed. All bills to which Charles I had given his assent were deemed to be good law; but all the Ordinances and Acts which rested upon the authority of Parliament alone were regarded as having been null and void from the first. In order to avoid confusion, however, a number of these were confirmed. Charles II, again, was possessed of the royal supremacy in matters ecclesiastical. Nor was it delimited by any new statute. He had, therefore, all the powers in ecclesiastical affairs which the Crown had had before 1640—except that he was prevented by statute from reviving the Court of High Commission.

No substantial modification of the King's status was made by law until the Revolution. But during the years 1679–81 several attempts were made, though in vain, to alter the succession to the Crown. On three occasions a bill was introduced for the exclusion from the succession of James, Duke of York, the heir presumptive, because James was a Roman Catholic. The first bill was introduced in the Commons in May, 1679. A prorogation, followed by a dissolution, prevented the House from passing it. The second bill was introduced in the Commons at the end of 1680, and, after having passed them, was rejected by the Lords. Shortly afterwards Parliament was dissolved. Charles's last Parlia-

ment met in March, 1681, and a third Exclusion Bill was forthwith introduced in the Commons. But a dissolution came before it had made much progress.

So strong was the movement in favour of Exclusion that Charles himself offered to make far-reaching concessions if he might save his brother's right of inheritance. In April, 1679, the Lord Chancellor informed Parliament, by the King's command, that Charles was ready to consent to the following limitations upon a Roman Catholic successor: he was to exercise no ecclesiastical patronage; Parliament was to meet immediately upon his accession; all Privy Councillors, judges, Lords Lieutenants, and naval officers were to be appointed and dismissed by Parliament. At the end of 1680 the Lords considered turning these proposals into law; but no bill actually passed their House. The Commons, on their part, never showed much enthusiasm for limitations. However, in the speech from the throne at the opening of his last Parliament, Charles said he was ready to assent to a bill ensuring that 'the administration of government' should 'remain in Protestant hands'. It is not necessary to believe that Charles's offers were sincere; but it is remarkable that they were ever made.<sup>1</sup>

<sup>1</sup> For the Exclusion question see also *infra*, p. 121. The discussions about 'limitations' are not of great interest, since few took the proposals very seriously. The significant thing is that they were made. Probably Charles II was only playing for time. When he felt himself strong enough he got rid of Parliament and dropped his proposals for 'limitations'. They were, in any case, impracticable, and he must have known it as well as any man. But they may have convinced some people that Charles was genuinely attached to the Church of England as well as to hereditary right. Charles's policy at this time was to appeal to moderate conservative opinion, and it proved a paying policy.

### III

#### PARLIAMENT

SINCE THE Convention Parliament of 1660 had not been summoned by the King, it was not, in strict law, a Parliament at all. However, an Act, passed soon after the King's return, declared that the Lords and Commons then sitting were to all intents and purposes the two Houses of Parliament. This same Act also declared the Long Parliament of Charles I to be dissolved.<sup>1</sup> Henceforth the Acts of the Convention Parliament were treated as good law. Several of the more important of them were confirmed by the Cavalier Parliament in the following year. But this was only done to make assurance doubly sure; the Courts did not hesitate to apply those Acts which had not been so confirmed. However strong the practical reasons for this *ex post facto* legalization of the Convention, there is no denying that it was a curious proceeding, and one which, in 1689, was to provide a precedent damaging to the cause of hereditary monarchy.

The Upper House of the Convention contained all the adult peers, including those whose peerages had been granted by Charles II during his exile. It did not include the Bishops, since they had been excluded by an Act of 1641. Their return was a natural consequence of the Restoration; but, since the Convention Parliament was averse to their presence there, it was left to the Cavalier Parliament to repeal the Act of Exclusion in 1661.<sup>2</sup> Charles II, further, increased the House of Lords by grants of over sixty peerages; though this increase was largely counterbalanced by extinctions, and the House, at his death, had no more than 181 members.

During this period there were a number of important decisions affecting peerage law. In 1641 the Lords had resolved that a peerage could not be surrendered to the King.

<sup>1</sup> 12 Car. II, c. 1.

<sup>2</sup> 13 Car. II, Stat. 1, c. 2.



Notwithstanding this resolution, the Law Officers, in 1660, held that a surrender by fine was good. In 1678, however, the Lords unanimously decided in the *Purbeck Case* that a peerage could not be so surrendered. The *Clifton Case*, in 1673, decided that one who received a writ of summons, and took his seat in pursuance thereof, acquired a hereditary peerage. The *Freschville Case*, in 1677, decided that a peerage was not conferred by the issue of a writ of summons, unless the recipient took his seat in pursuance thereof. It may be added that in 1669 the Privy Council, with the assistance of several judges and of the Law Officers, decided that barony by tenure 'was found to have been discontinued for many ages, and not in being, and so not fit to be revived'.<sup>1</sup>

Mention may here be made of two occasions on which the Lords, though not acting as a House of Parliament, played a great part in public affairs. In November, 1688, James II, despairing of defeating William of Orange, whose army was then marching on London, summoned all the Lords who were then in London for the purpose of asking their advice in the crisis.<sup>2</sup> About forty Lords assembled and tendered advice, which James in part accepted forthwith and in part promised to consider. The King, however, did not keep his word, but fled the capital in disguise. The country and, in particular, London was then in grave danger of falling into anarchy. To avert this a number of Lords Spiritual and Temporal met at the Guildhall and acted as a governing authority; they sent orders to the Army and Navy, and took steps to keep the peace in London. Further, they informed the Prince of Orange that they would assist him in securing the meeting of a free Parliament. The Lords had neither the leisure nor the inclination to enquire into the lawfulness of their conduct. But there was a general feeling that, if authority could rightfully reside anywhere in such a crisis, it rightfully resided with them.

The special privileges of the Lords did not greatly change during this period. Individual members of the House continued

<sup>1</sup> The Lords in 1866 similarly decided that barony by tenure was not then in existence (*Berkeley Peerage Case*).

<sup>2</sup> Compare the Great Council consulted by Charles I in 1640. Such consultations, however, could only take place when Parliament was not in being. Hence their cessation after 1688.

to enjoy the right of access to the sovereign, though the importance of this right was not great. In practice, few Lords tendered advice individually, unless the King so desired. The Lords also continued to enjoy exemption from statutory oaths until the second Test Act, which required all who took their seats to swear the oaths of allegiance and supremacy. But of much more importance than this limitation of their privileges was the definite establishment of the right of a minority to enter reasons for their dissent from the decision of the House in the *Journals*. This practice became frequent after the Restoration, and was subjected to vigorous criticism in 1675, when there was talk of committing the signatories of a certain protest to the Tower. But so strong was the opposition to this suggestion that nothing was done, and protests continued to be made as before.

Mention must here be made of certain proceedings which shed light on the attitude of the other courts to the House of Lords. In February, 1677, the Lords committed Shaftesbury and three other peers for contempt, during His Majesty's pleasure and their own. In June, when the Houses were adjourned, Shaftesbury got his case argued before the King's Bench by a writ of *Habeas Corpus*. He and his counsel contended that the return to the writ was bad, since neither the time nor the nature of the contempt was specified, but merely the fact that he had been committed for contempt. Moreover, commitments of this kind were, they said, dangerous to the liberty of the subject; the Lords, though the supreme court of the realm, were not above the law, and *lex Parliamenti* could not override *lex terrae*; since no such commitment by another court could be upheld, that by the Lords was bad. Shaftesbury himself, in his address to the court, argued that the commitment was bad as being contrary to fundamental law. Counsel who argued for the Lords said that the Upper House could regulate its own proceedings, without control from any other court, and that the inferior courts could not determine the limits of *lex Parliamenti*; though they might determine a question of privilege that arose incidentally in another case, they could not exercise jurisdiction over a matter arising in Parliament. The court held it had no power to bail or discharge Shaftesbury, though the commitment was irregular.

But it must be added that it did not say it could not have done so, had Parliament been prorogued. Since, however, the Houses were only adjourned, the session was still in progress.

The average attendance at debates in the Upper House was small, partly because voting by proxy was frequent. But these debates now began to be marked by a novel feature—the presence of the King. Charles, after a few years, took to attending debates, to which he listeded, not from the throne, but from the vicinity of the fireplace. Nor did he scruple to use his influence to sway votes on both legislative and judicial issues. The effect of this practice would be hard to estimate, but it undoubtedly lowered the dignity of the Crown.

The numbers of the Commons were slightly increased during the reign of Charles II. Five hundred and seven members were elected in 1661. In 1673 a statute gave two members each to the county and city of Durham.<sup>1</sup> The reason assigned in the preamble of the Act was that ‘the inhabitants of the said county . . . are liable to all payments, rates, and subsidies, granted by Parliament’. A bill to the same purpose had been carried by the Commons in 1624, but had failed to pass owing to a dissolution, and another bill in 1668 had failed to pass the Lower House. A further increase in their numbers was caused by the grant of a charter which gave the town of Newark the right to elect two members. But since then no monarch has exercised the prerogative of summoning burgesses from a town not previously represented. The numbers of the Commons, thus raised to 513, remained unchanged until the Union with Scotland.

The county franchise was not altered, but with the franchise in the boroughs it was, in many cases, otherwise. The Corporation Act of 1661 imposed upon all Mayors, Aldermen, Common Councillors, Recorders, and corporation officers, besides the oaths of allegiance and supremacy, an oath repudiating the doctrine that it could in any circumstances be lawful to take up arms against the King.<sup>2</sup> Those who refused to comply were to be removed. Further, none for the future was to fill any of these places unless he had sworn these oaths and taken the sacrament according to the rites of the established Church. This Act must have affected the electorate in several

<sup>1</sup> 25 Car. II, c. 9.

<sup>2</sup> 13 Car. II, Stat. 2, c. 1.

boroughs. Moreover, during the latter part of the reign of Charles II and during the reign of James II many boroughs forfeited or surrendered their charters and received new charters, which often modified the franchise or altered the personnel of the electorate.

Although no statutory changes were made in the franchise, there was some talk of the desirability of a radical reform. In 1668 it was stated in the Commons that the West and the North were over-represented, and the Midlands under-represented, in proportion to their wealth and population.<sup>1</sup> A suggestion was also made that the shires be given an increase of representation and that some of the boroughs be deprived of their members. In 1679 a bill actually secured two readings in the Commons, which provided that the county franchise be restricted to males of twenty-one and upwards who had been residents or householders for a year prior to the election, paid rates, and were possessed of £200 in fee; for the borough franchise—save in London, York, Norwich, Exeter, and Bristol—there were to be similar age and residential qualifications, and electors were also to be persons paying scot and lot. It would seem, too, that Shaftesbury was in favour of a redistribution of seats, together with the establishment of a high property qualification for electors.<sup>2</sup>

No new statutory qualification for membership of the Commons was imposed during the early years of Charles's reign. But the House, in the period immediately following the Restoration, was wont to order all members to take the sacrament according to the rites of the established Church. However, a bill, introduced in 1673, to make those who did not conform to the established Church incapable of being elected, failed to pass. A similar fate also befell the bill, championed by Danby in 1675, which provided that all members of both Houses and all office-holders were to take an oath that it was not lawful to take up arms against the King on any pretext whatsoever, and to pledge themselves 'not to endeavour any alteration in the government in Church or state as it is by law

<sup>1</sup> These opinions were expressed during the debates on the Durham Bill; it is possible that they contributed to its rejection in that year.

<sup>2</sup> I doubt, however, whether his views on these matters were heartily shared by many other politicians. The tendency of the age was too much opposed to change.

established'.<sup>1</sup> But in 1678 the second Test Act made it obligatory on all members of both Houses to sign a declaration repudiating the doctrine of transubstantiation and to take the oaths of allegiance and supremacy in their respective House at the beginning of each Parliament. Until these requirements had been fulfilled, no person was to sit in the Commons after the choice of the Speaker.

The Commons were always eager to guard themselves against attempts on the part of the Crown to encroach upon their rights. When Parliament met in 1673, after a long prorogation, the Lower House contained thirty-six new members, who had been elected to fill seats vacated by death, in pursuance of writs issued by the Lord Chancellor. The King, in the speech from the throne, said he thought the issue of the writs was legal, but desired the Commons to look into the matter. A vigorous debate followed, and, in spite of the precedents adduced in support of the Chancellor's action, led to a resolution that the writs were void, and that the Speaker should issue warrants to the Clerk of the Crown for the making out of new writs. The King yielded without a struggle and directed that the Chancellor's writs be annulled. The Commons again asserted their rights in 1675, when they resolved that it was a breach of privilege for any member to be made a Sheriff during the continuance of Parliament.

Election petitions were tried by the Committee of Privileges and Elections. Its decisions were reported to the House for confirmation or rejection. The Committee was at first a select committee, but in and after 1673 any member was permitted to attend.

An interesting point with regard to the law of elections was decided by the case of *Barnardiston v. Soame*. In 1674 Sir Samuel Barnardiston brought an action against Soame, Sheriff of Suffolk, for having made a double return in a bye-election, at which Barnardiston had been a candidate. He recovered £1,000 damages in the King's Bench. Soame thereupon obtained a writ of error, and the Exchequer Chamber reversed the judgement of the King's Bench. After the Revolu-

<sup>1</sup> The bill passed the Lords, but failed to get through the Commons, owing to a prorogation caused by the quarrel between the two Houses over the case of *Shirley v. Fagg*.

tion, however, Barnardiston brought a writ of error into the House of Lords; but the Lords upheld the judgement of the Exchequer Chamber. The chief grounds of that judgement seem to have been, firstly, that the action of the Sheriff in making a return was of a judicial character, and no action lies against a judge for what he does judicially; secondly, that the Commons alone had power to determine a disputed election and to censure the returning officer.<sup>1</sup>

It would seem that the payment of wages to M.P.s ceased during the reign of Charles II. We know at least that very few members then took them. But we hear of a curious attempt on the part of some members to turn the law for the payment of wages to a new and corrupt purpose. Certain boroughs were threatened with actions for the payment of arrears of wages, if they did not re-elect their old members. These threats caused the introduction of a bill, in 1677, for abolishing the obligation to pay wages. The bill failed to pass, and, since no petition in support of it came from any borough, it is a legitimate inference that the obligation was not seriously regarded as a burden. The rapid increase of bribery at elections afforded abundant testimony that such threats would soon become futile.

The position of the Speaker remained somewhat anomalous. He was not, as yet, either uniformly impartial, or supposed to be so. He often felt it his duty to use his position to further the King's wishes. He was, indeed, sometimes the virtual nominee of the King. But both the Speaker and the House could, on occasion, assert their independence. Sir Job Charlton, who became Speaker in February, 1673, was not satisfactory to the King. After a very brief occupation of the chair he resigned on the plea of sickness and was succeeded by Edward Seymour. When Parliament met again, after a prorogation, in the following October, Seymour's tenure of the chair was made the subject of criticism, because he was a Privy Councillor and Treasurer of the Navy. The former position would, it was contended, lead him to divulge the

<sup>1</sup> In 1696 a statute gave a right of action against a returning officer who made a double return. A double return was a return of more persons than were required to be chosen. Nobody returned by a double return could take his seat until the House had decided who had been elected.

proceedings of the House to the King; the latter made him improper to sit in the chair if questions relating to his office were before the House. The Commons, however, declined to take any action. But Seymour's subsequent conduct gave offence to the King, and when a new Parliament met in 1679, a crisis occurred. Seymour was unanimously re-elected, and, knowing the King would have acceded to the request, did not, as was customary, ask him not to approve of the Commons' choice, when he appeared before his Majesty to inform him of it. The King, none the less, directed the Lord Chancellor to state that he refused to approve of Seymour's election. A heated debate thereupon took place in the Commons, who refused to elect a candidate known to be acceptable to the King, and drew up a strong representation to His Majesty, in which they virtually denied his right to refuse to approve of their choice. A contemptuous answer from the King led to another representation, which was followed by a prorogation. When the House met again, a spirit of compromise prevailed, and they elected, not the candidate favoured by the King, but another person, and Charles forthwith approved of their choice. Since then, the King has never refused to accept the person elected by the Commons.<sup>1</sup> Thus the Speakers in the Parliaments of 1679-81 were far from being *personae gratae* to the King.

In defence of the privilege of freedom of speech the Commons took strong action. They resolved in 1667 that *Strode's Act* of 1513 was a general law declaring the 'ancient and necessary rights and privileges of Parliament'. With this resolution the Lords concurred. That privilege was further strengthened

<sup>1</sup> One of the objections against Seymour's choice advanced in the Commons was that he had not been proposed by a Privy Councillor. The struggle of the Commons established the principle that it was not necessary that a Speaker should be proposed by a Privy Councillor, and this, Harley observed a generation later, was its only result. That statesman, however, did not realize the importance of the fact that though the Commons had not got Seymour for their Speaker, they had at least refused to accept the King's candidate for the post. Moreover, it was not a small thing to put an end to the convention that a Speaker must be proposed by a Privy Councillor. For that convention implied that he was the King's candidate. Of course, the Ministers usually tried, after this as before, to secure the election of a Speaker favourable to the King's policy, but they did so in a manner which implied respect for the theoretical independence of the House. In this matter outward forms had some real importance.

in a different way. In 1629 Eliot, Valentine, and Holles, three members of the lately dissolved Parliament, had been tried before the King's Bench on charges of making seditious speeches in the House, of contempt against the King in striving to prevent the adjournment of the House, and of assault upon the Speaker. They had pleaded to jurisdiction; but the plea had been overruled, and they had been condemned.<sup>1</sup> The Commons now resolved that the judgements were illegal and breaches of privilege. In the following year, 1668, Holles obtained a writ of error and brought the case before the Lords, who reversed the judgement against him. It is worth adding that one of the reasons for their decision was that the uttering of seditious words and the assault on the Speaker had been condemned in one and the same judgement. Over the former, however, the King's Bench had no jurisdiction, whether or no they had it over the latter.

In this connexion mention must here be made of two other cases. In 1682 one Jay brought an action in the King's Bench against Topham, Serjeant-at-Arms, in respect of acts done by him in obedience to the orders of the Commons. Jay was awarded damages. Again, in 1684, Williams was prosecuted for publishing, while Speaker, and by order of the House, a narrative which was alleged to be seditious. Williams was sentenced to pay a fine of £10,000. In both cases the defendants pleaded to jurisdiction, and their pleas were overruled. It would appear that the court could hardly have done otherwise, since its jurisdiction was not obviously excluded by statute or precedent. It was contended later that they should have pleaded in bar, which would have allowed the court to inquire whether or no their actions were privileged.<sup>2</sup> The Commons in 1689 censured the conduct of the two judges who had tried *Jay v. Topham*. On the other hand, a bill to quash the judgement against Williams failed to pass the Lords in 1696. The Commons, it would seem, took the view that a claim to privilege on the part of their House was sufficient to establish that privilege; otherwise they would not have acted thus.

<sup>1</sup> A plea to jurisdiction alleges that the court has no jurisdiction to try a case.

<sup>2</sup> A plea in bar is a plea alleged to be sufficient to overthrow the action, e.g. to plead the statute of limitations was to plead in bar.



No very important changes occurred in the other privileges of the House. The Commons showed themselves zealous to extend them, not only as against the Crown, but also as against the ordinary citizen. One claim, however, they virtually abandoned. It was not perfectly certain at the Restoration whether or no they had the right to administer an oath. The House itself apparently had doubts on the matter; for in December, 1661, they asked the Lords to swear certain witnesses at their bar, in order that they might be examined by the Commons. This the Lords refused to do. Again, in November, 1666, the Commons proposed the establishment of a joint committee of both Houses, in order to scrutinize the public accounts and examine witnesses on oath. The Lords, however, refused to accede to this unprecedented request. In June, 1675, at a conference between representatives of the two Houses, the Lords denied that the House of Commons was a court or could administer an oath. The Commons firmly contended they were a court, but said nothing on the second point. In October, 1678, the Commons, desiring to examine Oates upon oath, ordered him to be sworn by those members who were also J.P.s for Middlesex. In the following month they had a witness sworn by the Chief Justice of the King's Bench. These proceedings amounted to a virtual surrender of their claim to administer an oath.

With regard to the frequency and duration of Parliaments, the law, under the Act of 1641, was that a Parliament ought to be held at least once every year, and elaborate machinery was provided to ensure the holding of a Parliament at least once every three years.<sup>1</sup> There was, however, no law to prevent the King from keeping the same Parliament in being as long as he pleased. The Act of 1641 was naturally very distasteful to the King, more especially as some contended that it made a general election obligatory at triennial intervals. In his speech from the throne in 1664, the King alluded to this

<sup>1</sup> Such I take to be the meaning of the Act of 1641. The preamble says: 'by the laws and statutes of this realm the Parliament ought to be held at least once every year'. The first enacting clause contains the proviso 'that the said laws and statutes be from henceforth duly kept and observed'. It is true, however, that the Act only provides machinery to secure the holding of a Parliament every three years, whether the King desired it or no. The ancient statutes are 4 Edward III, c. 14, and 36 Edward III, c. 10.

belief, and hinted at his desire for the total repeal of the Act. Parliament hastened to comply with his wishes, and the Act of 1641 was repealed as being derogatory to the Crown.<sup>1</sup> The Act of Repeal, however, declared that Parliaments ought by law to be held 'very often', and enacted that a Parliament should meet every three years at least. No provision was made for forcing the King to obey this clause. Hence, during the last four years of his reign, Charles II ruled without a Parliament. The danger that the King might thus dispense with Parliaments had been recognized by many in previous years, and attempts to guard against it had been made, albeit unsuccessfully. In 1668 the Commons ordered Sir R. Temple to withdraw a bill for triennial Parliaments, which provided that the Chancellor should issue writs, even without the King's command, if he omitted to hold a Parliament for more than three years. In 1680 the Commons resolved, in Committee, that a bill for frequent Parliaments should be introduced: but the dissolution which shortly followed frustrated their intention. They had previously resolved, however, that it was the right of Englishmen to petition the sovereign to hold a Parliament.

The other danger—that a Parliament might be kept in being too long—was not the subject of so much apprehension. It is true that in 1675 a motion for an address to the King, praying him to dissolve the then Parliament, was only rejected by two votes in the Lords. But in 1677 the Lords committed to the Tower four peers, who had urged that Parliament, which had just met after a prorogation of fourteen months, was *ipso facto* dissolved, since the law was that Parliament should meet annually.<sup>2</sup> Their argument was, indeed, rather in the nature of a quibble. But it is curious to find the Lords thus ready to curtail the freedom of debate. The same topic was also discussed in the Commons; but the Lower House, though they refused to consider Parliament as dissolved, did not commit any of their members to prison.<sup>3</sup>

The King always delivered a speech to Parliament at the

<sup>1</sup> 16 Car. II, c. 1.

<sup>2</sup> See *supra*, p. 76.

<sup>3</sup> The imprisoned peers were eventually released after making a humble apology to the Upper House. However, on November 3, 1680, the Lords resolved that their commitment had been 'of evil example', and ordered all references to it to be erased from the *Journals*.

beginning of a session. But the speech from the throne was usually followed by a lengthy discourse from the Lord Chancellor or Lord Keeper, developing what the King had said. On certain occasions, too, Charles made speeches to Parliament in the middle of a session. In his speeches the King explained his policy in greater or less detail. During the later years of his reign an apologetic note is perceptible in them. James, on the other hand, spoke in a somewhat provocative manner.

Charles frequently found it convenient to suspend a session by ordering the Houses to adjourn. They always obeyed his commands, and Charles, on his part, never denied that they had a right to refuse to adjourn, if they so pleased.<sup>1</sup>

<sup>1</sup> In April, 1677, the Speaker adjourned the Commons without letting a member speak on the matter. When Parliament met again, his conduct was criticized in debate, though no resolution was passed. Many then thought that the King could compel an adjournment, but as far as I know Charles never formally claimed a right to do so.

## IV

### LEGISLATION

ONE OF the first Acts to be passed by the Cavalier Parliament was that declaring all orders or Ordinances of both Houses or of either House of Parliament which had not received the royal assent to be null and void. This same Act made it an offence to affirm that the Houses or either House had any legislative power without the King.<sup>1</sup>

The right of veto was twice exercised by Charles II: in 1662, when he vetoed a bill for confirming the office of Register of Sales, and in 1678, when he vetoed a Militia Bill, on the ground that it would deprive him of control over that force. James II, on the other hand, never used the veto. Charles, moreover, often killed bills by the indirect but no less efficacious measure of proroguing or dissolving Parliament. On two occasions the same end was secured by other and less honest means. In July, 1663, a bill for the better observance of the Sabbath was lost, after it had passed both Houses, nor could the Clerk of the Parliaments explain its disappearance from the table of the Lords, where it had been laid. In January, 1681, a bill for the repeal of an Elizabethan statute against recusancy was likewise lost. The matter was investigated in the following March by the subsequent Parliament, and it was then conjectured by the Commons that the Clerk of the Parliaments had caused the bill to disappear at the King's instigation. The House began to suspect that a similar trick had been played in 1663, and requested the Lords to concur with them in the setting up of a joint committee of both Houses to inquire further into the question. However, the sudden dissolution of Parliament prevented anything from being done.

Proclamations continued to be issued with great frequency.

<sup>1</sup> 13 Car. II, Stat. 1, c. 1.

They were passed under the Great Seal and issued with the advice of the Privy Council. The majority of them were merely admonitions to the King's subjects to observe the existing law. Some, however, prohibited actions which were not legally crimes. But, since the Star Chamber was no longer in existence, there was no tribunal which would punish disobedience to such proclamations.<sup>1</sup> There seem, however, to have been few attempts to disobey them, and the King's conduct in issuing proclamations was not criticized in Parliament, save in so far as he claimed to be able to suspend statutes. Nay, more, on one occasion at least Parliament desired the King to legislate by proclamation. In October, 1666, the Houses jointly requested Charles to prohibit the importation of French goods by proclamation, until the passing of an Act to that effect. It is true that England and France were then at war; but the action of Parliament is worth noticing.

Charles II and James II claimed and exercised a power to dispense with, and to suspend, statutes. A dispensation permits its recipient to do what would otherwise be illegal. The suspension of a statute makes it wholly inoperative during such suspension. The power, therefore, to dispense with and to suspend statutes is really a power to legislate in a peculiar way. For the exercise of both these powers by the King there were precedents in the pre-Restoration period. The mediaeval monarchs, for instance, had often dispensed with the Statute of Mortmain and the Statute of Provisors. Both Elizabeth and James I had given dispensations to Roman Catholics from the penal laws. An argument for the legality of these last dispensations might be derived from the ecclesiastical supremacy of the Crown. But dispensations had been issued, since the fifteenth century, from other kinds of statutes; there had, for example, been many dispensations from the navigation laws and from laws prohibiting the export of arms and bullion. The Council of State, too, during the Interregnum, had dispensed with the Navigation Act of 1651.<sup>2</sup>

The lawyers had never held that the King could dispense with any and every law. In the Middle Ages they distin-

<sup>1</sup> The courts could, however, punish such actions as came within the definition of a nuisance.

<sup>2</sup> Patents were also frequently issued, which dispensed with statutes.

guished between *mala prohibita*, such as coining, which were merely offences by statute law, and *mala in se*, offences against the law of God or the law of nature. The former the King could license any man to do; the latter could not be made legal by any authority. The classification, however, of wrongs under these two heads was never easy, and varied from age to age. But the idea long remained that some acts were wrongful apart from any human law against them. The lawyers, too, were generally of opinion that the King could not grant a dispensation which would injure any of his subjects; no dispensation could legalize the committing of a nuisance or deprive a man of his action. Certain cases and judicial opinions clarified the law a little further. It had been held in 1541 that the King could not dispense with a statute before it had been made. In 1602 it was held, in the *Case of Monopolies*, that the grant of a monopoly of the importation of playing-cards was void because it defeated the intent of an Act to restrain the importation of cards. But the *Case of non Obstante* was more favourable to the King. For it was then held that he could dispense with an Act which barred him from the exercise of a prerogative inseparable from the Crown. Nor did Parliament deny that the King had a certain dispensing power. The House of Commons admitted this at the time of the Petition of Right. Thus, though it cannot be said that the law with regard to the extent of the dispensing power was clear, the existence of that power was plain. The legality of the suspending power, on the other hand, was doubtful; for it had been but little used hitherto, though Elizabeth had partially suspended certain Acts.

The Convention Parliament in 1660 seemed to recognize that Charles possessed a certain power to dispense with ecclesiastical statutes; for, when they settled the revenue, they apparently calculated that the King would derive some income from the fees paid by recusants for dispensations. The Cavalier Parliament, however, did not share this point of view. The Lords refused to insert into the Act of Uniformity a proviso which gave the King a limited power to dispense with the Act. Later in that same year—1662—Charles issued a Declaration, in which he announced his intention of seeking the consent of Parliament for the granting of dis-

pensions to the Dissenters in virtue of the power he conceived to be inherent in him. The speech from the throne at the next meeting of Parliament contained an intimation of the King's wishes in the matter. The Commons, however, in their address, expressed a strong dislike of the suggestion and declared that the Act of Uniformity could only be dispensed with by statute. None the less, a bill was introduced in the Lords to empower the King to dispense with the Act; but it failed to pass the House. Yet Parliament did not wholly deny the existence of a dispensing power in the Crown. For the Act of 1668 to prohibit the importation of Irish cattle into England termed such importation 'a public and common nuisance'.<sup>1</sup> These words were deliberately inserted by the Commons in order to prevent the granting of dispensations from the Act. They aroused violent opposition in the Lords, where it was contended that it was in the public interest that the King should be able to dispense with the Act. Finally, the bill was carried in the form desired by the Commons. But it is noteworthy that Parliament thus acknowledged the existence of a right to dispense while preventing its exercise in certain spheres.

No long time after this an important exposition of the law was given by Chief Justice Vaughan. His judgement in *Thomas v. Sorrell*, delivered in 1674, stated that, though the King could not dispense with *mala in se*, the converse proposition—that he could dispense with all *mala prohibita*—could not be maintained; the King was not empowered to grant a dispensation to commit a nuisance, nor one which would deprive any of his subjects of an action; thus the King could only dispense with statutes when no man was injured by such dispensation. Vaughan, moreover, seems to have implicitly conceded that dispensations contrary to the intent of a statute were void, though this is not certain.

Charles II granted numerous dispensations from the Navigation Act and, during the earlier part of his reign, from penal statutes in matters ecclesiastical.

James II made much use of the dispensing power. Early in his reign he gave many dispensations to enable Roman Catholics to hold commissions in the Army. The House of

<sup>1</sup> 18 and 19 Car II, c. 2.

Commons, however, viewed this use of the prerogative with alarm, and the address which they presented to the King in November, 1685, contained a request that he would dismiss these officers, lest their continuance in employment might be taken to imply that he could dispense with the Test Act without statutory authority to do so. James refused to make any concessions and prorogued Parliament before they could make further protests. He then proceeded to seek judicial confirmation of the dispensing power. He arranged that a collusive action should be brought by one Godden against Hales, an officer who had been reconciled to the Church of Rome, but had continued to hold his commission in virtue of a dispensation. The judgement of Chief Justice Herbert, with which all the other judges save one concurred, was in favour of the defendant. Herbert maintained that the King could not dispense with *mala in se*, but that he had wide powers of dispensing with *mala prohibita*. Now, since Hales's action in retaining his commission after his conversion would have been legal before the Test Act, a dispensation could still make it legal. To the objection that the Test Act had been made in the interests of religion he replied that, though not even a statute could legalize *mala in se*, the Test Act was merely a 'humane and political constitution', and, as such, although made for the interest of religion, could have an end as well as a beginning. He also referred to the resolution of the judges in the reign of Henry VII, that, in spite of any Act to the contrary, the King could license a man to be sheriff for more than one year at a time, since he was entitled to the services of his subjects; in support of this view the opinion of Coke could be adduced, that no Act could 'bind the King from any prerogative that was inseparable to his person'. Finally, his judgement did not conflict with *Thomas v. Sorrell* by depriving a man of his action; the action against Hales was brought by a common informer, who must sue in the King's name as well as in his own. Moreover, since Godden had no action, unless Hales had broken the law, he was not injured in this case; for, if the dispensation was legal, Hales had committed no offence.

This judgement gave rise to much controversy both of a legal and a political character. On the one hand, it was



argued that the judgement was bad law, because its effect was to remove an incapacity, which, it was contended, could not be done even by a pardon, still less by a dispensation; and that the informer had been illegally deprived of the fine which the law gave him. On the other hand, it was said that the King had the same power to dispense with penal laws in matters ecclesiastical as had been possessed by the Pope. The best modern opinion would seem to be that the judgement was sound law. But the real issue was not purely legal. The question that stirred Englishmen was whether James had the power and the will to do what was thought to be an injury to the established Church.

Both Charles and James also employed the suspending power. The Navigation Act of 1660 was partly suspended in the second and third Dutch wars, nor did Parliament raise any objections to the suspensions. But the Declarations of Indulgence issued by Charles and James were most unpopular. Yet there were some who held that the suspending power was peculiarly extensive in matters ecclesiastical, because of the royal supremacy. However, there was no doubt about the attitude of Parliament. In 1672 Charles issued a Declaration of Indulgence, which announced the suspension of all laws against nonconformists and recusants, and the permission to Romanists to hold services in private houses and to Protestant Dissenters to do the same in public buildings, provided the ministers obtained a licence. This the King did in the exercise of 'the supreme power in ecclesiastical affairs', which he claimed was inherent in him. When Parliament met in 1673, the Declaration was soon made the subject of debate, and the Commons resolved 'that penal statutes in matters ecclesiastical cannot be suspended but by Act of Parliament'. Their address conveyed this opinion to the King, who replied that he had acted for the furtherance of the common weal, and repudiated any claim to suspend laws affecting the life or property of the subject. With this reply the Commons refused to be satisfied, and presented another address, in which they repeated their former contention. Charles thereupon attempted to gain the support of the Lords against the Commons, and referred the matter to the Upper House. The attempt failed; for the Lords, in the address drawn up in reply to the King's

request for advice, stated that the question had better be settled by a bill. Charles, who badly needed the grant of a supply, then decided to yield. The Declaration was cancelled, and Charles informed Parliament in a speech that it would not be treated as a precedent, a promise which he kept. Further, an Act of Indemnity was forthwith passed to protect all who had broken ecclesiastical statutes in consequence of the Declaration.<sup>1</sup> By giving his assent to this bill Charles virtually acknowledged that the Declaration had been, at best, of very doubtful legality.

The suspending power, none the less, had not been expressly declared illegal either by statute or by the courts. The resolution of the Commons did not have the force of law, nor did the above-mentioned Act so much as allude to the Declaration. We hear that in 1675 there was a bill before the Commons, which provided that the dispensing with, or suspension of, statutes relating to the Church was illegal, except by Act of Parliament. But no such bill became law. It is true that legal opinion was mainly unfavourable to the existence of a suspending power in ecclesiastical affairs, and it is worth mentioning that Herbert's judgement in *Godden v. Hales* carefully omitted any mention of it. But the question never properly came before the courts.

In this connexion it should be added that the Commons on one occasion indirectly claimed a suspending power for themselves. In January, 1681, they resolved that the prosecution of Protestant Dissenters was grievous to the subject and dangerous to the peace of the Kingdom. It was argued by some that this resolution was only intended to be a deterrent to possible prosecutors, and not a direction to judges and juries. But it is difficult to accept this view and impossible, on any view, to justify the resolution of the Commons as being constitutional.

When James II, in 1687, issued a Declaration of Indulgence suspending all penal statutes in matters ecclesiastical and authorizing Dissenters and Roman Catholics to hold services in public, he was not violating a statute nor disregarding a

<sup>1</sup> 25, Car. II, c. 5. The Act was one granting the King's pardon for all offences, save those expressly excepted, committed before March 25, 1673. The exceptions, however, were so numerous that the Act was virtually one for the pardon of offenders against ecclesiastical statutes.

judicial decision. His action was certainly impolitic, and the Declaration was of doubtful legality; but that is all that can be said. A year later James issued a second Declaration to the same effect as the first, which the clergy of the established Church were directed by Order in Council to read out to their congregations on two successive Sundays. Thereupon the Primate and six of his suffragans presented a petition to James, in which they stated that they would not read the Declaration, on the ground that they thought it illegal. James instituted a prosecution against them for the publication of a false, malicious, and seditious libel; for such the petition—which had been published—was termed. The trial was conducted with curious negligence by the four judges on the bench, and the whole issue was left to the jury. The verdict was one of acquittal, and could scarcely have been otherwise, unless the jury had accepted the contention of the prosecution, that the King could only be petitioned in Parliament. For the Bishops' petition was not false, nor could it, in respect of its language, be fairly called malicious or seditious. But it is permissible to conjecture that dislike of the suspending power had some influence upon the verdict. One of the judges, indeed, had declared it illegal, while the other three had not mentioned it.

The evolution of popular opinion concerning the dispensing and suspending power is significant. At the Restoration many were ready to admit that it was desirable that the King should be able both to dispense with statutes, in order to relieve hard cases or further the common good, and also to suspend statutes, wholly or partially, in times of emergency. It was felt that there ought to be a fairly wide discretionary power in these respects, and the Crown seemed its natural repository. When, however, the King so used the power as to conflict violently with the religious opinions of the bulk of his subjects, it began to appear a grievance. Since it was difficult, if not impossible, to regulate the use of the power, the trend of opinion was to regard it as definitely illegal. James, be it said, took the precaution of packing the bench before the case of *Godden v. Hales*, and it is remarkable that he should have thought it necessary to do so when there was so much to be said for the legality of the dispensing power. But the nation was not impressed by the arguments for the dispensing power, and held James's use of the suspending power to be wholly unjustifiable.

## V

### REVENUE AND TAXATION

THE CONVENTION Parliament decided that Charles II must be provided with a revenue sufficient to discharge the ordinary expenses of government in time of peace. They calculated that £1,200,000 a year would be an adequate sum, and proceeded to grant the King such taxes as would, in their opinion, together with the hereditary revenue, bring in the required income. Considerable changes were made in the hereditary revenue. The Court of Wards and tenure by knight service were abolished, as were the rights of pre-emption and purveyance.<sup>1</sup> Parliament granted the King certain Customs duties and Excise duties. The former were granted for life; the latter, as to one half, were settled on the Crown in perpetuity as compensation for the loss of income from the Court of Wards, and, as to the other half, were given Charles for life. Certain other taxes, such as Hearth Money, were also later granted Charles and his successors, when it had become plain that his income was far below Parliament's original estimate.<sup>2</sup> Charles's actual income varied from year to year. He was entitled not to a fixed sum, but to the yield of certain sources, and it happened for many years that the revenue was far short of £1,200,000. Parliament, moreover, in 1678 reduced the value of the Customs by prohibiting the importation

<sup>1</sup> The *de facto* abolition of the Court of Wards dates from 1646.

<sup>2</sup> The Crown also possessed other sources of revenue besides these taxes. These were its lands and hereditaments, the droits of Admiralty, and a few other minor sources. Early in the reign of Charles II the Crown also secured the grant of a duty of four and a half per cent. on exports from Barbados, St. Kitts, Nevis, Montserrat, and Antigua. Out of this income, however, certain charges had to be met. In 1663 the profits of the Post Office—hitherto the property of Charles—were granted by statute to the Duke of York. Upon James's accession the profits of the Post Office were once more made part of the hereditary revenue. Postage rates were determined by statute. See 12 Car. II, c. 4, 23, 24, and 35, and 14 Car. II, c. 10, and 15 Car. II, c. 14.

of French goods for three years,<sup>1</sup> and thence till the end of the next session.

When James II succeeded to the throne, he also succeeded to the hereditary revenue, and Parliament likewise granted him for life the life revenue of Charles II. Further, James was given certain temporary sources of income. Extra Customs duties were granted him, some for eight years, some for five.<sup>2</sup> Altogether James was in receipt of about £1,900,000 a year, and this sum corresponded with the estimates of the Commons. James, therefore, was not in need of extraordinary grants while he remained at peace.

The ordinary revenue of Charles II and James II was strictly their own property, though they were supposed to defray from it the normal expenses of government. They could not properly be called upon—even through their Ministers—to account for its expenditure to Parliament. Neither in 1660 nor in 1685 did Parliament in any way attempt to regulate the King's use of his ordinary income, though it was stated in the preambles to two of the Acts granting James duties for a term of years that the money was intended for the Navy.

On various occasions Parliament granted additional supplies to meet extraordinary expenses. Special mention may be made, in this connexion, of an Act of 1661, which, though it did not impose a tax, was yet a source of money to the Crown.<sup>3</sup> The Act authorized the King's subjects to make him 'free and voluntary' gifts, and was declared not to be a precedent. Normally, however, supplies were granted by means of an assessment, a method devised during the Civil War. Each county and city was thereby required to provide a certain sum, spread over a period. The amounts to be paid by individuals on the basis of their property were assessed by commissioners named in the Act which imposed the tax. Recourse was also had to a subsidy in 1663. But that was the last occasion of its imposition. A graduated poll tax was also several times imposed.<sup>4</sup>

It was during this period that the clergy of the established

<sup>1</sup> 29 and 30 Car. II, c. 1.

<sup>2</sup> 1 Jac. II, c. 1, 3, 4, and 5.

<sup>3</sup> 13 Car. II, Stat. 1, c. 4. It expired on June 24, 1662.

<sup>4</sup> The history of taxation in this period is still very obscure. I have done no more than indicate a few points of specifically constitutional interest.

Church gave up the privilege of taxing themselves. Hitherto, except during the years 1642-60, they had granted subsidies to the King in the Convocations of the Northern and Southern Provinces, though these grants had usually, since the Reformation, been confirmed by Parliament. In 1664, however, Sheldon, the Primate, made a verbal agreement with Clarendon, the Lord Chancellor, as a result of which the clergy were taxed by Parliament for the future. The first Act so taxing them—one of 1665—contained the words, ‘provided that nothing herein included shall be drawn into example to the prejudice of the ancient rights belonging to the Lords Spiritual and Temporal or the clergy of this realm’.<sup>1</sup> But no statute has ever explicitly enacted or declared that Parliament can tax the clergy, though two Acts assume its right to do so.<sup>2</sup> The change appears to have excited remarkably little comment at the time, though there is some reason to believe that it was welcomed, or at least tolerated, by the bulk of the clergy, because they believed they would pay less under the new arrangement. It must be added that, in consequence of their subjection to Parliamentary taxation, they acquired the right of voting at elections, if otherwise qualified to do so.

Thus Parliament gained control of all taxation. But the balance of power within Parliament was greatly altered in favour of the Commons. There were a number of disputes about taxation between the two Houses in Charles’s reign, and from each of these the Commons emerged victorious. The Lower House, with good precedent on their side, denied the right of the Lords to initiate a money bill and also, without good precedent, their right to amend one. The Lords, however, were far from conceding these claims. On three occasions—in 1661, 1665, and 1667—they sent money bills down to the Commons, though none of them was in itself of any importance. Two of these bills the Commons refused to consider; the third they rejected on the first reading. The question of the right of the Lords to amend a money bill gave rise to far more serious controversy. During the first decade of the reign, indeed, the Commons accepted several amendments to money bills. But when, in 1671, the Upper House carried an amendment for reducing a proposed duty on sugar,

<sup>1</sup> 16 and 17 Car. II, c. 1.

<sup>2</sup> 10 Anne, c. 31, and 18 Geo. II, c. 18.

the Commons rejected it on the ground that the Lords could not amend a money bill. The Lords, on the other hand, maintained that their right to amend was 'fundamental'. Similarly, the Commons refused to accept certain amendments made by the Upper House to a money bill in 1677. In the following year another dispute of the same kind led the Commons to resolve 'that all aids and supplies . . . are the sole gift of the Commons; and all bills for the granting of such aids and supplies ought to begin in the Commons; and it is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, limitations, and qualifications of such grants, which ought not to be changed or altered by the House of Lords'. In 1679 the Lords again amended a money bill; but when the Commons refused to accept some of their amendments, they forthwith yielded. The victory of the Commons gave them the power, which they soon proceeded to use, of 'tacking' to a money bill enacting clauses with regard to totally different matters, and thus confronting the Lords with the dilemma of accepting clauses they disliked or depriving the Crown of indispensable supplies. Charles, however, declared in 1678 that he would veto any bills of this character.

The Commons, while thus strengthening their control over the granting of money, made certain rules for the conduct of financial business in their own house, with a view to the prevention of hasty or excessive grants. In February, 1668, they resolved that no proposal for a supply ought to be debated on the day it was made; but that it should be referred to a committee of the whole House for consideration at some later date. This was the Committee of Supply, whose opinions were reported to the House. The new rule was usually, though not always, observed. It was also the practice that the House should either accept or reject, but should not amend, the proposals of the Committee. In 1685, however, the House irregularly increased a proposed duty on sugar. In November, 1675, it was also made a standing order that, 'when there comes a question between the greater or lesser sum; the longer or shorter time,'—*i.e.*, the time over which payment was to be spread—'the least sum and the longest time ought first to be put to the question'.

For the appropriation of supply there had been precedents in the fourteenth century and in the first half of the seventeenth century, but for a few years after the Restoration no attempt was made to secure it. Late in 1664, however, the Commons voted that a grant which they were about to make should be applied towards the prosecution of hostilities against the Dutch. But no clause to this effect was inserted in the Act of Supply. In the following year the Commons put an appropriation clause into another money bill, though some members denounced it as 'introductive to a Commonwealth'. The Lords viewed the clause with much distaste, and would probably have struck it out had they not been given to understand that the King did not wish the grant of supply to be delayed by a conflict between the Houses. The precedent thus established was often followed, and several later money bills contained similar clauses. But the Commons could not always ensure that money was spent on the purpose to which it had been appropriated. Thus money assigned to the disbanding of part of the Army in 1678 was actually expended on its maintenance.<sup>1</sup> Fear of such misapplication on occasion led the Commons to take special precautions. In 1677, when appropriating a grant to the building of ships for the Navy, they provided that the money should be paid by the Treasury to the Treasurer of the Navy and to him only. Moreover, in both 1675 and 1679 proposals were made, though without success, that the produce of taxes about to be granted should be paid, not into the Exchequer, but into the Chamber—*i.e.*, the treasury—of London.

It would appear that in 1675 the Commons were in some fear that taxes might be levied without Parliamentary authority; for they then gave two readings to a bill making it an offence liable to the same penalties as treason to levy any taxes that had not been imposed by statute. No such attempt was made by Charles II; but after his death there was a brief period of unauthorized taxation. James II had no right to collect any tax, save the hereditary taxes, but he none the less collected both the whole of the Excise and the Customs also,

<sup>1</sup> Misapplication of appropriated moneys seems to have been exceptional. Danby's conduct in misapplying this grant was made one of the counts in his impeachment. See also *infra*, p. 115.



until Parliament met—some two months after his accession—when the duties were granted him by statute as from his brother's death. Many strong practical reasons could be advanced to justify the King's action, nor was he criticized for it in Parliament. The collection of the Excise duties was further justified by the following specious argument. Charles II, on the day before his death, had granted a farm of the Excise for three years. Now, since Charles had a statutory right to grant a farm for that period, it was contended that the grant was valid even after his death. Ten days after James's accession a proclamation had announced that, in the opinion of the judges, the Excise duties were legally payable and would be collected. Many lawyers, however, were of another opinion.

The Commons were also at some pains, on occasion, to regulate the King's power of borrowing on the security of the revenue—a common practice at that time. The Act of 1665 for an Additional Aid contained a clause exhorting the public to lend money on the security of the tax and arranging the order of repayment of loans from its proceeds. Again, in 1677 the Commons inserted a clause in a bill of supply, authorizing the Crown to borrow £200,000 on the security of the tax.<sup>1</sup> But in January, 1681, when the House profoundly distrusted the King, they resolved that whoever lent money to him on the security of the hereditary revenue 'shall be judged to hinder the sitting of Parliaments and shall answer for the same in Parliament'. Such a threat was of little avail; yet it showed the tendency of the Commons to curtail the power of the Crown in money matters.

This tendency had been manifested earlier in a very different way. The second Dutch War aroused in the Commons a wish to examine expenditure. When Parliament met in September, 1666, the Lower House demanded and obtained that the naval and Ordnance accounts be examined by a committee of the House. That committee, however, was hampered by its inability to administer an oath. Hence an unsuccessful attempt was made to get the Lords to consent to the establishment of a joint committee of both Houses.<sup>2</sup> The Commons thereupon tacked a proviso for the creation of a committee of their House, with power to examine the accounts and to swear

<sup>1</sup> 17 Car. II, c. 1 and 29 Car. II, c. 2.

<sup>2</sup> See *supra*, p. 83.

witnesses, to a money bill. The King was furious at this, and let it be known that he would veto the bill. The Commons then abandoned the tack and embodied the proviso in a separate bill. When the bill came before the Upper House, it was much disliked there as an infringement of the prerogative. None the less, the Lords committed the bill, but they petitioned the King 'that he should be pleased to issue out his commission under the Great Seal for taking the accounts of public moneys'. The King granted their request, though he commented on its unusual character. The Lords, meanwhile, informed the Commons of what they had done and explained that they thought this the best way out of an awkward situation, since the bill was of an unprecedented character. The Commons retorted by resolving that the action of the Lords in thus petitioning the King while the bill was before them was 'unparliamentary'. Eventually, the Lords passed the bill with some amendments; while the Commons were still debating these, Parliament was prorogued. The King, however, appointed a commission of accounts by letters patent. But those of the commissioners who were also M.P.s apparently felt certain scruples at serving without the authority of Parliament, and the investigation made little progress—for this and perhaps also for other reasons.<sup>1</sup> When Parliament reassembled in October, 1667, they were informed by the Lord Keeper that the King was willing for the accounts to be examined in any way that seemed good to the Houses. Accordingly a bill was carried which constituted a commission to take the accounts. The commissioners were named in the bill, but none of them was an M.P. They were authorized to take the accounts of all the moneys granted by special Acts and also of that portion of the Customs duties which had been applied to the war; they had power to swear witnesses, to commit those who refused to obey them, and to direct actions to be commenced in the Exchequer Court for the recovery of money that had been misapplied.<sup>2</sup>

The Commons had won a great victory; for it will be noted

<sup>1</sup> Two patents were issued: one in March and one in May, 1667. The first is apparently no longer extant. The second nominated certain members of both Houses and certain judges.

<sup>2</sup> 19 and 20 Car. II, c. 1.

that the commission was even empowered to inquire into the expenditure of part of the King's ordinary revenue—that is to say, of his own property in the strictest sense of the word. It is true that the commissioners were not M.P.s; but still, they had been chosen, and their duties had been prescribed, by Parliament. The commissioners, however, did not perform their task efficiently. The then financial system was too complex for them to grasp. Their report, when presented to Parliament, produced very different impressions on the two Houses. The Commons proceeded to censure the Treasurer of the Navy; the Lords, on the other hand, approved of his conduct. No similar commission was again appointed during this period.

## VI

### PRIVY COUNCIL AND CABINET

THE LACK of precision in constitutional matters which obtained during this period is particularly noticeable with reference to the Privy Council and the Cabinet, the new informal body, which gradually took over many of the Privy Council's functions. There was then a widespread belief, both in England and on the Continent, that a King should seek the advice of trusted persons—though he need not follow it—before coming to an important decision. Even absolute rulers have usually had some advisers, upon whom they relied to a greater or lesser extent. But there is a wide difference between a tendency to seek advice which it is not necessary to accept, and an obligation to consult, and be guided by, a determinate group of councillors. In spite of some opinions to the contrary, it cannot be said that the King of England was under any such obligation at the time of the Restoration. The Privy Council was, it is true, the King's old-established council, but the use he made of it depended largely on his pleasure. Charles II could fairly claim that he was not bound to consult the Privy Council as such on any matter, and that there was nothing to prevent him from asking the advice of a few Councillors informally or that of persons who were not Councillors.<sup>1</sup> Nor was Charles bound to follow advice when he had asked and received it. There were many, however, who did not wish to admit this. When Parliament criticized the executive, it was proper and usual for the criticisms to be levelled not against the King himself, but against his evil advisers. There was an assumption that every command issued by the King

<sup>1</sup> Clarendon himself, who had more clearly defined views on constitutional questions than most of the King's servants, held that it was perfectly correct for the King to consult, not the Privy Council as such, but a few Councillors at an informal meeting. Nor, in this respect, were Clarendon's views out of date.

was the result of advice. The adviser of an illegal act could be impeached by the Commons. Strictly speaking, Parliament had no means of punishing the adviser of an act, however unpopular, that was not illegal. The most that could be done was for either or both Houses to address the King, petitioning him to remove the offender from his presence and counsels. But Parliament naturally wished to know who were the King's advisers and, on occasion, was ready to assume, without full proof, that particular persons had advised particular measures.

It is convenient in treating of this subject first to deal with the Privy Council and its committees, formal and informal, before the reform of 1679.

Charles II had a Privy Council during his exile, though it met but seldom and its importance was small. After the Restoration things were very different. The Council at first numbered twenty-seven, but its membership increased as the years passed. In 1664 there were forty members, and in 1675 fifty. Some well-informed critics, such as Clarendon, thought the numbers too large for efficiency. It must be remembered, however, that by no means all the members attended regularly. In 1675 the quorum was fixed at four. Much business was transacted at the Council meetings, where the King was often present. A good deal of it, indeed, was of a routine and unimportant nature; but, especially in the earlier years of the reign, several important decisions were made at Council meetings. The matters there dealt with were so miscellaneous that they can hardly be summarily indicated. The Council could and did deal with numerous small administrative questions; it considered petitions and referred them to the Minister within whose purview they came; bills which had passed both Houses were supposed to be considered in Council during the earlier part of the reign; treaties were often considered there; strategy in war time was, on occasion, debated in Council. At any time matters of policy or questions affecting more than one department might come before it. The latest historian of Charles II, Mr. D. Ogg, has aptly called the Council during the earlier part of the reign 'a great clearing house of government'. There is, indeed, an obvious need in every state of some means of co-ordinating governmental activities. The question, then, was whether the Privy Council

was to continue the discharge of that function in England. Meanwhile Parliament regarded the Council as the only proper advisory body for the sovereign, except, of course, itself. They had, however, no means of finding out who had advised any particular measure, and in 1677 the Commons were bluntly told by Mr. Secretary Coventry that the King was not bound to follow the advice of his Council unless he so wished.

Throughout the period between the Restoration and the reform of 1679, and especially after the first few years following the Restoration, the labours of the Privy Council were lightened, and its control over affairs diminished, by the existence of numerous committees. In the appointing of committees of the Council, both temporary and standing, there was nothing new. Numerous temporary committees were appointed after the Restoration. Four standing committees were also created in 1660: for the Treasury, for Irish affairs, for the Plantations, and for the Navy. Mention too must be made of another body—a committee for foreign affairs. This, though as far as is known it was not a formal committee of the Council, was of more importance than any of the above. It dealt with matters requiring secrecy, not merely with foreign affairs. Sometimes it prepared business for the Privy Council. It was on this committee that Charles seems chiefly to have relied for advice, and among its members were the Chancellor, Treasurer, and the two Secretaries of State. Since each of the four formal standing committees and practically all the temporary committees of the Council had at least one Secretary among their members, it is plain that the committee for foreign affairs was well qualified to serve as a general advisory body.

In 1668 a change took place. The old committees were dissolved and four new standing committees of the Council were appointed: for foreign affairs, for the Navy, for trade and the Plantations, and for complaints and grievances. The principal Ministers sat on all four committees and were also among the most regular attendants at meetings of the whole Council.<sup>1</sup> The committee for foreign affairs, which was also supposed to deal with the maintenance of order in England,

<sup>1</sup> It was further decided at this time that the two Secretaries of State were to be members of all committees. The quorum was to be three, of whom one must be the Lord President, Lord Keeper, or a Secretary.

was incomparably the most important of the four. Unlike the others, it was not bound by the rule that no matters should be dealt with by a committee unless referred to it by the Council. The King usually, if not always, attended its meetings, while he was not regularly present at those of the other committees. In practice, too, the committee for foreign affairs was not restricted to dealing with those matters with which it had been appointed to deal. Thus it is not strange that the importance of the Privy Council steadily decreased. Decisions were often taken without its knowledge, and in many other cases it only recorded its approval of what had been settled in the committee. For instance, the issuing and terms of the Declaration of Indulgence were carefully discussed in the committee; the Privy Council as such was not informed, until the King ordered the publication of the Declaration at a Council meeting. But it would not be true to say that the committee dealt with all important matters, or that every such matter was discussed by a formal body. Charles did not scruple to keep both the Council and all its committees in the dark, when he so pleased. The secret treaty of Dover was not known to any of these bodies. Shaftesbury, too, while Lord Chancellor, apparently thought it perfectly natural for the King to take an important decision on the private advice of a single person.

As Parliament grew more critical of the King's policy, complaints began to be uttered in the Commons that the Privy Council was not consulted on matters of moment, and that the King took important decisions on the advice of a few men, whom he trusted at the time. Parliament were thus hampered in their attempts to control policy, since it was impossible to know with certainty who were the royal advisers. The complaints became especially loud in 1678, and were repeated in the new Parliament, which met in March, 1679. The King, it was then stated, had dissolved the last Parliament without consulting his Privy Council. Charles then made an attempt to conciliate Parliament, a thing particularly necessary when the nation was in the midst of the Popish Plot scare. On April 20 he dismissed all the members of the Privy Council. They were told that the Council had grown too large, and that therefore the King had hitherto been compelled on many occasions to consult only the foreign committee, or a few of

them; this had led to much dissatisfaction; Charles had accordingly resolved to appoint a new, and smaller Council, by whose advice he was determined to govern. This Council was to number thirty, of whom fifteen were to be great officers of state, ten prominent Lords, and five commoners.<sup>1</sup> On the following day Parliament was informed of the change by the King, and was assured that he intended to follow the advice of the new Council.<sup>2</sup> It is to be noted that some of the advocates of Exclusion were to be found among the new Councillors, and their appointment cannot but be regarded as an attempt to throw dust in the eyes of the public. For events soon showed that Charles had no intention of making the reformed Council an effective advisory body.

The new Privy Council never had much power. Charles did not hesitate to disregard its advice, when he so pleased. Thus, he dissolved Parliament in July, 1679, although a majority of the Council were against dissolution, when the question was put to them. Again, in January, 1681, he told the Council he was about to dissolve his fourth Parliament, and added that nothing any Councillor could say would make him change his mind. The members of the Council found they had little influence, and were regarded with some suspicion by the Commons. It is no wonder that some of them resigned after a short time. Charles, on his part, soon dismissed certain Councillors whom he disliked.

Immediately after the constitution of the new Privy Council four standing committees were appointed: for intelligence, for trade and Plantations, for Tangier, and for Ireland. The Chancellor, President, and Secretaries sat on each of these.<sup>3</sup> The committee for intelligence was simply a revival of the old committee for foreign affairs under another name, and it soon began to discharge much the same functions. The King

<sup>1</sup> The old Council had numbered forty-seven; the new one actually numbered thirty-three and included two-thirds of the members of the old. The scheme for the reform may have originated with Sir W. Temple, but this is not certain.

<sup>2</sup> The declaration to the old Privy Council was also published in the *Gazette*. Charles, in fact, was endeavouring to conciliate public opinion by a pretence of loyalty to what many deemed a laudable and ancient constitutional practice.

<sup>3</sup> The committees numbered respectively, nine, twenty-two, thirteen, and ten.



usually attended its meetings, and business of all kinds was discussed there. As time passed its membership changed, and it came to be known as 'the Committee,' or 'the Committee for foreign affairs', or 'the Cabinet'. For all these names were used to designate the body of the King's confidential advisers. It was still true, however, that the King might consult with whom he would in any manner that he pleased. There is reason to believe that, at times, some members of the committee were more trusted than others and were, on occasion, consulted separately. James II, moreover, seems to have held meetings of a small group of Roman Catholic advisers besides meetings of the committee.

Thus we find that throughout this period there was, besides the Privy Council, always another body—whether a formal committee of the Privy Council or not—which the King often consulted on matters of moment. But this latter body had not clearly-delimited functions. Its popular designation was as uncertain as its nature was indefinite.<sup>1</sup> All this vagueness was to the advantage of the King, in the sense that it made it easier for him to keep in the dark those whom he wished to be uninformed. How far it obstructed administrative efficiency is another question. Throughout this period, however, it is noticeable that a small group of Privy Councillors tended to assume an importance disproportionate to its numbers. This group, most of whom were Ministers, attended Council meetings regularly, and usually sat on important committees, particularly on the confidential committee. These men could not but have a great deal of knowledge and of the power that goes with knowledge. But a Cabinet in the modern sense they were not. There was, as yet, no Prime Minister and no collective responsibility. They were in the most literal sense the King's servants; he could use or refuse their services as he pleased, and the frequent divergences of opinion among them helped to keep them weak.<sup>2</sup>

<sup>1</sup> I do not discuss the history of the words 'Cabal', 'Cabinet', and the like.

<sup>2</sup> See *infra*, pp. 109-110, 112.

## VII

### KING, PARLIAMENT, AND MINISTERS

THE REIGN of Charles II witnessed a number of attempts on the part of Parliament, and, in particular, of the House of Commons, to control the executive in various ways. It would, however, be incorrect to assume that Parliament, in this respect, pursued a deliberate and consistent policy throughout the reign. What happened was that on certain occasions the Commons, under the influence of strong feelings aroused by the circumstances of the moment, attempted to make their will prevail. In strict theory the executive was very little subject to Parliamentary control. For the King was the executive. He could appoint and dismiss his Ministers at pleasure and give them whatsoever orders he wished. It is true that they were not bound to break the law at his command. They were, indeed, punishable for any illegal act they might commit. Since, too, the King, in many matters, could only act through a Minister, his powers were thereby limited. The Commons, moreover, could impeach before the Lords persons who could not easily be brought to trial before any other court. To bring great offenders to trial was not merely their right, but their duty, as the grand inquest of the nation. The King, then, who could do no wrong himself, could only induce others to do wrong at their peril. But in law there was nothing to prevent him, with the aid of one or more Ministers, from pursuing a policy which, though it involved no illegality, was yet highly distasteful to Parliament. Over policy the Houses had little direct control. Indirectly they might influence it by refusing supplies, by addresses containing advice, and by impeachments of Ministers. But it was by no means clear that Parliament had any business to interfere with the executive in normal circumstances. Government, and the conduct of foreign affairs in

particular, was held by many to be the province of the King alone. Hence Parliament's attempts to intervene in this sphere were intermittent and controversial.

Charles II, albeit unconsciously, greatly contributed to the increase of Parliament's powers. His policy frequently aroused much opposition and stimulated the Commons to attempt what some considered unwarrantable encroachments on the prerogative. Moreover, he kept the Cavalier Parliament in being for nearly eighteen years, and so did much to educate a class of politicians.<sup>1</sup> The four years without a Parliament at the end of the reign did not undo the effects of this. In other ways, too, Charles weakened the Crown. He often pretended to take Parliament into his confidence on matters of policy, and he sometimes had recourse to measures which appeared to be concessions to Parliamentary pressure. Thus the fact that the powers of Parliament were not too clearly defined turned to their advantage. The more Parliament did, the more difficult it became to say what they could not do.

For a few years after the Restoration there was tolerable harmony between Parliament and the executive. Although Parliament did not see eye to eye with Charles in matters ecclesiastical, yet his general policy was not displeasing to them. Nor did they make any attempt to influence his choice of Ministers. Charles exercised his powers of appointment and dismissal much as his predecessors had done. He did not try to secure a set of Ministers who were agreed on all major points. He considered them as a number of individuals, not as a united body. None had any claim to be consulted in matters that did not concern his own department. The Lord Chancellor, Clarendon, had, it is true, a position of some pre-eminence. But this was chiefly due to his long and valuable services to the Stuarts. Clarendon himself, when advised by some friends to give up the Great Seal and become a Prime Minister—not in the modern sense, but in the same way that Mazarin had been Prime Minister in France—turned down the suggestion as impracticable and undesirable. Nor had Charles any real desire for such a Prime Minister. Clarendon on more than one occasion saw high office conferred on men he disliked,

<sup>1</sup> Parliament did not sit for business every year; but there were seventeen sessions of the Cavalier Parliament, many of them long sessions.

and on some important matters was not even consulted. Thus it might and did happen that different policies had each its advocate among the Ministers, while the policy of the King did not necessarily agree with that of any Minister. Charles, who was a master of dissimulation, probably thought this state of affairs advantageous to him; but experience soon showed that it increased the difficulties of co-operation between King and Parliament. Charles, of course, found it necessary to secure the aid of certain members of both Houses—some of them Ministers—for the purpose of managing Parliament. These persons, however, had not necessarily his full confidence, and this fact diminished their chances of success. To a great extent, indeed, the King could always rely on the Lords for support. But the Commons were more troublesome. Though Charles could sometimes secure the defeat of unpalatable bills in the Upper House, that was not enough. For he was frequently in need of supplies, and the Commons knew well how to tighten the purse-strings.

The second Dutch war enabled Parliament to assert themselves in more ways than one. In the spring of 1664 both Houses passed resolutions on the subject of Dutch aggression, which were presented to the King. He was asked to take steps to secure the rights of his subjects, and the Houses promised to support him in any measure he took. Charles, so far from resenting this, replied that he would act in the manner desired. In the following session, at the end of the same year, the speech from the throne stated that the King had been compelled to equip a great fleet against the Dutch, and concluded with a request for supplies. Moreover, a narrative of the quarrel between England and the United Provinces, drawn up by the King, was read out to the Houses. Again, at the opening of the next session in October, 1665, Charles declared, 'I entered upon this war by your advice and encouragement'. Thus Parliament were stimulated to take an interest in foreign policy. The ill-success of the war soon led the King to take a further significant step. In the summer of 1667 he dismissed Clarendon, who had become very unpopular. When Parliament met in October, the King's speech hinted that he had done so to please them. The Houses thereupon voted addresses, in which they thanked the King for the dismissal,

Charles in his reply pledged himself never to employ Clarendon again. The Commons, however, did not let the matter rest there. They drew up articles of impeachment against Clarendon, the last of which charged him with betraying the King's secrets to the enemy, and this was taken as sufficient ground for an impeachment of treason.<sup>1</sup> But the Lords refused to commit Clarendon, since no particular act of treason was alleged. The King, to avoid trouble—perhaps he feared Clarendon might suffer the fate of Strafford—ordered the ex-Chancellor to flee the country, which he did. The Houses thereupon passed a bill for the banishment of Clarendon. If he returned, he was to suffer the death penalty, and the King was prohibited from pardoning him.

These events were of great importance. Not only had the King encouraged Parliament to believe they could secure the dismissal of a Minister, but the Commons had made an unwarrantable use of their right to impeach. They had drawn up the articles against Clarendon without taking any real care to secure proper evidence. Their overmastering desire was to prevent the return of Clarendon to influence in the royal counsels, and to secure their end they had employed the weapon of impeachment without much regard for justice. The Lords, as became the highest court in the land, had shown due respect for the law. But both Houses had acquired a sense of increased importance.

Charles continued to take Parliament into his confidence on some matters of foreign policy. In February, 1668, he informed them of the conclusion of the Triple Alliance. The Lord Keeper, again, at the beginning of the session of 1670-71, referred to several recent alliances. In February, 1673, the Chancellor gave Parliament a narrative of the events which

<sup>1</sup> Clarendon was also charged with corruption in the execution of his office, with advising illegal imprisonments, with designing to establish arbitrary government by the aid of a standing army, and with counselling the sale of Dunkirk. It may be added that many M.P.s held the sale of Dunkirk without the consent of Parliament to be illegal. Opposition to the cession of territory without Parliamentary consent was again shown by the Commons in April, 1679, when they resolved 'that those who shall advise His Majesty to part with Tangier to any foreign power or state . . . ought to be accounted enemies to the nation'. It would seem that at the present day it is probable, though not certain, that the Crown may cede territory without the consent of Parliament at any time; it may certainly do so as part of the terms of a treaty of peace.

had culminated in the third Dutch War, and told them the war was theirs. At the beginning of the session of 1674 the King made a speech in which he denied that the alliance with France contained any objectionable secret articles and offered to submit the treaties with France to a small committee of both Houses. A little later in that session the King communicated to Parliament the peace terms offered by the Dutch, and asked their advice on the subject. Both Houses then presented addresses advising him to make peace, and this advice he promised to follow. Meanwhile the Commons attacked some of Charles's advisers. The alliance with France was by no means popular, and this, together with the King's religious policy, made the Commons aggressive. They began by presenting an address requesting the King to dismiss the Duke of Lauderdale from his employment and from the royal presence and counsels for ever.<sup>1</sup> They then turned upon the Duke of Buckingham, who obtained their leave to make a speech in his own defence. After he had done so, the Duke was required to answer certain questions. He was asked who had advised various diplomatic and naval measures. The House were so displeased with his speech and answers that they resolved to address the King for his removal from his employment and from the royal counsels. Finally, the conduct of the Earl of Arlington, one of the Secretaries of State, was called in question. Arlington, as Buckingham had done, appeared before the Commons, delivered a speech, and answered several questions. He made a good impression, and no further steps were taken against him.<sup>2</sup> The relations of Charles's advisers with each other are illustrated by the fact that Buckingham's speech had been largely devoted to an attack on Arlington.

In 1675 the Commons considered the question of impeaching Danby, the Lord Treasurer, for misconduct in the management of his department. The charges were flimsy and were eventually dropped. This attempted impeachment was simply a move of Danby's political opponents. It serves

<sup>1</sup> Lauderdale was a Privy Councillor, but held no English office; he was, however, a Minister in Scotland.

<sup>2</sup> The House, which had been considering the impeachment of Arlington, referred the matter to a committee. It was never again taken up by the House.

to show, however, the way in which impeachments had come to be regarded.

The session that opened in February, 1677, witnessed a sharp conflict between King and Commons concerning foreign policy. On March 15 the two Houses jointly presented an address, which represented the progress of the French forces in the Netherlands as a danger, and requested the King to make alliances with a view to saving them from conquest. Charles replied that he would do what he could to check the French, consistently with the maintenance of peace and the safety of England. On March 30 the Commons presented a further address to the same effect, with the addition that they would support the King if he were involved in war. Charles subsequently intimated that his policy would be influenced by their readiness to vote supplies. The Commons made a certain provision, but not so great a one as the King desired. When, after a brief recess, the Houses met again in May, conflict rapidly developed. The King asked Parliament to trust him and grant money. The Commons, however, drew up an address, presented on May 26, in which they declared it was contrary to precedent to vote money for the support of alliances that had not been communicated to Parliament, and requested Charles forthwith to make an alliance with the United Provinces. This address had been strongly opposed in debate as an encroachment upon the prerogative, and the King's reply made the same point in the most incisive language. He said that, were he to suffer 'this fundamental power of making peace and war to be so far invaded . . . as to have the manner and circumstance of leagues prescribed to me by Parliament, it is plain that no prince or state would any longer believe that the sovereignty of England rests in the Crown'. An adjournment then suspended the quarrel.

Parliament met again at the beginning of the following year. The King, in a conciliatory speech, said he had made alliances with the United Provinces in order to preserve the Netherlands, and that he trusted the supplies required for his armaments would be granted. The Commons in their address of thanks, presented on January 31, requested Charles to insert certain clauses in all treaties of alliance. The King returned an angry answer in writing, which stated he would never surrender his

treaty-making power. The answer gave rise to animated debates, and eventually led to the drawing up of an address requesting the King to declare war on France immediately. The Lords were asked to concur with this; but, since they proposed amendments to which the Commons would not agree, the address was never presented. At the same time, however, a bill was passed for the grant of a supply, which was appropriated to the expenses of a war with France.

In April the Lord Chancellor made a speech to the Houses which gave an account of the recent negotiations and alliances between England and the United Provinces and stated that the King wished to have—and would accept—the advice of Parliament on foreign policy. The King, further, laid the treaties with the Dutch before the Houses. Not content with this, they asked him to lay certain diplomatic correspondence before them. These requests, however, were refused. The Commons then resolved that the treaties with the United Provinces were not in accordance with their addresses nor consistent with the national interest. A second resolution was also passed to the effect that the King be advised to ally himself with the Dutch, the King of Spain, and the Emperor, in order to make war on France. These resolutions were ordered to be reported to the King, who returned a curt and angry answer. The Commons retorted by drawing up an address, in which they protested they had never intended to encroach upon the prerogative, but had merely tendered their advice on matters affecting the national safety. The address concluded with a request for the dismissal of those councillors who had advised the royal replies to the addresses of May 26, 1677, and January 31, 1678. The King thereupon prorogued Parliament for ten days, after telling the Upper House that the Commons had used him very ill.

Subsequently, Parliament had less opportunity and desire to meddle with the conduct of foreign affairs, owing to the urgency of other matters. But though they abandoned for the time their attempts directly to control foreign policy, they once more attempted with the utmost vigour to interfere with the King's choice of Ministers and counsellors.

At the end of 1678 the Commons impeached the Lord Treasurer, Danby, of high treason. It was pretty clear that



the acts upon which the most serious charges were based were not legally treasonable. Moreover, Danby could prove they had been done by the King's command.<sup>1</sup> But the Commons, who knew this full well, were striking at the Minister, in order to cripple the King. Danby's unpopularity with the House, though real, was not the chief cause of his impeachment. The Commons were incensed with the King for pursuing a hated foreign policy and for receiving French gold. The Lords, however, refused to commit Danby, and shortly afterwards Parliament was dissolved. When the new Parliament met in March, 1679, they were informed by the King that he had granted Danby a pardon. A little later Danby was dismissed from the office of Lord Treasurer. Heated debates about the pardon took place in the Commons, and the House showed itself resolved to proceed against Danby, on the ground that the pardon was illegal. When it appeared that he might abscond, they carried a bill for his attainder unless he surrendered by a certain day. The bill was accepted by the Lords after some demur; but it never became law; for Danby surrendered himself before it was presented to the King. He then, after having been committed to the Tower, pleaded his pardon in bar of the impeachment. Danby was never tried, owing, firstly, to disputes between the Houses about procedure, and, secondly, to prorogations and dissolutions. Hence the validity of his plea could not be judicially decided.<sup>2</sup>

Towards the end of 1680 Parliament again impeached a Minister. The victim was Sir Edward Seymour, Treasurer of the Navy. He was accused of misconduct in his official capacity, and possibly the charges had some substance.<sup>3</sup> A

<sup>1</sup> The main charges against Danby were: that he had illegally conducted negotiations with foreign states and had given orders to English envoys without informing the Secretaries of State or the Privy Council; that he had designed to introduce arbitrary government and, with this end in view, had promoted the raising of a large army and had applied to its maintenance moneys statutorily appropriated to its partial disbandment; that he had endeavoured to alienate the King from Parliament, and, in order to do so, had sought to obtain a French subsidy for him; that he had concealed his knowledge of the Popish Plot; that he had been guilty of misconduct in his management of the Treasury; and that he had wrongfully obtained large grants from the Crown.

<sup>2</sup> See *infra*, p. 151.

<sup>3</sup> The principal charges against Seymour were: that in 1677 he had lent money, appropriated by statute to the building of ships, for the support

dissolution, however, prevented his trial. Of far greater significance was the attack on Lord Halifax, who had just played a great part in the rejection of the second Exclusion Bill by the House of Lords. Halifax was a Privy Councillor, but held no office. Hence he could not be accused of ministerial misconduct, and the attack on him took the form of an address praying the King to dismiss Halifax from his presence and counsels. The reason assigned was that Halifax had advised the dissolution of the previous Parliament. Charles replied that no substantial grounds for the removal had been given, but that, if any crime could be proved against Halifax or any other counsellor, he would not interfere to protect the guilty party. Thus the King's refusal was accompanied by a concession; for his answer was a virtual promise not to grant any more pardons to persons accused of political crimes.

During the reign of James II there was but one session of Parliament. Only at the end of that session did the Commons come into conflict with the King, who promptly prorogued Parliament in order to escape their importunities on the subject of the dispensing power.<sup>1</sup> Hence there is little to say about the relations of Parliament and the executive while James was on the throne.

The attitude of the House of Commons towards the King and his Ministers altered considerably during the years 1660-81. At first the Commons held that Parliament was only concerned with money-giving, law-making, the representation of grievances in the old sense, and the impeachment of criminal Ministers on rare occasions. Gradually they became critics of the King's policy, which they sought to control. Since they had no proper means of determining the King's choice of advisers, they made use of impeachments and addresses. But the King, by prorogations and dissolutions, could always prevent the trial of impeached persons, while addresses could simply be ignored. The most effective weapon in the hands of the Commons, the control of the purse, they had blunted by the financial settlement of 1660. Thus Charles, with the aid

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of troops who ought, by statute, to have been disbanded; that he had misapplied other moneys; and that, while Speaker, he had received £3,000 a year out of the secret service funds.

<sup>1</sup> See *supra*, p. 90.

of occasional subsidies from Louis XIV, could be independent of Parliament in peace time. He could not, indeed, carry on a war for long without Parliamentary support; but Parliament, on the other hand, could not force him to start one. Thus, while there was ample cause for friction between King and Parliament, there was no obvious way of deciding disputes. Charles and James seem dimly to have realized the need for some means of securing harmony between Parliament and the executive, and they tried to maintain a group of supporters in the Commons by the use of patronage. Danby appears to have been, for a time, a fairly successful Parliamentary manager. These methods, however, were only partly and temporarily successful. Perhaps their failure was in some degree due to the fact that the ablest Parliamentarians either were, or were created, peers.

During the Exclusion Bill controversy Shaftesbury created something very like an organized party in support of Exclusion. This development was striking, and had no precedent in the earlier part of the reign.<sup>1</sup> But parties in the modern sense did not then exist. Though the names 'Whig' and 'Tory' came into general use at this time, their meaning was rather vague; nor could all who were interested in politics be classed as either 'Whigs' or 'Tories'. There was, indeed, a widespread disapproval of anything like a political party; that the Commons should be divided on party lines was regarded as particularly unfortunate, and was certainly out of keeping with the old conception of their functions. By parity of reasoning the King's attempt to secure a majority favourable to him in the House was disliked as an infringement of its independence. Twice attempts were made to check it. In 1675 the Commons considered a bill for declaring vacant the seat of any member who accepted an office of profit from the Crown, although his re-election was permitted. This bill was defeated, as savouring

<sup>1</sup> It would seem that Shaftesbury's organization circulated during the Exclusion elections a form of 'instructions', which constituents were asked to require successful candidates to accept. This was a kind of attempt to make M.P.s delegates instead of representatives; but the precedent thus set was not followed at the election of 1685. In the eighteenth century 'instructions' were sometimes given to M.P.s by their constituents. Opinions varied much as to their propriety. But they have never had any legal force. No M.P. could ever be compelled to follow them or be made liable to a penalty for not doing so. See *infra*, p. 245.

of a commonwealth. But on December 30, 1680, the Lower House resolved that no member should accept a place or pension without the leave of the House. It would be unwise to draw sweeping conclusions from these facts, but they show that the existence of a new problem was recognized. Its solution was not to come until after the Revolution, and then only after much debate and hesitation. But it is interesting to note that even in the reign of Charles II the eventual compromise was partly foreshadowed by the bill of 1675.

## VIII

### THE PROBLEM OF SOVEREIGNTY

TO THE modern student it seems that the chief constitutional conflicts of this period turned on the question of sovereignty. Did sovereignty reside with the King alone, with the King in Parliament, with the Houses of Parliament, or with the people? Certainly, the central problem was that of sovereignty. But this fact was then realized by few. The prevailing belief was still that there was some sort of fundamental law, which could not justifiably be altered or broken. But side by side with this belief, real though it was, there was often to be found a belief in the existence of a supreme power, which could act decisively in emergencies. The contradiction was seldom apparent, because those who advocated particular changes were far from desiring a complete change of political institutions. Almost all were conservatives in a greater or lesser degree. Hence, although Hobbes had expounded a theory of sovereignty in the clearest language, few understood him. Men were attached to the great national institutions, the monarchy, the Church, Parliament, and the Common law. These were held all the more dear because of their sufferings in the period 1642—60. How, then, could men believe there was any power which could rightfully destroy them?

Hence there was much confusion in the minds of the majority. Belief in a fundamental law was cherished, because that law appeared to be a safeguard for old and valued institutions. But the fundamental law was variously described as the Common Law, Magna Carta, the law of nature, the contract between King and people, and the divine right of kings. At the same time it was generally accepted that somewhere in the body politic there must be a power that could provide for emergencies, and that power was often regarded as residing with the King in Parliament. Such a view could not but conduce

to the belief that the King in Parliament was sovereign, though that conclusion was seldom drawn until a later date. Acts of Parliament were of great moment at this period. They turned the Convention into a true Parliament, imposed a new Prayer Book, confirmed the King's control of the forces, imposed tests, and disbanded parts of the Army, to name only a few examples. Meanwhile—whatever might be said of their power to do so—the courts never pronounced a statute void as being contrary to fundamental law. All this could not but mightily enhance the prestige of Parliament.

But what of the King? Could not a case also be made out for his sovereignty? In point of fact his chances of being generally recognized as a sovereign, in the Austinian sense, did not increase. Many held that he reigned by fundamental law, whether or no they called it divine right, and that certain powers were inseparably attached to the Crown. But even those who held this belief in its most extreme form did not regard him as absolute. They would not admit, for instance, that he could alter the succession. Many denied that he was one of the three estates of the realm, as was later to be generally believed.<sup>1</sup> These estates, they said, had no power without him.<sup>2</sup> Some went further, and maintained that it was the King's will that made a law, while Parliament only advised it. None the less, that advice was generally considered necessary for legislation. At most, the King, apart from Parliament, was held to have a dispensing and suspending power. The theory of the divine right of kings, indeed, was far from being conducive to a belief in the sovereignty of the monarch. Those who maintained that theory laid stress rather upon the sinfulness and unlawfulness of rebellion than upon the king's absolute power. The theory of the divine right of kings, moreover, was generally accompanied by that of passive obedience. Granted that resistance—so it was argued—was never justifiable, though the King were as wicked as Nero, yet obedience to any command he might give was not required. The early Christians, it was

<sup>1</sup> In the eighteenth century King, Lords, and Commons were often held to be the three estates of the realm, between whom power was divided. In the Restoration period many denied that the King was an estate; for he was above the estates, who were in no sense his partners.

<sup>2</sup> On the other hand, some said King, Lords, and Commons had co-ordinate power.

pointed out, had submitted to torture and death without resistance, but they had not apostatized. The duty of the subject, when commanded to do wrong, was respectfully to refuse and meekly to abide the consequences. It was, then, perfectly conceivable that a King might find himself faced with the refusal of a majority of his servants to obey him. Nearly all the clergy did in fact refuse to read James's second Declaration of Indulgence. Thus passive obedience might turn out to be what would nowadays be called passive resistance and non-co-operation. This is poles apart from Hobbes's doctrine that the command of the sovereign carries with it its own justification and requires active obedience.

The crisis brought on by the Popish Plot scare clearly revealed the inconsistencies in the minds of most men. A strong majority in the Commons and a minority in the Lords, under the leadership of Shaftesbury, wished to exclude from the succession the Duke of York, the heir presumptive, who was a Roman Catholic. Such an act could surely only be performed by a sovereign power. Even those who held that there was a contract between King and people, for the breach of which the former might rightfully be dethroned, could not find any ground therein for excluding James before he had come to the throne. Nor could it be said that it was contrary to fundamental law for a Roman Catholic to reign. For it could scarcely be maintained that all the Roman Catholic Kings of England had lacked a proper title to the throne. James could only be rightfully excluded if the King in Parliament was competent to make any law for any reason. The advocates of Exclusion could not, logically, set any limits to the power of the King in Parliament. For it would be difficult to imagine a stronger act than the exclusion of the heir presumptive from the succession. Yet Shaftesbury, the leader of the Exclusionists, had said in 1677 that the courts ought to declare void a statute which conflicted with Magna Carta.<sup>1</sup> But why should Magna Carta be a fundamental law, when that regulating the succession was not?

The debates on the Exclusion Bills gave occasion for much interesting discussion on this issue. Those in favour of the bills

<sup>1</sup> He had said this when applying to the King's Bench to release him from prison after his committal by the Lords. Cf. *supra*, p. 76.

argued that the King in Parliament was omniscient and could not be restricted by fundamental law. As a natural consequence of this, it followed that no Act could bind a subsequent Parliament. It was further contended that James's exclusion was for the national good, and that interference with the normal course of succession could be justified by precedents drawn from the sixteenth century. Had not an Act of 1571 declared that the succession could be altered by statute? Those who opposed the bills laid stress upon fundamental law and the unalterability of the succession; an Act for that purpose would be null and void, as would an Act against Magna Carta. Exclusion, too, would involve all who had sworn allegiance to Charles and his heirs in the guilt of perjury. From this one would be tempted to infer that the contest was between believers in sovereignty and believers in fundamental law. But, as has been said, advocates of Exclusion were ready enough, on occasion, to profess belief in fundamental law. Moreover, inconsistencies are also to be found among the opponents of Exclusion. Charles II, who was firmly attached to the established order of succession, resorted to a curious expedient in order to save James's right. He professed himself ready to assent to a bill which would deprive his brother, on his advent to the throne, of the exercise of the most important parts of the prerogative. Charles's sincerity may be doubted; but the offer is none the less remarkable. Charles's proposal really implied that no inseparable prerogatives were attached to the Crown. But of what value was that bare right to reign which would have been left to James, had the plan of limitations been adopted by Parliament? Charles's action contributed to weaken belief in fundamental law. For the moment, however, it served to show the reasonableness of the King and the unreasonableness of the advocates of Exclusion. Charles, therefore, gained a considerable tactical advantage, when his offers were treated with scorn. About the ultimate consequences of his move he troubled himself but little. In this, as in so many other things, Charles showed his lack of foresight. The loyalist reaction at the close of his reign caused the problem of sovereignty to fall into the background. Nor was it raised in an acute form during the next reign. For those who favoured the Revolution tended to think of themselves as upholding



fundamental law. Even though they might differ as to the exact nature of that law, they were united in the belief that James had gone beyond due bounds. For this reason even after the Revolution there were for some time few who cared to maintain the existence of a sovereign power in that state.<sup>1</sup>

<sup>1</sup> Halifax, however, thought the notion of a fundamental law absurd. So-called fundamentals, he said, varied from age to age. He believed 'that in every constitution there is some power, which neither will nor ought to be bounded'. But such views were very exceptional in the political world, and Halifax did not print the work which contains them. See *Political, Moral, and Miscellaneous Thoughts and Reflexions*, first published in 1750. But Halifax must occasionally have given utterance to his opinions in Parliament; of his speeches, however, we know deplorably little.

## IX

### CHURCH AND STATE

THE RESTORATION of the monarchy did not and could not by itself solve those ecclesiastical problems which had so long vexed the nation; rather did it excite hopes and fears of different kinds in the various schools of thought. The position in England was then chaotic. Benefices were held both by those who had, and by those who had not, received episcopal ordination. Wide variations of doctrine and ceremonial existed. There were, moreover, many who acted as ministers to the numerous unauthorized sects. The general feeling in 1660 was that some attempt must be made to secure a lasting settlement. But there was great difference of opinion as to the character which that settlement should assume. The bulk of opinion was in favour of an established Church and against toleration for those outside it. But was that Church to resemble, as nearly as might be, the Church at the outbreak of the Civil War, or were its discipline, rites, and ceremonies to be modified so as to widen its appeal? The great majority of the episcopalians—particularly those clerks who had been violently extruded from their benefices—naturally favoured a return to the old order. On the other hand, many of the so-called Presbyterians wished such changes to be made as would enable them conscientiously to conform.<sup>1</sup> There were, however, a number of Protestants who were not likely to adhere to the established Church whatever the new settlement might be. Were they all to be refused toleration? As for the Roman

<sup>1</sup> The religious group, which desired this, is usually termed 'Presbyterian'. But many of its members were not Presbyterians in the strict sense of the word. Such a one was Baxter, who has always been regarded as a leader of the group. Baxter's real position is hard to define. While, then, I use the term 'Presbyterian' for want of a better, I must admit that I use it in a rather indefinite sense, but in this I have followed the practice of other writers.

Catholics, few outside their own communion favoured any relaxation of the laws against them.

The restoration of the King brought with it that of the old legal position of the Church as it had been in the spring of 1642, and this was a great source of strength to the episcopalians.<sup>1</sup> Much, however, depended on the King, who was now in full possession of the ecclesiastical supremacy. Charles was morally, though not legally, bound by a somewhat vaguely-worded clause in the Declaration of Breda, which promised toleration to tender consciences in such form as Parliament might sanction. In the period immediately following his return, practical considerations commended a conciliatory line of conduct to the King. The Convention Parliament had therefore a great opportunity to bring about the ecclesiastical settlement it desired. That opportunity was not taken. Perhaps the diversity of opinion in the Convention made legislation impossible. We hear that in June, 1660, a Bill for the Maintenance of the True Protestant Reformed Religion was read in the Commons; but the M.P.s were far from agreeing as to what that religion was. Some argued that matters of doctrine should be determined by Scripture, and matters of discipline by law; Presbyterianism had its advocates; but others favoured a form of episcopacy. Eventually, consideration of the bill was postponed, and a request, to which he agreed, was made to the King that he should call an assembly of divines to advise him on matters ecclesiastical.

Certain Presbyterian divines had approached Charles—while he was still in Holland—and intimated to him their readiness to accept moderate episcopacy; but they had asked that they and those who thought like them might not be required to consent to things which they held to be unlawful and the lovers of the old order admitted to be indifferent. Charles's answer had been favourable, and later—in June—the Presbyterians, on the understanding that reciprocal concessions were to be made, submitted their proposals. They were ready to accept episcopacy of the kind advocated by Archbishop

<sup>1</sup> The Convention Parliament passed an Act, which restored to their benefices all who had been expelled during the Interregnum, provided they had not advocated the trial of Charles I nor condemned infant baptism. See 12 Car. II, c. 17. The implications of this Act were momentous.

Ussher; every Bishop was to appoint numerous suffragans—one for each rural deanery—and these suffragans were to hold monthly synods of the incumbents in their district; once a year the diocesan was to hold a synod of the suffragans and incumbents under his charge; every three years there were to be provincial synods of diocesans, suffragans, and representatives of the incumbents. Synods of the first kind were to have jurisdiction as courts of first instance; but there was to be an appeal from their decision to the diocesan synod, and thence to the provincial. Certain changes in the ceremonies of the Church were also proposed. It may be imagined how little these suggestions were to the taste of the Bishops. Those prelates to whom they were referred peremptorily refused to accept the new scheme of episcopacy, and plainly showed their dislike of the other proposals, though they hinted that in these matters they might comply with the King's desires. In the autumn, however, when Parliament was not sitting, certain of the Presbyterian leaders were informed by the Lord Chancellor that the King was favourable to some of their requests; but at the same time they were told the Independents and Baptists were petitioning for toleration. The Presbyterians made it plain that they had no desire for such toleration; though they did not condemn all toleration outright, they distinguished between 'tolerables' and 'intolerables', and implied that the doctrines and ceremonies of these sects came under the latter category. However, on October 25, 1660, Charles issued a Declaration in which he made considerable concessions to the Presbyterians and none to the other sects. The Declaration spoke of comprehension—or, as we should now call it, reunion—as though it were both desirable and easy to attain; a modified form of episcopacy was to be adopted; numerous suffragans were to be appointed; Bishops were to exercise jurisdiction with the consent and advice of 'presbyters'; the Book of Common Prayer was to be revised by an assembly of divines of both parties; some changes in ceremonies were to be made. These concessions would undoubtedly have led to the inclusion in the Church of by far the greater number of Presbyterians. But when Parliament met again in the following month, a bill to turn the provisions of the Declaration into law was defeated on the second reading in the Commons, and

it was generally believed that the defeat was due to royal influence.

In pursuance of the Declaration, Charles issued a commission to a number of divines to consider the revision of the liturgy. These held numerous conferences in the spring of 1661, but came to no agreement. The Bishops there present took the line that it was for the Presbyterians to propose changes and demonstrate the need for them. They themselves proposed nothing; for they desired no change. Moreover, the Bishops were not ready to abolish or alter anything, unless it could be proved positively sinful. The Presbyterians pleaded for concessions in things indifferent; but the attitude of the Bishops made compromise impossible. The Cavalier Parliament, which first met in May, 1661, likewise manifested a temper strongly hostile to all forms of Dissent. These events determined the character of the religious settlement. Concessions with a view to comprehension were to be refused, and toleration was not to be granted. The aim of the coming legislation was to be the extirpation of Dissent. Parliament could only see room for one Church within the state, and that Church should concede nothing to former rebels.

Soon after it had met the Cavalier Parliament repealed the Act of 1641 which disabled all persons in Holy Orders to exercise any temporal authority or jurisdiction, and thereby restored the Bishops to their seats in the House of Lords.<sup>1</sup> This amounted to an acknowledgement that they considered episcopacy of the old type the best form of Church government. At the end of the year came the Corporation Act, which required all persons holding municipal office to take the oaths of allegiance and supremacy, and also an oath that it was not lawful to take up arms against the King on any pretext whatsoever; they were likewise to subscribe a declaration that the Solemn League and Covenant did not bind those who had taken it, and that it was an unlawful oath. Further, the Act provided that no person should enter upon a municipal office who had not taken the sacrament according to the rites of the Church of England within the previous year.<sup>2</sup> This legislation was followed in 1662 by the Act of Uniformity.<sup>3</sup>

<sup>1</sup> 13 Car. II, Stat. 1, c. 2.

<sup>2</sup> 13 Car. II, Stat. 2, c. 1. See also *supra*, p. 77, and, *infra*, p. 452.

<sup>3</sup> 14 Car. II, c. 4.

That some such Act should be put on the statute book was the desire of the King as well as of Parliament; for the Chancellor's speech, which followed the speech from the throne, at the opening of the session, while implying that the oaths to be exacted of the clergy might be modified for the benefit of tender consciences, stressed the need of a 'yoke' upon the clergy. In November, 1661, the Convocations of Canterbury and York were requested by the King to consider the Prayer Book and recommend such changes as they thought desirable. However, in order to save time, the Bishops of the Northern Province sat in the Convocation of Canterbury for the occasion, and the Lower House of the Convocation of York was represented there by certain selected members. The work of revision proceeded speedily, and many changes were suggested, most of them calculated to make the Prayer Book more distasteful to the Dissenters. Finally, a declaration of approval of the revised Book was signed by all who sat in either House. Convocation had not been requested to revise the Thirty-Nine Articles, and could not therefore do so. But it is worth adding that they seem to have felt no desire for such revision. The proposed changes in the Prayer Book were considered by the King in Council—four Bishops being present—and were approved by him. The Book was next submitted to Parliament. The Lords had then before them a Bill of Uniformity, sent up by the Commons in the previous July. That bill required all the clergy to use the Prayer Book of Queen Elizabeth. The Lords now substituted for this the revised Book. When the bill was returned to them, the Commons agreed to the substitution, and resolved not to debate the amendments made by Convocation to the Book. They were careful, however, also to resolve that the amendments 'might have been debated'.

The provisions of the bill, which became law in May, 1662, were as follows: the use of the revised Prayer Book was made compulsory for all clergy; all the then beneficed clergy, before the Feast of St. Bartholomew, and all subsequently beneficed clergy within two months of entry into their benefices, were to declare to their congregation their 'unfeigned assent and consent' to everything contained in, and prescribed by, the Prayer Book; all persons in Holy Orders, all teachers in

Universities, and all schoolmasters were to sign a declaration that it was not lawful to take up arms against the King, that they would conform to the liturgy, and that the Covenant did not bind anybody.<sup>1</sup> No one was to be admitted to a benefice, or permitted to administer the sacrament of communion, unless he had received episcopal ordination; all lecturers, preachers, and schoolmasters were to be licensed by the Archbishop of the Province or the Bishop of the Diocese.

As a result of the Act of Uniformity a great number of clergy who refused to conform were deprived. It would appear that many objected to declaring their 'assent' to the Prayer Book, who were ready to declare their 'consent' to it. The word 'assent', they argued, implied that the Book was as good as it could be. Some lawyers, however, maintained that 'assent and consent' applied to the use of the Book, and not to the Book in itself. It is possible that this somewhat technical distinction enabled a few persons to remain in their benefices or to take Orders in the established Church; but there can be little doubt that Parliament in 1662 intended to exclude all save those who loyally adhered to it in every way. Thus the policy of Parliament, as shown by the Corporation Act and the Act of Uniformity, was to make the position of the Dissenters so uncomfortable that they would find it expedient to conform, not to bring them into the Church by concessions. In this policy the Bishops and the bulk of the clergy were at one with Parliament. But, while the former wished the Dissenters to be persecuted, as much because they were guilty of the sin of schism as because they were held to be politically dangerous, Parliament were more influenced by political than by religious considerations. Schism, in their opinion, naturally led to rebellion, and the experience of the past years had served to corroborate this view. Subsequent experience, however, might well modify it. The attitude of the clergy, on the other hand, depended on their interpretation of the will of God. The belief that schism is a sin has always been prevalent among ecclesiastics, and from that belief it is a plausible inference that it is the duty of the magistrate to persecute schismatics at the bidding of the Church.

<sup>1</sup> The repudiation of the Covenant was not to be required after March 25, 1682.

The course of future events depended partly upon the attitude of the King, as well as upon that of Parliament and the Church. Charles's policy was certainly inconsistent, nor are his motives always easy to discover; but as a rule he seems to have aimed chiefly at strengthening his own power. Since his actions were sometimes imprudent as well as inconsistent, they aroused a distrust which was to have important consequences in the sphere of legislation. The King had much less power in practice than in theory; it was almost impossible for him to resist the combined pressure of Church and Parliament, when they were in agreement.

The policy of crushing Dissent by persecution was continued by the Conventicle Act of 1664.<sup>1</sup> Dissenting preachers were already liable to imprisonment under the Act of Uniformity and, under an Elizabethan statute, it was an offence for a layman to abstain from attending the services of the established Church or to attend a conventicle.<sup>2</sup> The Act of 1664 declared this last to be still in force and made it criminal for any person aged sixteen or more to be present at any meeting of more than five people for worship otherwise than according to the liturgy of the Church of England. Upon their first and second conviction, offenders had the option of a fine or a term of imprisonment; upon the third, that of a far heavier fine or transportation for seven years. The Act was to continue in force for three years after the end of the then session and after that till the end of the next session of Parliament. It actually expired in 1667. Severe as the Act was, it would seem that it was sometimes mitigated in its application by the interpretation that it only prohibited seditious conventicles. Parliament, however, continued their policy of repression. In 1665 the Five Mile Act was passed.<sup>3</sup> This required all dissenting ministers to swear that it was not lawful to take up arms against the King, and that they would not 'endeavour any alteration of government, either in Church or State.' Those who refused, and all who

<sup>1</sup> 16 Car. II, c. 4.

<sup>2</sup> 35 Eliz., c. 1. This punished with imprisonment all who refused to come to church or attended conventicles. Should they not conform within three months of conviction, they were to abjure the realm. Those who refused to abjure it or, having done so, returned without licence, were to suffer as in case of felony without benefit of clergy.

<sup>3</sup> 17 Car. II, c. 2.



preached at conventicles, were forbidden, on pain of a fine, both to come within five miles of any corporate town and to act as schoolmasters. At the same time a bill was introduced in the Commons to impose the above oath on the whole nation; but it failed to pass by a few votes. Some dissenting ministers discovered that they could conscientiously take the oath, on the ground that the word 'endeavour' should be construed as meaning 'unlawfully endeavour', and several eminent lawyers concurred with this interpretation. But many, perhaps the majority, were of another opinion. Thus the intentions of Parliament were only partially frustrated.

In 1668 an attempt was made to pass a new, and somewhat more severe, Conventicle Act. A bill got through the Commons, but failed to get through the Lords, owing to a prorogation. A similar bill also failed to pass the Upper House in 1669 for a like reason. In 1670, however, a bill became law, though its provisions were rather different from those of the Act of 1664.<sup>1</sup> The penalty for attendance at a conventicle was now made a fine of five shillings for the first, and of ten shillings for every subsequent, offence. But preachers at conventicles were to be fined £20 upon the first, and £40 upon each subsequent, conviction. One third of the fines was to go to the informers. Constables and Justices of the Peace who failed to enforce the Act were also finable. Finally, the Act was not for a term of years, but perpetual, and was to be construed 'most largely and beneficially for the suppressing of conventicles', nor was any record, warrant, or mittimus made by virtue thereof to be 'reversed, avoided, or any way impeached by reason of any default in form'.<sup>2</sup> Later in the same year another bill was introduced to punish conventicles as riots; but it failed to pass, owing to a prorogation.

The policy of repression did not succeed in extirpating dissent and, as this became plain, the desirability of both comprehension and toleration came to be more and more widely discussed. Books and pamphlets were published in large numbers to advocate or condemn either or both of these measures. But, as the years passed, the debate came more and

<sup>1</sup> 22 Car. II, c. 1.

<sup>2</sup> The general legal principle was that penal statutes were to be strictly construed; small errors of form often led to the quashing of convictions.

more to centre upon the question of toleration; for the difficulties in the way of comprehension appeared too formidable to be overcome.<sup>1</sup> The arguments employed on both sides—at least when the disputants were laymen—tended to be political rather than religious. The Dissenters, it was said, were perfectly ready to be loyal to the King, and only persecution could make them disaffected. To irritate a large number of peaceable subjects was to weaken the state. Moreover, since the Dissenters were excellent workers and men of business, persecution was bad for industry and trade. Was it the moment to injure English trade, when England was engaged in a great economic struggle with the United Provinces? Arguments such as these were reinforced by appeals to humanity and charity. Some bold spirits went further, and contended that the magistrate had no concern with people's religious opinions as such. It was for each man to care for his own soul as best he could; there was no infallible authority to decide religious disputes. The principle that dissent from the official religion of the state must be punished would justify the persecution of Christians in Turkey. To these daring propositions, however, several qualifications were usually appended. Scarcely anybody asked for the toleration of Roman Catholics; for loyalty to the Pope was held to preclude loyalty to a Protestant King. The state was also regarded as fully entitled to punish those who held immoral doctrines. Atheists, too, were outside the pale of toleration, since one who did not believe in God could be neither moral nor loyal. In reply to these and similar arguments it was urged that the Dissenters were naturally prone to rebellion and that, in any case, no state could long endure which tolerated a diversity of religions. The Dissenters could think as they pleased; but to allow them to form religious associations would lead to such an increase of their numbers as would make them formidable. Some champions of the prerogative, however, contended that the King might grant them an indulgence, which, of course, would be revocable at pleasure, but that a statutory toleration would be highly dangerous. Meanwhile many clerical controversialists continued to insist that schism was a sin punishable

<sup>1</sup> I here endeavour to summarize the chief arguments for and against toleration in the reign of Charles II.

by the state; the duty of the subject was to conform to the established Church, as long as conformity did not involve consent to anything positively sinful. Since the majority of the Dissenters did not hold the doctrines, discipline, liturgy, or ceremonies of the Church to be positively sinful, they were culpable. Another, and more telling, argument was that the Dissenters were often ready to persecute each other.

Whatever the facts may have been, there is little doubt that the Dissenters while suffering under the penal laws were regarded as a potential danger to the state. The King therefore began to see the desirability of making concessions to them. He likewise hoped to give some relief to his Roman Catholic subjects. We hear that, at the beginning of 1668, the Lord Keeper conducted negotiations on his behalf with some of the leading Presbyterians. A suggestion was made that the Act of Uniformity should be so modified as to enable the Presbyterians to reunite with the Church, while toleration was to be given to the Independents. A hint was also dropped that something would be done for the Romanists. The Presbyterians, however, were loath to see toleration given to the Independents and to the Romanists. When Parliament met in February, the King's speech intimated that some change in the laws relating to the Church was desirable with a view to reuniting his Protestant subjects and the consequent strengthening of the state. The resulting debate in the Commons revealed that the House was hostile to toleration, though not wholly averse from comprehension. Some distinguished between the Presbyterians, as comparatively harmless, and the other sects, as actively disloyal. Others, again, held that toleration would be dangerous unless a strong standing army were kept up. No bill for either toleration or comprehension was brought in. Charles, however, did not give up his wishes altogether; but he adopted a different method of realizing them. He decided to make no further attempts at comprehension, but to grant an indulgence. In April, 1672, the Declaration of Indulgence was issued, which gave full liberty of worship—under certain conditions—to the Protestant, and partial liberty to the Roman Catholic, non-conformists.<sup>1</sup> The grant and duration of that liberty were, however, entirely dependent on the King's pleasure; the

<sup>1</sup> See also *supra*, p. 91.

Declaration could be cancelled at any moment. The King, too, could exercise his discretion in the giving of licences to Dissenting ministers. But the Dissenters were, on the whole, inclined to be grateful for this relief, more especially as their ministers were not required to take any oath. On the other hand, it was an ill omen for the success of the King's design that the Primate instructed the clergy to preach against Popery in spite of a request from the King that he would forbid controversial sermons on that subject. When Parliament met in 1673, the King cancelled the Declaration.

The controversy over the Declaration of Indulgence not only caused Parliament to distrust the King; it also marked the beginning of a change in their attitude to Dissent. The cancelling of the Declaration was followed by the enactment of a law still further to penalize Roman Catholics. The Test Act of 1673 required all persons who held offices or places of trust under the Crown to take the oaths of allegiance and supremacy, to sign a declaration repudiating the doctrine of transubstantiation, and to receive the sacrament according to the rites of the Church of England.<sup>1</sup> Offenders were liable to a fine of £500, were disabled to bring any action in the courts, and were made incapable of any office. This Act, though aimed at the Romanists, also affected the Dissenters. Since, however, many of the latter were ready to practise 'occasional conformity'—some of them had done so before and continued to do so on principle, in order to promote Christian fellowship—they did not feel much injured by the new law. Moreover, the passage of a bill through the Commons for the relief of the Dissenters showed that the House looked on them with some benevolence. The bill provided for the toleration of all Dissenters who subscribed such of the Thirty-Nine Articles as were purely doctrinal and took the oaths of allegiance and supremacy; further, it contained a clause for the repeal of the requirement in the Act of Uniformity that incumbents should give their 'assent and consent' to the Prayer Book. Thus, had the bill become law, it would have brought about some measure of reunion as well as of toleration; but these results might have been only temporary. For the Act would have expired after one year. The Commons, in fact, wished to

<sup>1</sup> 25 Car. II, c. 2.

make an experiment. But the Lords made several restrictive amendments very little to the taste of the Commons. While the Lower House was debating these, there came an adjournment, which was followed by a prorogation.

The King's policy continued to be one of opposition to all changes in matters ecclesiastical, save those made by himself alone. In 1675 a bill was introduced in the Lords with his approval, which required all members of either House and all office-holders to take an oath pledging themselves not only not to take up arms against the King, but also 'not to endeavour any alteration of the Protestant religion, now established in the Church of England, nor . . . any alteration in the government in Church or state as it is by law established'. The bill passed the Lords and might have passed the Commons, had not the violent dispute between the two Houses over the case of *Shirley v. Fagg* led to a sudden prorogation.<sup>1</sup> This bill was not so much an attempt to make the constitution static, as one to strengthen the Crown. For the precise extent of the prerogative was ill defined and, had the bill become law, it would, in theory, have been difficult for Parliament to restrict or define the prerogative by statute. The promoters of the bill, however, underrated human ingenuity. For, had Parliament wished to make changes, it would doubtless have construed 'endeavour' as meaning 'unlawfully endeavour'.

Parliament soon became more friendly to the Dissenters. In 1677 an Act abolished the writ *de haeretico comburendo*.<sup>2</sup> In 1678 the Popish Plot scare led to the passing of the second Test Act.<sup>3</sup> This required every member of either House of Parliament to take the oaths of allegiance and supremacy, and to sign a declaration repudiating the doctrine of transubstantiation and condemning the invocation of the Virgin Mary and the sacrifice of the Mass as idolatrous and superstitious. Those who disobeyed the Act were to be adjudged Popish recusants convict and to suffer other heavy penalties. This Act effectually excluded Romanists from Parliament; but it did not penalize the Dissenters in any way, since it did not impose a

<sup>1</sup> See *infra*, p. 149.

<sup>2</sup> 29 Car. II, c. 9. See also *infra*, p. 137.

<sup>3</sup> 30 Car. II, Stat. II, c. 1. This Act is usually known as the second, or Parliamentary, Test Act. The Duke of York was excepted from its provisions.

sacramental test. Further,<sup>1</sup> a bill for the relief of the Dissenters was passed by the Lords in December, 1678, and only failed to pass the Commons owing to a prorogation. In 1680 a Comprehension Bill was introduced in the Commons; but the Dissenters wanted toleration rather than comprehension. This fact and the general belief that the Lords were hostile to the bill caused it to be dropped. The Commons, however, in 1681 attempted to grant relief to the Dissenters by resolutions, which, of course, had not the force of law.<sup>2</sup> Soon afterwards Parliament was dissolved, and the last Parliament of Charles's reign had too short a life to be able to do anything for them. James's Parliament showed no desire to modify the penal laws. But James's personal policy in matters ecclesiastical aroused a tempest of opposition.

When James succeeded his brother, he declared to the Privy Council that it was his firm intention to protect the established Church. In 1687, however, he issued a Declaration of Indulgence, in which, while promising to respect the rights of the Church, he announced the suspension of the penal laws in matters ecclesiastical and stated that the tests required by the Acts of 1673 and 1678 would no longer be imposed; dispensations would be granted to all who desired them. A year later the King issued a second Declaration repeating the first and stating his firm resolve to adhere to it. James, in a word, wished to secure the support of all non-Anglicans by the grant of a toleration which depended upon his pleasure alone. The bulk of the Dissenters, however, refused to be won over, while the adherents of the established Church were largely alienated from the King. Thus James achieved the feat of temporarily uniting almost all Protestant opinion in a common opposition to his policy.

The position of the ecclesiastical courts gave rise to only one great controversy during this period. An Act of 1641 had abolished the Court of High Commission and repealed the clause in the Elizabethan Act of Supremacy which gave statutory authority for the creation of such a court; it had likewise abolished the criminal, though not the civil, jurisdic-

<sup>1</sup> The Act was passed in November, 1678. A prorogation had killed a similar bill, earlier in the year.

<sup>2</sup> See *supra*, p. 92.

tion of all other ecclesiastical courts. In 1661, however, that Act was partly repealed.<sup>1</sup> All the other ecclesiastical courts were thereby restored to their former state—save that they were forbidden to administer the *ex officio* oath—and their judges were declared to possess all the powers which they had had by law in 1639. But the clauses in the Act of 1641 which abolished the High Commission, forbade the future creation of any similar court, and repealed the clause in the Act of 1559, were explicitly left unrepealed.<sup>2</sup> On the other hand, the Act of 1661 contained a proviso that the King's supremacy was not abridged.<sup>3</sup> •

The Courts Christian thus nominally restored to almost all their old powers do not seem to have been as active as in the earlier part of the century. In particular, they refrained from making much use of their jurisdiction over heresy and recusancy. Parliament, however, showed itself solicitous to preserve their powers undiminished. The Act abolishing the writ *de haeretico comburendo* contained a proviso which declared that the Courts Christian retained their full jurisdiction over cases of atheism, blasphemy, heresy, and schism, and had power to punish those offences by excommunication, deprivation, degradation, 'and other ecclesiastical censures not extending to death'.<sup>4</sup>

Charles II made no attempt to set up any court resembling the High Commission, but James was not so prudent, for he wished to coerce the clergy by means of a court of first instance which he could control. James might perhaps have achieved his end by appointing a Vicar-General; but he had no desire to see a subject in a position of such authority. Accordingly,

<sup>1</sup> 16 Car. I, c. 11 and 13 Car. II, Stat. I, c. 12.

<sup>2</sup> It had been contended before 1641 that the King had powers in virtue of the supremacy to erect a court like that of High Commission quite apart from any statutory powers which he might possess. The Act of 1641, however, definitely deprived him of whatever such powers of any kind he may have had previously. Nor can the proviso in favour of the supremacy in the Act of 1661 be taken to allow the creation of a court resembling the High Commission, since that Act did not affect the prohibition of the Act of 1641.

<sup>3</sup> But another proviso was also inserted to the effect that nothing in the Act should be taken to confirm the canons of 1640 or 'any other ecclesiastical laws or canons not formerly confirmed, allowed, or enacted by Parliament or by the established laws of the land as they stood in' 1639. The implication is that no canons are binding *proprio vigore*. See *infra*, p. 410.

<sup>4</sup> The insertion of this proviso was due to the Lords.

in 1686 he appointed an Ecclesiastical Commission. It was contended that this body was not a revived High Commission, and, indeed, its powers were somewhat different.<sup>1</sup> To admit this, however, is not to concede that it was a lawful court.<sup>2</sup> James's Commission had original jurisdiction over all ecclesiastical persons; it was not tied to any specific mode of procedure; it could suspend, degrade, and make persons incapable of preferment; those who were contumacious might be excommunicated. The Commission had also jurisdiction over cases matrimonial, and cases of adultery and fornication, whatever the status of the parties. Finally, the Commission was empowered to amend the statutes of the Universities, cathedrals, colleges, and grammar schools. The legality of the Commission was hotly disputed, and there seems to be no doubt that it was illegal. No opportunity, however, was given of bringing the question before the ordinary courts. The Commission, though it suspended Compton, the Bishop of London, from the exercise of his spiritual functions, made no attempt to deprive him of his temporalities. For they were advised that, had they done so, he could have applied for their restoration to the King's Bench. The Commission was always highly unpopular, and James abolished it a few weeks before he fell, in the hope of conciliating public opinion.

Of the history of the Convocations after 1662 there is not much to be said. The surrender by the clergy of their right to tax themselves inevitably weakened the position of the Convocations. While they taxed themselves the Convocations could insist on discussing grievances before giving supplies. But after this practice had been discontinued it was easy, and often convenient, for the King to refuse them leave to transact business. Between 1664 and the end of this period nothing of any importance was done in Convocation. Nor did the Convocation of the Northern Province even assemble during the reign of James II. Thus the clergy, being deprived of the

<sup>1</sup> James's commission consisted of the Chancellor, as President, the Primate, two other Bishops, and three other laymen. The Primate, however, excused himself from acting on the plea of ill health.

<sup>2</sup> Unlike that appointed by Elizabeth, James's Commission was not directed 'to enquire . . . of all and singular heretical, erroneous, and offensive opinions', nor was it charged with the maintenance of uniformity. Its powers were somewhat like those granted to Thomas Cromwell as Vicar General of Henry VIII.



effective use of their own assemblies, were left without means of regulating ecclesiastical matters. The cessation of the Convocations' activities was presumably agreeable to Charles II, and certainly agreeable to James II. But it is strange that the clergy did not agitate vigorously for their revival. Perhaps the Bishops had no great desire for this, since they may not have wished to be compelled to act with the co-operation of the representatives of the lower clergy.

## X

### JUSTICE

HAD NOT legislation provided otherwise, all judgements given by the courts and all proceedings begun between the outbreak of the Civil War and the Restoration would have become null and void upon Charles's return. To avert such an intolerable confusion as would have resulted from this, the Convention Parliament promptly passed two bills. One provided that judicial proceedings already begun were to continue and that the Commonwealth legislation of 1650, which made English the language of such proceedings and enabled the defendant or tenant for any matter to be pleaded in bar to plead the general issue of not guilty, was to be in force until August 1, 1660, and no longer. The second provided that no verdicts or judgements or fines of any court since May 1, 1642, should be void, save those of the so-called High Court of Justice; a right of appeal, however, was reserved. The Act, moreover, did not apply to sales made in consequence of any Ordinance or Act since May 1, 1642.<sup>1</sup>

The prerogative courts, which had been abolished by statute in 1641, could not be revived without the consent of Parliament. The Privy Council, also, had then been deprived of the greater part of its jurisdiction, and now did little judicial work apart from the hearing of appeals from the Channel Islands and Colonies.<sup>2</sup> These it regularly referred to a committee. No

<sup>1</sup> 12 Car. II, c. 3 and 12.

<sup>2</sup> 16 Car. I, c. 10. This Act abolished the Star Chamber and the Star Chamber jurisdiction of the Court in the Marches of Wales, of the Court of the Council of the North, of the Court of the Duchy of Lancaster, and of the Exchequer Court of the County Palatine of Chester. It also provided that 'neither H.M. nor his Privy Council have or ought to have any jurisdiction . . . by English bill, petition, articles, libel, or any other arbitrary way whatsoever, to examine or draw into question, determine or dispose of the lands, tenements, hereditaments, goods, or chattels, of any of the subjects of this kingdom'. It should be added that it has been shown by Mr. Sacret that, in the years following 1660, the Privy Council dealt with certain disputes affecting the municipal corporations.

attempt was made to revive any of the prerogative courts by an Act, although some of the Lords apparently thought the creation of a court resembling the Star Chamber was desirable. Nor was the Court of Requests revived, in spite of the absence of any legal obstacle. Charles II appointed Masters of Requests; but they did not exercise any jurisdiction; their sole function was to examine petitions addressed to the King.<sup>1</sup> The Palatinate of Durham, which had been abolished in 1646, was revived, but not the Council of the North. The Council in the Marches of Wales was revived as regards its civil jurisdiction. Many, however, contended that this revival was illegal, and more found it burdensome. A bill for the abolition of the court failed to pass the Lords in 1680; but one was carried in 1689.

The judges who had sat on the bench during the Interregnum were naturally displaced at the Restoration; but six of them were reappointed subsequently, as were three others who had retired during that period. Many of Charles's appointments were good or, at least, respectable; and in the years immediately following the Restoration judges were given their places during behaviour. Later, however, they were appointed during pleasure. In consequence, both Charles and James could and did remove them, when their conduct failed to give satisfaction. They were expected to favour the Crown in all political cases, and symptoms of independence were apt to lead to dismissal. It is only fair to add that the standards of the seventeenth century in such matters were different from those of our own age. None the less, the packing of the bench, particularly by James II, gave rise to many contemporary criticisms. Nor is there much doubt that James had difficulty in getting competent lawyers to accept judicial office. The judges thus appointed sometimes showed their subservience to the Crown, not only in the partial conduct of trials, but also in the imposition of extravagant fines and other punishments that were excessive or even illegal. For instance, when Oates was found guilty of perjury in 1685, he was sentenced to be unfrocked, to undergo two floggings, so severe that they would have killed an ordinary man, and to be imprisoned for the term of his

<sup>1</sup> The Court of Requests was not affected by the Act of 1641 and actually went on sitting until 1642.

natural life. Since perjury was then only a misdemeanour, Oates could not be sent to the gallows; but the court, having no power to hang him, plainly intended that he should be flogged to death, an intention that violated the spirit, though not the letter, of the law. The two other punishments were definitely illegal. Only a spiritual court could degrade a priest, and imprisonment for life was not a penalty for perjury.

On more than one occasion the Commons evinced a desire to secure the independence of the judges. In 1674 they debated a bill, which failed to become law, providing that judges should hold their places during good behaviour. In 1680 they passed a resolution to the same effect. They likewise sometimes called in question the conduct of the judges. Thus, at the end of 1680, Scroggs, Chief Justice of the King's Bench, was impeached, on the ground that he had endeavoured to subvert the fundamental laws, established religion, and government of the kingdom. Several specific illegal acts were laid to his charge, such as the imposing of excessive fines, the issuing of general warrants, and the discharging of a Grand Jury who were about to present the Duke of York for not attending Church.<sup>1</sup> The Lords, however, refused to commit him on this charge, and the speedy dissolutions of the then Parliament and of its successor prevented the prosecution of the impeachment. But the King thought it prudent to dismiss the Chief Justice. Richard Weston, another judge, would also have been impeached at the same time as Scroggs, had it not been for the dissolution. His offence lay in certain expressions used by him in a charge to the Grand Jury of Kingston, which were held to disparage Parliament and to claim arbitrary power for the King.

The independence of juries, unlike that of judges, was now secured, but by a judicial decision, not by a statute. Juries had often been punished in the sixteenth and early seventeenth centuries by the Star Chamber for verdicts which were considered wrong; though the tendency was only to penalize them for corrupt, as opposed to merely mistaken, verdicts. After the Restoration the judges of the Common Law courts claimed—with the support of mediæval precedents—that they

<sup>1</sup> For the question of general warrants see *infra* pp. 417 *sqq.* For Scroggs' judgements affecting the press see also *infra*, p. 163.

possessed a similar power. Several juries were in fact punished by judges who disapproved of their verdicts. The Commons took alarm at these proceedings, and in 1667 investigated the conduct of Chief Justice Kelyng, who had fined one jury for disobeying his directions, and on other occasions had commanded juries to find a particular verdict. A committee of the House resolved that his conduct had been 'arbitrary and illegal'. Kelyng, however, was permitted to address the Commons, and made a vigorous defence, in which he contended the law was on his side. The House were apparently impressed, for they took no further proceedings against him; though they resolved that the fining and imprisoning of juries were illegal. A bill to secure the independence of juries was thereupon brought in, but failed to become law. The same end was achieved, however, in 1670 by the judgement of Chief Justice Vaughan in *Bushell's Case*. That case arose out of the trial of two Quakers, Penn and Meade, for a tumultuous assembly. The jury had acquitted them both and, as a result, had been fined and sent to prison until payment. Bushell, one of the jurymen, thereupon obtained a writ of *habeas corpus*, and his case in due course came up for trial before the Court of Common Pleas. The return to the writ said he had been imprisoned for acquitting, together with his fellows, the two Quakers *contra plenam et manifestam evidentiam et contra directionem Curiae in materia legis*. The court of Common Pleas, however, decided that he must be discharged.<sup>1</sup> Vaughan's judgement declared that juries, in giving a verdict, were performing a judicial, not a ministerial, act. They were the sole judges of fact, while matters of law were exclusively reserved for the judge, though upon them he could form no opinion till the jury had decided the questions of fact. It was therefore wrong for a judge to direct a jury to return a particular verdict. Nor was it to be assumed that the jury were corrupt if their conclusions from the evidence differed from those of the judge. For there was often room for an honest difference of opinion. Moreover, the jury, coming from the neighbourhood, might well have in-

<sup>1</sup> The judgement was reversed because it was held that the Court of Common Pleas had no jurisdiction in such a case. But the principle laid down by Vaughan has been observed ever since. Thus in 1786 Baron Eyre said 'there must always in what they (*sc.* the jury) do be cause for it, and there never can be any malice in what they do'.

formation other than that given by the witnesses.<sup>1</sup> Finally a jury might be attainted for a wrongful verdict.<sup>2</sup> If a jury could be punished by the judge for not following his directions, they might be punished for not doing what would lay them open to an attain. After this judgement it was no longer easy to intimidate juries; but it remained possible to pack them, and there is abundant evidence that the Crown, when it could secure the co-operation of a sheriff, was often able to obtain juries favourable to the prosecution in political cases.<sup>3</sup>

The law with regard to political offences was modified in several ways during the reign of Charles II. An Act was passed in 1661 for the safety of the King's person, which made it treason, during Charles II's life, to do him any bodily harm, put any restraint upon his person, deprive him of any of his titles, levy war against him, stir up foreigners to invade the realm, and to declare an intention of doing any of these things either orally or in writing. Moreover, any person convicted of proclaiming Charles II a Papist or heretic was to be incapable of holding any office. Finally, all who denied that the Long Parliament of Charles I was dissolved, or who affirmed that any oath to change the government in Church or state had binding force, or that either or both Houses of Parliament alone had any legislative power, were to incur the penalty of *praemunire*. No person, however, was to be prosecuted under the Act for any offence, except treason, unless by the King's special order, and that within six months of the alleged offence. A proviso was added that nothing in the Act was to be taken as abridging the Parliamentary privilege of free speech.<sup>4</sup> Another Act of the same year regulated the right of petitioning. Henceforth it was to be an offence to obtain more than twenty signatures to a petition for any alteration in Church or state, addressed either to the King or to Parliament, unless with the

<sup>1</sup> It is interesting to note the survival of an old conception of the jury; it was certainly obsolescent in 1670. But Erskine, as counsel for Stockdale in 1789, maintained that the jury might 'found their verdicts . . . upon what they know privately themselves'.

<sup>2</sup> Attaints had, in fact, long fallen into disuse. In 1690 a bill for their revival was introduced in the Lords, but was eventually dropped. They were never used in criminal cases.

<sup>3</sup> Juries were also sometimes packed by sheriffs opposed to the policy of the Crown.

<sup>4</sup> 13 Car. II, Stat. I, c. 1.

sanction of three Justices of the Peace of the County, or with that of a majority of the Grand Jury at Assizes or at Quarter Sessions, or—if the petition came from London—with that of the Lord Mayor, Aldermen, and Common Councillors. Further, no petition was to be presented by more than ten persons. The penalty was to be a fine not exceeding £100 and three months imprisonment; but prosecutions were to take place not more than six months after the offence had been committed.<sup>1</sup>

The law of treason was also developed and extended by judicial construction. The Act of Edward III—the only one in force, save that of 1661—was plainly insufficient to protect the Crown, unless broadly construed. The judges, accordingly, so interpreted that Act as to extend its scope. The Act had made the compassing or imagining the King's death treason. Gradually the judges came to take the view—the process began early in the seventeenth century—that an attempt to put restraint upon the King was treasonable. In 1663 it was decided that a conspiracy to levy war was an overt act proving the compassing of the King's death. Again, in another case—*Rex v. Twynne*—of the same year the court held that printing a seditious book was an overt act of the same character. Twenty years later the law was further stretched in the *Case of Algernon Sidney*, when it was laid down that an unpublished manuscript, in which the King was said to be under Parliament and liable to deposition, was evidence that its author and possessor was guilty of treason.<sup>2</sup>

The clause in the Act of 1352 which made it treason to levy war against the King had been widely extended in the sixteenth and seventeenth centuries, so as to cover the use of force for

<sup>1</sup> 13 Car. II, Stat. 1, c. 5. A proviso was added that nothing contained in the Act was to debar persons, not exceeding ten in number, from presenting petitions to 'any Member or Members of Parliament after his election, and during the continuance of the Parliament, or to the King's Majesty . . . nor to extend to any address whatsoever to His Majesty by all or any of the members of both or either Houses of Parliament during the sitting of Parliament'. Note that counsel for the Crown in the *Case of the Seven Bishops* admitted that the Bishops' petition would have been lawful, had Parliament been sitting.

<sup>2</sup> It is not correct that Sidney was condemned on the evidence of only one witness. Apart from the evidence of Howard on another point, the finding of the manuscript was proved by a witness, and three persons swore that it was in Sidney's hand. But the judgement against Sidney was annulled in 1689 by a statute.

purposes of a public nature, and the judges continued thus to interpret it after the Restoration. In 1668 certain apprentices were found guilty of making a riot in order to pull down brothels. Ten out of the eleven judges who considered the case concluded that their offence was treason, and they were sentenced accordingly. On the other hand, the judges were equally divided, a few years later, on the question whether the offence of certain weavers in making a riot for the destruction of machines was treason or not. The weavers, therefore, were only prosecuted for riot.

Parliament made no attempt to restrict the scope of the law of treason thus interpreted. But they did much to protect the liberties of the subject by the *Habeas Corpus* Act of 1679. The writ of *Habeas Corpus ad subjiciendum et recipiendum* had long been employed to secure the release of persons wrongfully imprisoned. The Act for the abolition of the Star Chamber had made it a remedy for cases of imprisonment by order of a body of like nature or of the King or of the Council. It remained, however, uncertain whether the writ could be issued at all by judges of the Common Pleas or the Exchequer, and whether the judges of the King's Bench could issue it during vacation. Moreover, it could not be used to help those imprisoned in places beyond the seas.<sup>1</sup> There was plainly a case for legislation to remove these grievances, and as early as 1668 the Commons had before them a bill to facilitate the obtaining of the writ, although it failed to pass. Again, in 1670 the Lords rejected a bill, sent up from the Commons, to prevent the sending out of the country of all prisoners save felons convict. Bills to make the obtaining of the writ more easy likewise failed to pass the Lords in 1674, 1675, and 1677. In 1679, however, the *Habeas Corpus* Act was put on the statute book.<sup>2</sup> The Act made it obligatory upon the Chancellor and the judges of King's Bench, Common Pleas, and Exchequer to issue the writ at all times upon request for the relief of all persons imprisoned, unless they were accused or convicted of treason or felony, or were imprisoned as the result of some legal process; persons com-

<sup>1</sup> Clarendon was accused, in 1667, of having imprisoned people in remote places.

<sup>2</sup> 31 Car. II, c. 2.



mitted on charges of treason or felony were either to be tried at the following sessions or the following sessions but one, or to be let out on bail; nobody, save a felon convict, was to be imprisoned in any place outside England. It is to be noted that the Act applied only to those imprisoned on a criminal charge, and that the court was not empowered to examine the truth of the return made by the custodian of a prisoner. In spite of these defects it served a great purpose. The extent to which it fettered the executive may be gauged from the fact that James II hoped to secure its repeal in 1685.

At the Restoration the precise extent and nature of the jurisdiction of the House of Lords were still uncertain in many respects. As was natural, controversies arose; the first concerned the right of the Lords to exercise an original jurisdiction in civil cases. There were several mediaeval precedents in support of their claim to do so, but their applicability to the conditions of the seventeenth century was doubtful. It was more to the point that the Lords had not exercised such an original jurisdiction in the Tudor period. They had, however, exercised it on a few occasions during the third decade of the seventeenth century and also during the Long Parliament, though the value of the latter precedents was small. After the Restoration the Lords continued to claim an original jurisdiction in civil cases.<sup>1</sup> But in 1668 the Commons came into conflict with the Lords over the great case of *Skinner v. the East India Company*.<sup>2</sup> That case arose thus. Skinner claimed that he had been wronged by the Company; since the actions he complained of had been committed beyond the seas, he found—or said he found—difficulty in getting his case heard by the inferior courts, and therefore petitioned the King for redress. Charles referred the petition to certain Privy Councillors, who reported that Skinner had a *prima facie* case. The King then requested the Lords to try the issue. They did so, found for Skinner, and ordered the Company to pay him damages. The Company, which had

<sup>1</sup> In 1663 they fined and imprisoned Fitton and Car for libelling a peer. The Commons investigated the case of Fitton but took no action. They seem to have regarded it as a matter of privilege, in which the Lords had jurisdiction.

<sup>2</sup> The case actually began in 1666.

pleaded to jurisdiction and contended the case should have come before the courts in Westminster Hall, did not acquiesce in the Lord's decision, but petitioned the Commons. The Lower House took the matter up with all the more eagerness because some of the directors of the Company were also M.P.s. They held that the Lords had no original jurisdiction in civil cases, and also denied their right to summon a member of the Lower House before them without the consent of that House. A conference then took place, at which the representatives of the Lords maintained that there were no bounds to their jurisdiction. The Commons proceeded after this to pass several angry resolutions, including one that any person who took part in putting the decision of the Lords into execution should 'be deemed a betrayer of the rights and liberties of the Commons of England and an infringer of the privileges of the House'. The Lords, who had already voted the petition to the Commons to be a libel, retaliated by fining and imprisoning Barnardiston, one of the petitioners. Shortly afterwards the Houses adjourned and, being subsequently prorogued, did not meet again until October, 1669. The Commons then took up the case of Barnardiston, and passed severe resolutions maintaining the right of the subject to petition them without molestation from any court. A prorogation, however, suspended the dispute, and, when Parliament met again in 1670, the King put an end to it by a suggestion, which was accepted, that both Houses should erase all references to the matter from their *Journals*. But the Commons had won; for the Lords never again exercised an original jurisdiction in civil cases.

The Lords, on the other hand, definitely established their claim to hear appeals from the Equity side of Chancery. Their right to hear appeals from the Common Law side of that court had long been unquestioned, but it was far otherwise with regard to appeals from the Equity side. They had not, it would seem, heard such appeals before the reign of Charles I. In 1624 they had refused to hear an appeal, and, instead, asked the King to appoint commissioners to review the Chancellor's decision. Subsequently, however, and particularly in 1640, the Lords had acted as a court of appeal in Equity cases. They continued so to act after the Restoration,

nor did the Commons challenge their jurisdiction for some years. But in 1669 the case of *Slingsby v. Hale* caused the Commons to intervene; for Hale was an M.P. The Lower House requested the Lords to respect their privileges, which the latter promised to do, though in general terms and without reference to the case before them. Moreover, the Committee of Privileges, to whom the matter was referred, reported that the Lords had an undoubted right to hear appeals from all inferior courts, even if a member of either House was a party. Slingsby, however, withdrew his appeal, and the Commons allowed the matter to drop. But in 1675 three appeals from Chancery came before the Lords, in each of which the respondent was a member of the Lower House.<sup>1</sup> The Commons promptly challenged the jurisdiction of the Lords, and claimed that its then exercise was a breach of privilege. The Lords stuck to their guns, and angry votes were passed in both Houses. Nor did a prorogation lead to appeasement. After a second prorogation, however, the Commons let the question drop, nor did they subsequently dispute the right of the Lords to hear appeals from Chancery. Maitland has argued that the Commons yielded from fear; for investigation, while it revealed the weakness of the Lords' claim, also demonstrated that the King was the source of all jurisdiction. Certainly, had the Lords been forced to give way, it would have been difficult to contest the right of the King to appoint commissioners, as he had done earlier in the century, to review the Chancellor's decisions. The Lords were at least an independent tribunal. Commissioners might be chosen for other reasons besides merit.

The right of peers to be tried by their fellow-peers in cases of treason and felony was undisputed; but the nature of the privilege was not the same when Parliament was not sitting as when it was in session. When Parliament was in session, all the peers were judges both of fact and of law. When Parliament was not in session, cases were tried by the Lord High Steward and a jury of a limited number of peers, summoned by the Steward. The peers naturally regarded with grave misgivings the power of the Crown to pack a jury, and several bills to reform the constitution of the Lord High

<sup>1</sup> The case upon which the dispute centred was that of *Shirley v. Fagg*.

Steward's court were passed by the Upper House.<sup>1</sup> But all failed to get through the Commons; for the Lower House had no desire to see the privileges of the peers extended. The Lords, moreover, though the case for reform was strong, did not suffer in practice. When Lord Delamere was tried for treason, in 1685, before a Lord High Steward—Jeffreys—and a jury of thirty peers, he was unanimously found not guilty, although half the jury were Army officers and many of the others held lucrative places. It is true that the evidence against him was weak; but it was no weaker than that against other persons whom ordinary juries had found guilty.

The numerous impeachments of the period gave rise to many legal problems and also to some disputes between the two Houses. In 1663 the Earl of Bristol brought before the Lords articles of high treason against Lord Chancellor Clarendon, with a view to his impeachment. The House referred the matter to the judges, who advised them that 'a charge of high treason cannot, by the laws of this realm, be originally exhibited by one peer against another unto the House of Peers'. With this opinion the Lords concurred. In 1667 the Commons impeached Clarendon of treason in general terms without specifying any particular treason. The Lords thereupon refused to commit Clarendon, on the ground that such a proceeding would have been unjust and contrary to precedent. A conference was held to discuss the matter, at which the representatives of the Commons referred to the precedent in Strafford's case; those of the Lords, however, replied that that precedent was singular and not fit to be followed. The Upper House continued to adhere to its decision and to maintain that it was bound to observe the ordinary rules of justice. The Commons, on the other hand, appear to have taken the line that they could proceed as seemed good to them. A further controversy was caused by the decision of the Lords, in 1679, that 'the Lords Spiritual have a right to stay in court in capital cases, till such time as judgement of death comes to be pronounced.'<sup>2</sup> The Commons held that the Bishops ought not to take any part in trials. The Bishops,

<sup>1</sup> Bills passed the Lords in 1667, 1669, 1674, 1675, and 1680.

<sup>2</sup> This decision was taken with reference to the impeachment of five peers in connexion with the Popish Plot.

however, asked leave of the Upper House to withdraw from the pending trials with a full reservation of their rights. To this the Commons objected, on the ground that it would implicitly concede the right of the Bishops to take part. The Lords refused to give way, and the dispute waxed so hot that the King prorogued Parliament.<sup>1</sup> Thus the Lords resisted the claim of the Commons to determine the composition of the Upper House when it sat as a court. At the same time, too, they resolved that they were competent to try peers on impeachments, even though the King should not appoint a Lord High Steward.

In this same year—1679—three further points of importance were raised by the impeachment of Danby. The Lords resolved that a dissolution did not determine an impeachment. That resolution, however, they reversed in 1685. Secondly, the question arose whether a pardon could be pleaded in bar of an impeachment; for Danby, who had received a full pardon from the King, pleaded it by the advice of his counsel. The Commons thereupon resolved that the pardon was illegal and void and could not be pleaded, and that they would demand judgement on Danby. Pardons, they held, were pleadable to indictments, because these were in the King's name; impeachments were in the name of the Commons, and therefore pardons could not be pleaded to them, just as they could not be pleaded to appeals. Danby, however, was not tried, and the point remained undetermined until the Act of Settlement. But Danby, who had been committed to the Tower, raised yet a third point through his eagerness to get out of prison. In 1682 he brought a *habeas corpus* in the King's Bench, in order to be bailed. The court remanded him, and a similar result attended a subsequent application. In 1684, however, he made a third attempt, and on this occasion was granted bail. His case was that the charges against him did not amount to treason and that, even if they did, he should be granted bail, since there was no prospect of a trial in the near future.

A question of a very different nature arose in 1681. The Commons resolved to impeach Edward Fitzharris of treason. When the matter came before the Lords, they were informed

<sup>1</sup> Charles had also other reasons for so doing.

by the Attorney-General that he had orders from the King to prosecute Fitzharris, and that he had accordingly prepared an indictment against him. The House then resolved that he should be proceeded against according to the course of the Common Law, and not by way of impeachment. A minority entered a strong protest, while the Commons were indignant. It was contended that an indictment, the suit of the King, was very different from an impeachment, the suit of the Commons, and could not therefore stand in its way. Some of the Lords, however, apparently held that a commoner could not be impeached of treason. This opinion was vigorously controverted by several speakers in the Commons.<sup>1</sup> Parliament was shortly afterwards dissolved, and within a brief space Fitzharris was tried on the indictment and sentenced to death.

<sup>1</sup> There seems to be little doubt that a commoner may be impeached of treason. In 1680 Scroggs and the Earl of Tyrone—an Irish peer and so ranking as a commoner in England for legal purposes—had been so impeached. In 1690 the Lords, after mature consideration, resolved that Sir A. Blair could be impeached, and expressed their readiness to proceed with his trial. But Blackstone says a commoner cannot be impeached of any capital offence. Such an impeachment, however, has not occurred since 1690. Hastings was only accused of high crimes and misdemeanours.

## XI

### THE FORCES OF THE CROWN

ONE OF the great questions in dispute between Charles I and the Long Parliament had been that of the control of the Militia, which he had always claimed as his alone.<sup>1</sup> Charles II likewise claimed that he was the head of all the forces. Early in his reign he issued commissions to Lieutenants and their deputies authorizing them to command and drill the Militia of their county. The Cavalier Parliament was ready to concede that the command of all the forces rested with the Crown, and an Act was passed in 1661 which gave expression to that view.<sup>2</sup> The preamble spoke of the sole command of all the forces by land and sea as being, and always having been, by the laws of England the right of the King, and repudiated the opinion that either or both Houses of Parliament could exercise such command or levy war against the King. But the enacting part of the statute dealt with other matters.<sup>3</sup> Therefore it cannot be strictly said that Parliament decided a disputed point in the King's favour. But practically the Act of 1661 was always taken as declaratory of the law. The enacting part of the statute, however, shows that the Cavalier Parliament did not intend to leave Charles's power over the Militia undefined. For, after a reference to coming legislation on the matter, it provides that the Lieutenants and their deputies shall continue to act according to the King's commissions and instructions until March 25, 1662, and indemnifies them from any penalties they may have incurred by acting in execution of such commissions. The implication of this could only be that the King's prerogative powers for the

<sup>1</sup> It must be remembered that between 1604 and 1661 the King had no statutory authority for organising and employing the Militia. The nature and extent of his prerogative powers in this respect had been disputed.

<sup>2</sup> 13 Car. II, Stat. 1, c. 6.

<sup>3</sup> The preamble to the Militia Act of 1662 is worded in the same way, but there is no enacting clause dealing with this topic.

regulation of the Militia were minimal. The Act further provided that nothing in it should be so construed as to give any power for transporting subjects or in any way compelling them to march out of England 'otherwise than by the laws . . . ought to be done'.

The organization of the Militia was determined by two Acts, of 1662 and 1663 respectively.<sup>1</sup> The King was thereby authorized to issue commissions of Lieutenancy to persons in each county, who, together with their subordinates, were to command the local Militia. That force was to be composed of horse and foot; owners of property of a certain value were to supply either an armed infantryman or an armed cavalryman according to their assessment; Lieutenants were allowed to levy a limited rate for the provision of ammunition; provision was made for the regular drilling of the men; in the event of rebellion or invasion the Militia might be used anywhere in the country; when they were called out for active service, those responsible for providing the men were to supply them with one month's pay. But this was to be repaid by the King. The officers were given power to punish disobedience by a fine of five shillings or imprisonment for twenty days. Thus Parliament made fairly sure that the Militia would be the kind of force they desired. For the King's discretion was fairly effectively fettered by these Acts. He could, indeed, appoint and dismiss the officers as he pleased, but his use of the Militia was limited in many other ways; moreover, it was certain that if he called them up for any length of time he would have to apply to Parliament for the money to pay them.<sup>2</sup>

The Militia were not the subject of much controversy after these regulating Acts; for it was generally recognized that they were needed for the defence of the realm, while their officers were country gentlemen, who were loyal to the good old constitution. There was, on the other hand, always a

<sup>1</sup> 14 Car. II, c. 3 and 15 Car. II, c. 4.

<sup>2</sup> There were other Militia Acts before that of 1757; but their constitutional interest is not great. See 10 Will. III, c. 18; 1 Anne, Stat. 2, c. 15; 1 Geo. I, Stat. 2, c. 14. It will be noted that Charles was not given power to subject the Militia to martial law. The Act of 1662 gave the officers a very limited power of inflicting punishments and that was all. It is hard to see how discipline could have been maintained, had the Militia been embodied and called upon to serve for any length of time.



feeling, and sometimes a strong feeling, against a standing army. Men could not forget the Cromwellian dictatorship. But the position of Charles after the Restoration was sufficiently precarious to make the retention of some regular troops desirable. These conflicting sentiments were reflected in an Act of the Convention Parliament for the disbanding and paying off of the Army, which, at the same time, authorized Charles to retain, at his own expense, such portion of them as he wished.<sup>1</sup> Charles availed himself of this permission so far as to keep a small body of regular troops, nor did the Cavalier Parliament show any hostility to that force for some years. Indeed, an Act of 1662, for the preventing of frauds in the Customs, indirectly sanctioned its existence.<sup>2</sup> Later, however, a different temper prevailed. On July 25, 1667, the Commons resolved that such of them as were Privy Councillors should convey to the King the desire of the House that the troops raised during the Dutch war be disbanded upon the conclusion of peace. To this request Charles returned a vaguely favourable reply. The House, which had thus shown a wish to keep down the numbers of the Army, soon showed fear of any Army at all. For the articles of impeachment against Clarendon accused him of advising the King to govern by the aid of a standing army, maintained by free quarter and forced contributions.<sup>3</sup> Their apprehensions, however, were subsequently allayed; for the Conventicle Act of 1670 authorized the use not only of the Militia, but also of the Army, to break up conventicles, though only upon the requirement of a magistrate.

But no long time afterwards the Army once more became a cause of controversy. Its existence might be legal, but, even so, there were many problems connected with it that were as yet unsolved. It was uncertain by what means military discipline was to be maintained, and whether disputes between soldiers and civilians were triable in the ordinary courts or elsewhere. Parliament had abstained from legis-

<sup>1</sup> 12 Car. II, c. 15.

<sup>2</sup> 14 Car. II, c. 11. This commanded all 'officers belonging to the Admiralty, captains and commanders of ships of war, castles, and block-houses' to assist the Customs officer in its execution.

<sup>3</sup> Of course the House was reckless in bringing its charges; but I think they had a real fear of the Army, though its expression was exaggerated.

lating on these matters after the Restoration. Perhaps they had feared that an attempt to do so would give the King a pretext for asking them for supplies to maintain the Army. Charles, therefore, could manage the Army as he pleased save for such rather uncertain restrictions as were imposed by the existing law.<sup>1</sup> Nor did he hesitate to provide for the maintenance of discipline in the Army. He authorized the Captain-General, in 1663, to constitute courts martial; but the powers of these courts were limited by the direction 'that in all cases, wherein any person is to suffer the pain of death, no trial, execution, or proceeding be made, but according to the known laws of the land, if the crimes are punishable thereby, or otherwise by special commission under the Great Seal by advice of our judges'. The second and third Dutch wars caused the jurisdiction of military tribunals to be more clearly defined. In 1666 Charles issued a code of 'Orders and Articles of War', which was largely based upon the Parliamentary code of 1642. This code made detailed regulations for the constitution of courts martial, which were to determine 'all controversies in the Army'.<sup>2</sup> It also forbade magistrates to imprison soldiers on any charge except treason, misprision of treason, murder, robbery, or being accessory thereto. Finally, it provided that civilians who wished to enforce the payment of debts owed them by soldiers should first apply to the Judge Advocate; if they could not obtain redress from him, they were at liberty to sue in the ordinary courts.

Another code was issued in 1672, which did not purport to exempt the soldier from the jurisdiction of the civil courts in any way. But in December of that year Charles issued a proclamation commanding his subjects, if they suffered injury from soldiers, to complain to their commanding officer, who was either to give redress or, if he could not, to give the offender up to the civil magistrate; if, however, complainants could not thus obtain redress, they were to give information to a Justice of the Peace, who was then to inform a Secretary of

<sup>1</sup> The Petition of Right had made illegal the infliction of the death penalty by courts martial in time of peace, and had prohibited the compulsory quartering of soldiers upon civilians.

<sup>2</sup> Courts martial were empowered to inflict the death penalty. But, so far as I know, no soldier suffered this penalty in England for an offence committed in time of peace. Doubtless courts martial acted with greater freedom outside England.

State; in such cases the King promised to examine the complaint himself and to do justice. There can be little doubt that this interference with the jurisdiction of the ordinary courts was illegal, and there is even less about the illegality of another of the King's directions. In 1672, and perhaps earlier, Charles ordered troops to be billeted in private houses, when there was not sufficient accommodation available in ale-houses. It is no wonder that the temper of the House of Commons grew more hostile to the Army after 1672.

When Parliament met in 1673, the Commons, on March 25, presented an address on grievances, in which they asked for the recall of the proclamation of December, 1672, and requested that henceforth no soldiers be quartered in private houses, and that all troops raised since the previous session of Parliament—in 1671—be disbanded upon the conclusion of peace with the Dutch. They also asked the King to remedy the abuse of pressing soldiers. Charles returned a vague reply to the effect that he would remove the cause of their grievances before the next session, and shortly afterwards directed the Houses to adjourn themselves to October 20.<sup>1</sup> When they reassembled, the grievances connected with the Army were once more made the subject of debate in the Commons. Criticisms of the exemption of the soldier from the jurisdiction of the civil courts were uttered, and the Militia were pronounced to be the sole land force that was necessary. The military code of 1672 was also attacked as illegal. Eventually, on January 7, 1674, the House resolved that 'the standing Army is a grievance'. Later they again considered the Army and the question of martial law. Mr. Secretary Coventry, however, informed them that the code of 1672 was only intended to be applied to forces outside the realm. Finally, the House resolved that the continuance of any force other than the Militia was a great grievance, and presented an address to the King praying him to disband all the troops raised since the beginning of 1664. This the King promised to do.

Hitherto, it will be observed, the Commons had made no attempt to interfere with the King's undoubted right of command over the Army. Their requests that illegalities be

<sup>1</sup> I do not think the proclamation of December, 1672, was ever recalled.

made to cease were perfectly proper; their petitions for a reduction in the numbers of the Army the King might grant or reject, but he could not contest the right of the House to address him for such a reduction. In 1675, however, the Commons sought to limit that right of command which a statute had declared to reside entirely and solely in the Crown.<sup>1</sup> In April of that year the Commons presented an address to Charles praying him to recall those English soldiers who were serving with the French armies. The King replied that he could not honourably recall the English troops serving under Louis XIV, but that he would prevent any more from going over. The House refused to acquiesce and resolved to present a further address, but a prorogation put a stop to their endeavours. When Parliament met again in 1677 the Commons attempted to deal with the matter by legislation. A bill for the recall of the King's subjects from the service of Louis XIV passed the Lower House. Successive adjournments by Charles's command, however, prevented the Lords from dealing with it, and when the Houses once more met for business—in January, 1678—they were informed in the speech from the throne that Charles had recalled his troops.<sup>2</sup>

Towards the end of 1678 Parliament attempted to interfere with the King's command, not this time of the Army, but of the Militia. The Houses passed a bill, which provided that for six weeks after December 10, 1678, one third of the Militia were to be called up, kept under arms, and exercised, but no man was to serve for longer than fourteen days. This bill the King vetoed, nor did he leave the Houses in any doubt as to his reasons for so doing. He told them 'that he did not refuse to pass this Act for the dislike of the matter, but the manner, because it puts out of his power the Militia for so many days. If it had been but for half an hour, he would not have consented to it, because of the ill consequences it

<sup>1</sup> I do not say the action of the Commons was either inexpedient or morally wrong; but it was certainly an innovation, and it was regarded by many at the time as an unwarrantable attack on the prerogative.

<sup>2</sup> There were serving with Louis a number of English regiments besides individual volunteers. It was the recall of these regiments that the Commons particularly desired to secure. In fact Louis did not let them go even after Charles had nominally recalled them. He kept them till he had no more need of them.

may have hereafter, the Militia being wholly in the Crown'.<sup>1</sup>

Dislike of the King's foreign policy caused the Commons to make further attempts to secure a reduction of the strength of the Army in 1678-79. On May 27, 1678, they voted that they would support the King if he declared war upon France, but otherwise they would consider measures for disbanding the Army, which was intolerably expensive. Charles replied that it would be imprudent to reduce the forces until the conclusion of peace between France and the United Provinces. Meanwhile he asked the House to grant a supply for the Army. The Commons, however, carried a bill of supply—which became law—not for the maintenance of the Army, but for the paying off of all troops raised since the 29th of the previous September; these were to be disbanded within a few weeks.<sup>2</sup> But the King did not suffer the Act to be executed, and, when Parliament reassembled, after a prorogation, in October, he informed the Houses that he had found it necessary to spend on the maintenance of the Army the money granted for, and appropriated to, their partial disbandment. Another bill was thereupon passed by the Commons to secure the disbandment, which was drawn up in such a manner as they thought would be effective. The Lords made several amendments, which the Lower House was unwilling to accept, and the dispute was still in progress when a prorogation supervened. The matter was taken up again by the Parliament of 1679, and an Act was passed, which proved effective. It enumerated the corps to be disbanded, and made certain persons responsible for disbanding them. The Act, moreover, contained a clause which absolutely forbade the billeting of troops upon any householder without his consent.<sup>3</sup> Strong language had been used about compulsory billeting in the Commons, and the Army in general had been condemned by a resolution that any standing land force was illegal. But no attempt was made to abolish the Army altogether by a bill.<sup>4</sup>

It does not appear that Parliament or the Commons alone

<sup>1</sup> The report of this speech in the *Journals of the House of Lords* is in *oratio obliqua*.

<sup>2</sup> 30 Car. II, Stat. I, c. I.

<sup>3</sup> 31 Car. II, c. I.

<sup>4</sup> See also *supra*, p. 115, for the charge brought against Danby that he had designed to establish arbitrary government with the aid of the Army.

took any further action against the Army during the reign of Charles II. But James's Parliament contained many opponents of a standing Army, though these were not in a majority. Perhaps, however, the Commons would have eventually condemned it, had not their hostility to the employment of Roman Catholic officers caused James to prorogue Parliament at the end of 1685. Parliament never met again during the reign. James, being provided with an ample revenue, was able greatly to increase the numbers of the Army, nor did he pay much attention to the law in his management of military affairs. Troops were illegally billeted in private houses, and provision was made for the enforcement of martial law. James issued two sets of articles of war: the first during Monmouth's rebellion; the second in 1686. The latter provided for the punishment of military murderers and thieves, whether the victims were soldiers or civilians; but it was stated that courts martial in time of peace were not to inflict the penalties of death or loss of limb. On the other hand, they were given jurisdiction over all rebels, whether soldiers or not.

Charles II and James II, though they did not venture to allow courts martial in England to impose the death penalty during peace, were able to have deserters tried and condemned for felony by the civil courts. The judges decided that desertion in time of peace was a statutory felony—though the grounds for their decision were not too strong—and as early as 1678 a deserter was tried at the Old Bailey, convicted, and hanged. Grave doubts, however, were entertained by several eminent lawyers as to the justice of such proceedings.

The attitude of Parliament to the Navy throughout this period was very different from their attitude to the Army. So far from dreading the Navy as a force that might be employed for unconstitutional purposes, both Parliament and the nation regarded it as permanently indispensable. Hence in 1661 statutory provision was made for the maintenance of discipline in the Navy and for the punishment of offenders by courts martial.<sup>1</sup> The King thus gained legal power to enforce discipline in the Navy, but only within the limits laid down by Parliament; for the Act both enumerated the

<sup>1</sup> 13 Car. II, Stat. 1, c. 9.

punishable offences and regulated the composition of courts-martial. The Act therefore increased the power of Parliament. It is curious that Parliament did not likewise legislate for the maintenance of discipline in the Army and thereby assert their right to deal with the matter. But their dislike of the latter force so blunted their perceptions that they refrained. They could not see the need for a permanent standing Army, and legislation for the maintenance of discipline would, in their opinion, have amounted to a recognition of such a need, nor was the idea of a temporary Act yet seriously entertained.

## XII

### THE PRESS

THE SPECIAL measures for the control of the press taken during the Commonwealth and Protectorate naturally lapsed at the Restoration. This did not mean that anything could be printed and published with impunity. The authors, printers, and publishers of blasphemous and seditious writings were punishable at Common Law, and it was also probably illegal to publish any news without the King's consent. In spite of this, many works were printed of which the Government disapproved, and recourse was therefore had to Parliament. In 1662 the Licensing Act became law.<sup>1</sup> This prohibited the printing and publishing of heretical, schismatical, and seditious books, and provided that no book should henceforth be published without a licence. Legal works were to be licensed by the Chancellor, or by one of the Chief Justices, or by the Chief Baron, works on history or politics by a Secretary of State, works on heraldry by the Earl Marshal, works on divinity, medicine, and philosophy by the Primate or the Bishop of London or the Chancellors or Vice-Chancellors of the Universities.<sup>2</sup> These persons, however, could appoint deputies to act for them. Books printed abroad were to be inspected before they were allowed to be sold. Regulations were also made to limit the number of printers.<sup>3</sup> Moreover, the King and the Secretaries of State and the Master and Wardens of the Stationers' Company were given power to issue warrants for the searching of any premises suspected to contain illegally-printed books. The Messengers of the King's Chamber, who executed the warrants, were authorized to arrest suspected persons and bring them before a Justice of

<sup>1</sup> 14 Car. II, c. 33.

<sup>2</sup> The Chancellors and Vice-Chancellors could only license works to be printed in their respective Universities.

<sup>3</sup> I do not deal with the complicated question of the position of the Stationers' Company under the Act.



the Peace, who was to commit them to jail until their trial. Very few persons then objected to a censorship; but the clauses in the Act with regard to the right of search and arrest were distasteful to many. It would appear that the Lords, in 1661, had refused to pass a Licensing Bill because it contained such clauses. The Act of 1662, however, made a few exceptions in favour of peers, and with this concession they were satisfied. Moreover, the Act was to endure for only two years. But Parliament renewed it in 1664 and 1665, and it did not expire until June, 1679.

Strict enforcement of the Act proved difficult, and at times very difficult. Proper machinery was, indeed, lacking. In the months between the beginning of the Popish Plot scare and the expiration of the Act enforcement was particularly lax. After its expiration, however, Charles made an attempt to control the press through the judiciary. On October 31, 1679, he issued a proclamation commanding the seizure of all scandalous books and pamphlets. On May 12 of the following year a further proclamation forbade the publishing of any newspaper or pamphlet containing news without a royal licence. Charles had previously consulted the judges, and they had advised him that the proclamation was in accordance with the law. They adhered to this view in two important cases of 1680. Chief Justice Scroggs laid it down in the *Case of Benjamin Harris* that any book which libelled a private person or was 'scandalous to the Government' might be seized, and its publisher punished. In the *Case of Henry Carr* the same judge declared that it was illegal to print or publish any news whatsoever without the King's leave. He also made a rule—before Carr's trial—prohibiting the publication of a paper published by Carr. The House of Commons investigated the conduct of the Chief Justice in the autumn of 1680, and drew up articles of impeachment against him. One of the charges related to the rule against Carr's paper; the Commons contended that the making of the rule, before Carr had been tried, was illegal. It does not appear that they directly challenged the right of the Crown to control the publication of news.<sup>1</sup>

<sup>1</sup> But on October 30, 1680, they had resolved that their 'votes' be printed. This was a claim to publish news without licence.

The Parliament of James II renewed the Licensing Act for a period of seven years. It so happened, however, that the Act in one respect proved irksome to the King. His reign witnessed a great controversy between Protestant and Roman Catholic writers. The Primate and the heads of the Universities, acting in defence of their faith, licensed numerous works that attacked the Church of Rome, and the King found himself powerless to check their publication.

## PART III

THE REVOLUTION SETTLEMENT, 1689-1719



# I

## INTRODUCTION

COMPARED WITH many other revolutions, the English revolution of 1689 appears a very tame affair. There was no execution of a King, no reign of terror, and no confiscation. All that happened was, on a superficial view, a transference of the Crown and a few changes in public law. These events, however, implied a great alteration in the dominant political theory and led to many subsequent developments of great constitutional significance. The assumption of the Crown by William and Mary did not mark the end of the Revolution, but merely that of its first stage. For many constitutional problems of moment remained unsolved; some of these, indeed, were not yet properly understood. Hence there followed a long period of uncertainty and confusion. Many statutory changes in the constitution were made, and many more attempted. There was, moreover, for some time a very real danger of a counter-revolution brought about by foreign intervention. By the end of 1719, however, the Revolution settlement was complete, and appeared likely to endure. Henceforth there were, for many years, no important attempts to alter the constitution by statute, and no vital modifications of constitutional conventions.

What, then, were the chief characteristics of this settlement? In form it was conservative. Though great changes were made in the law, they were so made as to appear as little radical as might be. A good example of this tendency may be found in the Toleration Act. The powers of the Crown were slightly, but only slightly, abridged by statute. No Act formally extended the powers of Parliament, though many implied that they were vast. The established Church still retained its dominant position; though toleration was granted to certain classes of nonconformists, yet bare nonconformity

remained a crime, save for that statutory exception. When looked at more closely, however, the settlement appears far less conservative. The effect of all the changes taken together was drastically to alter the constitution as it had been generally understood in the reign of Charles II. Though every effort was made to stress continuity and to minimize the breach with the past, yet the Revolution settlement comprised a series of radical innovations. Nor were these only embodied in statutes. The development of the Cabinet and the rise of a new relationship between the executive and the Houses of Parliament were none the less important because they were extra-legal.

So great were many of these changes that we cannot but wonder why they were not even greater. A period of revolution usually favours extreme courses rather than compromises, and there is no doubt that most of the great laws of this period gave expression to compromises between different schools of thought. The explanation lies partly, but only partly, in the fact that many Englishmen held that the Revolution was, at best, something in which they might acquiesce, but could not openly exult. Doubtless their attitude was a moderating force, since to provoke them would have been to endanger the new régime. But this alone will not account for the character of the new settlement. It must be remembered that William and most of his supporters in 1688-89 professed to desire, not a revolution, but a restoration. The manifesto issued by William on the eve of his expedition laid great stress on the illegalities, real and alleged, committed by James II, which it enumerated in detail. James, in fact, was represented as endeavouring to subvert both the constitution and the established Church. William, on his part, represented himself as desiring to give Englishmen an opportunity to redress their grievances by securing the meeting of a free Parliament. It so happened that William's expedition resulted in the transference of the Crown from James to William and Mary. But this could be held to be the necessary concomitant of a restoration. James had striven to exercise arbitrary power; William and Mary were to respect the law. The monarchy had not been abolished, but restored to its rightful position. Moreover, the Church, Parliament, and the law had been delivered from a King who

had set himself against them. Was not this deliverance, as it were, a restoration? The events of 1688-89 were produced by hatred of Popery and arbitrary power, two things which, in the popular estimation, naturally went together. Thus, illegal though the Revolution was, it appeared to many Englishmen as a triumph not merely for their religion, but also for the law of their land.

The character of the new settlement was profoundly influenced by this belief. Arbitrary power—power uncontrolled by any counterbalancing force—was odious to the majority. Hence, for the future, attempts alike by the King and by Parliament—or either House thereof—to go beyond what were thought to be their due bounds aroused strong opposition. It was more and more widely held that King, Lords, and Commons each had a definite sphere in the constitution; they were the three estates of the realm, and equilibrium should exist between them. If one attempted to go beyond its due bounds, the other two should combine to check it. The constitution thus came to be envisaged as a system of checks and balances designed to secure the observance of rights. By rights were meant not so much natural rights—whatever they might be—as rights recognized by the law or constitution of the land, the rights of Englishmen. Certain rights pertained to all Englishmen; others only to this or that category; others, again, to certain bodies collectively. These rights were a species of property. It is not a mere chance that the period was one in which the sanctity of property was stressed. Property did not merely include material things, but also rights of all kinds. Did not Chief Justice Holt declare that the right to vote was a species of property?

For these reasons, though many strong things were done in this period, its general character was one of moderation. Even innovations were introduced in a conservative form. Most of them, moreover, could be represented as designed merely to secure the better observance of the existing law and constitution, or to correct anomalies therein. The House of Commons, it is true, sometimes showed a tendency to behave in an arbitrary way, but that tendency was checked by the King, by the courts, and—what was more important—by the growth of respect for the rights of others in the House itself. It might, indeed, be

contended that sovereignty was actually exercised by, though not formally claimed for, the Crown in Parliament, and sometimes exercised in the most drastic manner. But it was of some significance that sovereignty was not so claimed. Thus though the settlement undoubtedly strengthened the position of the Crown in Parliament and increased the power of Parliament—and especially of the Commons—as against the Crown, yet men in general continued to believe that the good old constitution was, in substance, still extant, and that belief was none the less important because it was at most half true. Therein may be found the explanation of the peculiar character of the Revolution settlement.



## II

### THE KINGSHIP

THIS IS not the place to tell in detail the story of the invasion of England by William of Orange. It is sufficient to mention the following facts. William landed at Torbay on November 5, 1688. He rapidly advanced towards London with his Dutch troops and a number of Englishmen who had risen and joined him. James, who had at first intended to fight William, was so alarmed at the desertions from his army that he returned to London. Thence, after having begun negotiations with William, he fled in disguise on December 11; his wife and son had been previously sent to France. Before he could leave the country James was seized by a number of Faversham fishermen. The Lords, who had assumed control of affairs in London, directed that he be brought back to the capital, where he once more lived as King. But William insisted that he retire to Rochester, whence he speedily made his escape to France, on December 22.

(The position in England after the flight of James was unprecedented. James was still King in law; but he was not able to exercise most of his prerogatives.) Recourse to William was therefore inevitable. (A number of Lords, who were present in London, collectively assumed authority after James's flight from the capital, and on December 11 declared their readiness to co-operate with the Prince of Orange in order to secure the meeting of a free Parliament. After he had received the news of James's escape to France, William summoned two meetings, one of the peers, the other of the members of the Commons in Charles II's last Parliament, together with the Aldermen and Common Councillors of London.<sup>1</sup> These bodies requested William to take over the

<sup>1</sup> The Commons of James's Parliament were regarded by many as illegally constituted, because of the remodelling of the corporations. For this reason, among others, William did not consult them.

administration and to summon a Convention of the Lords Spiritual and Temporal and of the representatives of the constituencies. To this request William acceded)

(The Convention which met on January 22, 1689, was certainly an illegal assembly, and consequently it had no authority to perform any act.) Its convocation and its proceedings can only be justified on other than legal grounds. The country was in imminent danger of falling into anarchy; there was no lawful government and no Parliament; for James had dissolved his Parliament in 1687.) Even the great majority of those who did not wish to see James deposed admitted that the country must save itself from anarchy as best it could. Several schools of thought, however, were represented in the Convention. (Very few seem to have wished to make terms with James, while the claims of his recently-born son were set aside without discussion, because he was generally believed to be a supposititious child. But there were a good number, particularly among the Lords, who held that James should be allowed to retain the title of King, though the exercise of the Kingly power should be entrusted to a regent.) Their desire to avoid a formal deposition blinded them to the patent absurdity of such a solution. They seem to have argued that, while James's title to the Crown was undeniable, a regency might be instituted on the ground that he was not in his right mind.) But a large party were determined that James must not be permitted to reign even in name; they were not, however, agreed upon the choice of his successor. Many favoured his nephew, William of Orange; some favoured his elder daughter, Mary, who was married to William. The claims of his younger daughter, Anne, were not seriously advocated.

(It was very significant that, when the Convention met, the Lords deliberately postponed discussion of the problem until the Commons had had an opportunity to discuss it. On January 28 the Lower House resolved that James, 'having endeavoured to subvert the constitution of the kingdom, by breaking the original contract between King and people, and, by the advice of Jesuits and other wicked persons, having violated the fundamental laws, and having withdrawn himself out of this Kingdom, has abdicated the government, and that

the throne is thereby vacant'.) On the following day they further resolved that 'it hath been found by experience to be inconsistent with the safety and welfare of this Protestant kingdom to be governed by a Popish prince'. The former resolution is thoroughly inconsistent. It implies that James merited deposition, because he had violated the constitution, and states that his flight was equivalent to abdication.) (But, if James was to be deposed, all talk of abdication was irrelevant. If, on the other hand, he had abdicated, there was, in strict logic, no need for any reference to his breach of the constitution. Moreover, according to a theory that then widely obtained, and has since become established, not the King, but his advisers, were responsible for all acts done in his name. James, again, still claimed to be King and, in view of this claim, could not fairly be said to have abdicated.' In any case a vacancy of the throne was, from a legal standpoint, an impossibility. Notwithstanding these objections, the resolution was a masterpiece of political sagacity.) Nay, more, its very inconsistencies were its chief merit. They enabled it to win the support of men of very different views. Those who held that the relation of King and people was contractual and those who believed that a King could not on any pretext be deposed were alike able to vote for it. The second resolution, of almost equal practical importance, was not liable to the same theoretical objections. It was a plain statement of opinion, which, however, virtually committed those who voted for it to a transference of the Crown.

On January 29 the Lords took into consideration the question of the Crown. They forthwith concurred with the second resolution of the Commons; but before considering the first, they debated the solution of setting up a regency and rejected it by three votes.) On January 30 and 31 they considered the first resolution of the Commons and carried an amendment to substitute 'deserted' for 'abdicated', which term, it was contended, was unknown to English law and misrepresented the facts; for James, whatever else he might have done, had not abdicated. They also carried another amendment, for the deletion of the words 'the throne is thereby vacant'. It is noteworthy that the Lords accepted the clause regarding the original contract, inconsistent though it seems to have been

with their other views. They were, moreover, at pains to take the opinion of several learned lawyers, who told them that, while there was little or nothing about a contract between King and people in the law-books, yet they conceived some such contract must be the basis of government.

(The Commons refused to accept these amendments, nor did the holding of a conference lead to any agreement. At this juncture it became known both that William would not accept the position of regent and that Mary had no desire to become sole ruler. After that only one solution was possible. The plan of a regency was finally dropped, and those who had hitherto wished Mary to become Queen regnant ceased to have reason to contend that the throne was not vacant because she had automatically succeeded to the throne upon James's desertion'.) A further conference was held, at which the meanings of the words 'deserted' and 'abdicated' were elaborately discussed. But the Lords, on February 6, decided to accept the resolution of the Commons in its entirety. They then resolved that the Prince and Princess of Orange be declared King and Queen of England and the dominions thereunto belonging. With this resolution the Commons concurred.)

(The Crown, however, was not offered without conditions. The Commons appointed a committee, which drew up a document—the celebrated Declaration of Rights—settling certain constitutional principles. This was accepted by both Houses.<sup>1</sup> It commenced with a recital of various things done in the reign of James II and in the latter part of that of Charles II to which exception was taken. It then stated that the Lords and Commons declared to be illegal the suspending power, the dispensing power as 'exercised of late', the commission for constituting James's Ecclesiastical Commission and all similar commissions, the levying of money without the consent of Parliament, the raising and maintenance of a standing army in time of peace, unless with the consent of Parliament, interference with the freedom of proceedings in Parliament, attempts to pack juries or—in cases of high treason—to constitute them of non-freeholders, the requirement of excessive bail, and the imposition of heavy fines or infliction of cruel

<sup>1</sup> The Lords obtained the insertion of some small amendments.

and unusual punishments.) (It also declared that subjects had a right to petition the King and, if Protestants, to possess arms for their defence, that Parliaments ought to be held frequently, and that elections ought to be free.) The Convention thus had no hesitation in declaring illegal many things that were probably or certainly legal. They simply declared that the law already was what they wished it to be. Once more the partisans of change represented themselves as conservatives. The Declaration concluded with the statement that the Lords and Commons claimed and insisted upon all the above points and, having an entire confidence they would preserve the people's religion and liberties, declared William and Mary King and Queen regnant for their joint and several lives. But William was to have 'the sole and full exercise of the regal power'; the Crown was to descend, in the first place, to their issue, in the second, to Anne and her issue, in the third, to William's issue by a second marriage. On February 13 the Lords and Commons tendered the Crown to William and Mary, and William accepted it for them both. From that moment their reign began.

(It will be noticed that the Declaration of Rights, though a constitutional document of the first importance, does not contain a complete constitution.) The old constitution was not held to have been abrogated, but rather to have been restored. (Apart from the passages relative to the Crown and the succession, the Declaration was regarded as doing little more than setting forth) in terms too plain to be mistaken, (certain points of the existing law; in so doing it simply secured to Englishmen the rights of which they were already legally possessed. )

(The illegality of the transference of the Crown was undeniable, as Jacobite writers were never tired of pointing out. But there was a large party in the Convention which strove to conceal this obvious fact by asserting, either that the people could depose a King who had broken the original contract, or that James had abdicated.) (These pretences—for in strict law they were nothing else—were of the greatest political importance. \*'They disguised the fact that there had been a break with the past. Moreover, those who held the contract theory were able to represent the Revolution as a triumph of

the rule of law.) There were many, however, who could not accept the Revolution as in any way lawful, but were prepared to acquiesce in it when accomplished. A legal wrong, they said, had been committed; but they felt it their duty to submit to William and Mary as *de facto* rulers, for the sake of the country's peace and well-being. This view commanded a measure of respect even from many of those who did not share it. Thus there was, for some time, a tendency to deprecate the raising of certain awkward questions.

Among these questions was that concerning the nature of the new rulers' title to the Crown. (It could be argued, in view of the Declaration of Rights, that they had entered into a kind of contract with the nation.<sup>1</sup>) If that was so, then the country was committed to the official acceptance of a political theory that was far from universally held. On the other hand, it could be maintained with equal force that the law knew nothing of such a contract, that no Convention could elect a King, and that William and Mary really reigned without any right. In support of this contention reference could be made to the revised form of the oath of allegiance, contained in the Declaration of Rights. The new oath was simply a promise to bear true allegiance to William and Mary, and made no mention of their being 'rightful and lawful' rulers.<sup>2</sup> Such an oath was plainly framed to conciliate those who would only accept William and Mary as *de facto* King and Queen.

(During the ensuing years there were a number of attempts to settle this question by statute, which were usually opposed by all who declined to admit that the nation could by any lawful means transfer the Crown. It was significant, however, that an Act was passed, at the very outset of the reign, for the modification of the coronation oath.<sup>3</sup>) The King was henceforth to swear that he would govern 'according to the statutes in Parliament agreed on') The oath in its previous form had pledged the King to 'grant and keep' the laws and customs

<sup>1</sup> I do not mean, of course, that there was any formal contract.

<sup>2</sup> The Declaration also contained a revised oath of supremacy; for which see *infra* p. 268. The new oaths were imposed on all who had hitherto been required to take the old oaths by 1 Will. and Mar., Stat. 1, c. 8.

<sup>3</sup> 1 Will. and Mar., Stat. 1, c. 6.

‘granted’ by his predecessor. If the laws were merely the King’s grants, then it might be contended that he could revoke them. Henceforth it was plain that he was bound by the laws.

In the spring of 1690 the Parliament which had succeeded the Convention Parliament passed a bill providing that the laws made by the Convention were good laws, and declaring and enacting that Parliament recognized that William and Mary ‘were, are, and of right ought to be, by the laws of this realm . . . King and Queen’.<sup>1</sup> Later in 1690 a bill was introduced in the Commons to require all office-holders and all holding commissions in the forces or ecclesiastical preferment to abjure James. The penalty of refusal was to be dismissal or deprivation. Further, Justices of the Peace were to be empowered to tender the oath to any person, and those who refused to take it were to go to prison until they submitted. The House, however, threw out the bill. But a very similar bill was forthwith brought into the Lords. This required all males over sixteen to swear to stand by William and Mary, who were and ‘of right ought to be’ King and Queen; those who would not swear were to pay double taxes. This bill was drastically amended in committee, and finally was dropped. Again, at the end of 1692 the Commons threw out a bill for the imposition of an oath of abjuration—of James—upon all office-holders, which oath might also be tendered to all suspected of disaffection. In January, 1693, another bill was introduced in the Lords, for the imposition of an oath on all office-holders, which contained a clause to the effect that the swearer did not hold himself bound by any former oath or obligation of allegiance to the late King James. This bill never got beyond the committee stage. All these bills were really attempts to force his subjects to acknowledge William as *de jure* King, and so to commit themselves to a particular view of the Revolution. They failed because Parliament cared much that William should be supported, but cared comparatively little why he was supported. An attempt to impose such an oath would, it was felt, have alienated many from him.

The discovery of the Assassination Plot, in 1696, led to a change in the attitude of Parliament. The majority of the

<sup>1</sup> 2 Will. and Mar., Stat. 1, c. 1.

Commons were induced to sign an Association binding themselves to stand by William as 'rightful and lawful' King. Many of the Lords also signed a document similarly, but not identically, worded; for it was said therein that William, and he alone, had a right to the Crown by law. This modification enabled some scrupulous peers to sign who would otherwise have refused. In the next session, however, an Act was passed which required all future office-holders, civil and military, and all future members of the Commons, during William's life, to subscribe the Association in the form drawn up by the Commons. In 1702 a further step was taken; an Act of that year provided that all holders of offices and of commissions in the forces, all ecclesiastical persons, all members of University Colleges, all schoolmasters, all Dissenting Ministers, and all members of either House of Parliament before they voted therein, were to take an oath of allegiance to William as 'lawful and rightful' King, to promise to support the provisions made for the succession in the Act of Rights and Act of Settlement, and to abjure the Pretender as not having 'any right or title whatsoever' to the Crown.<sup>1</sup> Subsequent statutes in the next two reigns required the same classes of persons to take oaths of a similar tenor.

(Thus it was established, as far as was in Parliament's power, that the only right to the throne was that conferred, firstly by the Convention's offer to William and Mary, and, subsequently, by the Act of Rights and the Act of Settlement.) (Parliament, in fact, solemnly repudiated the doctrine of the divine right of Kings, and made it a constitutional doctrine that the King who ruled by a Parliamentary title was *de jure* as well as *de facto* King.) It must be remembered that, by the end of William's reign, few really believed that James had, in any real sense, abdicated or that the Pretender was not actually his son. The Act of 1702, therefore, amounted to a declaration that the Lords and Commons could rightfully depose a King and bestow the Crown upon whomsoever they pleased.) When, in 1710, the Lords, in their judicial capacity, condemned the impeached Sacheverell for preaching a sermon in which he had advocated passive obedience and non-resistance, they were vindicating the validity of Parliamentary as opposed to hereditary right.

<sup>1</sup> 13 and 14 Will. III, c. 6.



With the progress of time the Revolution acquired an ever-growing respectability, and loyal subjects ceased to be divided into those who merely adhered to the King as a *de facto* King, and those who adhered to him as King both *de jure* and *de facto*.

Mention must also be made of certain other statutes affecting the Kingship.

In the autumn of 1689 the Declaration of Rights was enacted in the form of a statute, with some additions.<sup>1</sup> The Act provided that no person who was, or became, a Papist, or who married a Papist, should wear the Crown.) If this rule were broken, subjects were absolved from their allegiance. (Moreover, for the future those who inherited the Crown were to subscribe the declaration against transubstantiation contained in the second Test Act at the beginning of the first session of Parliament after their accession or at their coronation.) Thus a decisive test was provided to determine whether or no the new sovereign was a Roman Catholic.) The clause, however, which absolved the subject from his allegiance if the King became a Papist is curious. If the King declared himself a Roman Catholic after he had made the declaration against transubstantiation, could his subjects plot against him and, if tried for treason, plead that they owed the King no allegiance, and bring evidence to prove that he was a Papist? It is difficult to believe that the King's courts could determine the validity of the King's title to the throne. The rule against the marriage of the sovereign to a Papist is liable to even stronger objections. No test was provided for the King's wife; no definition of a 'Papist' was given. A court—nowadays, if not in the seventeenth century—might reasonably hold that it did not know what a Papist was.

(Towards the end of William's reign it became plain that adequate provision for the succession had not been made. Mary had died childless in 1694, and William had not remarried. Anne, the heiress presumptive, had lost her only surviving child in 1700, and appeared unlikely to have further issue. Accordingly, the Act of Settlement was passed in 1701.<sup>2</sup> This enacted that, when the provision made for succession by the Bill of Rights had failed, the Crown was to pass to Sophia, Electress dowager of Hanover, and her issue,

<sup>1</sup> 1 Will. and Mar., Stat. 2, c. 2.      <sup>2</sup> 12 and 13 Will. III, c. 2.

being Protestants.<sup>1</sup> The provisions contained in the Bill of Rights, that the monarch should not be a Papist or marry a Papist, were re-enacted and made applicable to Kings of the House of Hanover; these, moreover, were required to take the new coronation oaths, to sign the declaration against transubstantiation, and to join in communion with the Church of England.<sup>2</sup> The Act also confirmed all the laws for securing that Church and for securing the rights and liberties of the people. Finally, it provided that certain rules of constitutional importance should come into force upon the accession of a member of the House of Hanover.<sup>3</sup>

At various times special provision had to be made for the exercise of the regal power, when the sovereign was out of the country. Shortly before William's expedition to Ireland, in 1690, it was enacted that, whenever he should be out of England, Mary was to act in their joint names.<sup>4</sup> None the less, William was to retain authority in England. Mary's submissiveness to her husband averted all danger of a conflict,

<sup>1</sup> Sophia was the daughter of Elizabeth, daughter of James I, who had married the Elector Palatine.

<sup>2</sup> The Act of 1707 for the security of the English Church provided that Anne's successors were at their coronation to subscribe an oath to preserve the 'settlement of the Church of England, and the doctrine, worship, discipline and government thereof, as by law established'. See 6 Anne, c. 8 and *infra* pp. 257-9. Compare 1 Will. and Mar., Stat. 1, c. 6.

<sup>3</sup> These were:

- A. That England should not be obliged to go to war, without the consent of Parliament, in defence of lands not belonging to the Crown of England.
- B. That the monarch should not go out of the British Isles, without the consent of Parliament. (Repealed in 1716. See *infra*, p. 181.)
- C. That matters relating to the well governing of the realm which were recognizable in the Privy Council, be transacted there, and the resolutions signed. (Repealed in 1706. See *infra*, p. 216.)
- D. That no alien be capable of sitting in Parliament, holding office, or receiving a grant of land from the Crown.
- E. That no person holding an office of profit or in receipt of a pension from the Crown be capable of sitting in the House of Commons. (Modified in 1706, 1708, and 1716. See *infra*, p. 187.)
- F. That judges should hold their places during good behaviour. (See *infra*, p. 283.)
- G. That no pardon should be pleadable to an impeachment. (See *infra*, p. 289.)

<sup>4</sup> 2 Will. and Mar., Stat. 1, c. 6.

and the arrangement worked well as long as she lived. After her death William had recourse to a new expedient. Henceforth, during his annual absences, he delegated certain limited powers to a body of Lords Justices named by him. These were, however, closely controlled by the orders regularly sent them from the King.

While Anne still reigned, statutory provision was made for the carrying on of government during the interval between her death and the arrival of her Hanoverian successor in Britain. It was enacted in 1706 that there was to be a body of Lords Justices consisting of seven great officers of state and such other persons as the heiress or heir presumptive might appoint. They were to exercise the regal power, subject to the restriction that they could not, without express orders from the new monarch, either dissolve Parliament or assent to a bill for the repeal of the Act of Uniformity or the Act for the Security of the Scottish Church. They were also, of course, bound to obey any commands they might receive from the new monarch.<sup>1</sup> When Anne died, the Lords Justices duly began to act, and continued to do so until the arrival of George I.

In 1716 George I determined to pay a visit to his electoral dominions, and Parliament made no difficulty in repealing the clause in the Act of Settlement which prevented him from going out of the British Isles.<sup>2</sup> George, at first, designed to make his son Regent during his absence. But when he was told by his chief Ministers that there was no precedent for his proposal to join several persons in commission with the Prince of Wales, George, who was extremely jealous of his son, appointed him, not Regent, but Guardian of the Realm, a position last held by the Black Prince. Moreover, he hedged him about with so many restrictions that his power was minimal. The King's mistrust of his son increased with the lapse of time, and he did not renew this experiment. During George I's subsequent visits to the Continent Lords Justices acted on his behalf in Britain.<sup>3</sup>

<sup>1</sup> 4 and 5 Anne, c. 20. Re-enacted, after the Union, with a few changes, by 6 Anne, c. 41.

<sup>2</sup> 1 Geo. I, Stat. 2, c. 51.

<sup>3</sup> For the Lords Justices see also *infra*, p. 212.

There is yet one more statute relating to the Kingship which requires notice here. In 1696 it was enacted that no commission, civil or military, was, as formerly, to determine upon the sovereign's death, but should remain in full force for six months, unless sooner determined by his successor.<sup>1</sup>

<sup>1</sup> 7 and 8 Will. III, c. 27. By 7 and 8 Will. III, c. 15 it was enacted that Parliament should not be dissolved by the King's death, but should continue for another six months. See *infra*, p. 196. These statutes are symptoms of that tendency to think of the Kingship rather than of the King which has become more and more marked ever since the Revolution.

### III

#### PARLIAMENT

THE CONVENTION of 1689, like that of 1660, had no claim to the status of a Parliament. As soon, however, as William and Mary had been proclaimed, a statute was made declaring that the Lords and Commons were the two Houses of Parliament. Strong opposition was made to the bill by many in the Commons, who contended that the Convention could in no way turn itself into a Parliament. The majority, however, were swayed by considerations of expediency and defended their case by references to the precedent of 1660. In the following year, moreover, a new Parliament passed a bill declaring that the laws made by the Convention were good laws.<sup>1</sup>

The members of the Upper House increased during this period. William's creations, indeed, were largely counter-balanced by extinctions, and Anne did not make many peers in the early part of her reign. But the Act of Union provided that the Scottish peers were to be represented in the House of Lords by sixteen of their number, elected by their fellow-peers for each Parliament. In 1712, also, the Queen created on a sudden a batch of twelve peers; this she did in order to make a majority for her Ministers in the Lords. The step was bitterly resented at the time as an unwarrantable exercise of the prerogative which menaced the independence of the Upper House. George I in the first four years of his reign made some twenty peers; but as these creations were not simultaneous, it was not so easy to take exception to them.

In 1719 an attempt was made to fix the numbers of the Lords by statute. A series of resolutions was moved and carried by the Duke of Somerset, in February of that year, to the effect that the then number of peers should not be increased by

<sup>1</sup> 1 Will. and Mar., Stat. 1, c. 1, and 2 Will. and Mar., Stat. 1, c. 1.

more than six and that the House should contain twenty-five hereditary, instead of sixteen elected, Scottish peers; in the event of the failure of heirs to an English or British peerage, the King was to have power to create a new peerage; if, on the other hand, a Scottish peerage to which a seat in the Lords was attached became extinct, the King was to bestow the seat upon another Scottish peer; peerages granted in the future were to descend only to heirs male. Exception was taken to the resolutions, on the ground that they were an infringement of the prerogative. The King thereupon sent a message to the House signifying his acquiescence in the proposed change. Some members regarded this as an unconstitutional attempt to interfere with the freedom of proceedings; but their objection was disregarded, and the precedent then set has been followed on several subsequent occasions, when a proposal to curtail the prerogative was before Parliament. A bill to turn the resolutions into law was soon introduced, and made some progress in the Lords; before the third reading, however, the House let it drop, on the proposal of a Minister.

The reason for this was the strong feeling against the bill which had arisen both in the Commons and among the public. It was bitterly denounced in the press as an attempt to establish the Upper House as an uncontrollable power. The only check upon the Lords was the prerogative of creating peers. If they became a closed body, their power would be arbitrary and uncontrolled; they could throw out popular bills and acquit criminal Ministers whom the Commons had impeached.<sup>1</sup> Moreover, a peerage had hitherto been considered the supreme reward of merit. Was the King to be deprived of the power to raise an eminent commoner to the Upper House? These arguments were strong, and they could only be feebly answered. Those who wrote in favour of the change said much of the need for an independent House of Lords, and made much of the danger that the King might follow the evil precedent of 1712. But the chief cause of the proposed change they could hardly stress. The then Ministers were on bad terms with the Prince of Wales, and wished to make the House of Lords,

<sup>1</sup> The King could check the Commons, if they tried to step beyond their due bounds, by a dissolution; the two Houses could similarly check the King by refusing supplies.

where their adherents had a majority, a stronghold of their own, before he became King. The controversy lasted for some months, and the Ministers apparently came to the conclusion that the victory would be theirs. For the Peerage Bill was once more brought into the Lords, in November, 1719, and passed that House with ease. The real fight, however, came in the Commons, where the eloquence of Robert Walpole secured the defeat of the Bill.

Several problems arose with regard to the Scottish peers. In 1709 the Lords had to decide whether a Scottish peer who had been created a British peer since the Union could vote at the election of the Scottish representative peers. They decided that he could not.<sup>1</sup> In 1711 another question had to be answered. Could a Scottish peer who had been created a British peer since the Union sit in the Lords in virtue of that creation? The decision was that he could not.<sup>2</sup> On the other hand, the Lords held, in 1719, that the eldest son of a Scottish peer who had been created a British peer during his father's life could continue, after his father's death, to sit in the Upper House in virtue of that creation. Frequent advantage was taken of this way of giving the Scottish nobility hereditary seats in the House of Lords.

Both William and Anne were sometimes present during the debates of the Upper House. But George I did not continue this practice, nor has any subsequent sovereign adopted it.

The numbers of the Commons were increased from 513 to 558 as a result of the Union with Scotland.<sup>3</sup> But this was the only change. There were, however, a few people who thought the number of borough representatives should be augmented, since the towns were growing in population and wealth. But no bill to secure this was introduced.

Certain statutory regulations were made regarding the

<sup>1</sup> This decision was reversed in 1793.

<sup>2</sup> This decision was illogical. Its supporters said the number of Scottish members of the Upper House had been fixed by the Union. They did not, however, dream of questioning the right of the Crown to give a British peerage to those who were not already Scottish peers. Such a peerage, of course, carried with it a seat in the Lords. But if the composition of the House could thus be altered, it was unreasonable to say that the number of Scottish peers with seats therein must not be changed. The decision was reversed in 1782.

<sup>3</sup> See *infra*, pp. 258 *sqq.*

franchise. An Act of 1696 prohibited minors from voting and provided that all county voters must, if required by a candidate, swear that they had the necessary freehold qualification.<sup>1</sup> It was also enacted in the same year that persons refusing to take the oaths of allegiance and supremacy, which the returning officer was to tender if requested by a candidate, were not to be allowed to vote at elections.<sup>2</sup> An Act of 1708 further provided that would-be voters must take the oath of abjuration, if tendered to them.<sup>3</sup>

Various steps were taken to secure the freedom of elections. An Act of 1690 declared illegal the custom whereby the Lord Warden of the Cinque Ports nominated and recommended to each of the ports one person whom they were to elect.<sup>4</sup> Again, in 1694 officers of the Excise were prohibited from endeavouring to influence voters, on pain of a heavy fine.<sup>5</sup> In 1701 the same prohibition was extended to officers of the Customs, and in 1711 to those of the Post Office.<sup>6</sup> The Commons also endeavoured to prevent members of the Upper House from intervening in elections. They resolved in 1699 that no peer had a right to vote at a Parliamentary election and in 1701 that it was a high infringement of the liberties of the Commons for any Lord of Parliament or Lord Lieutenant to concern himself in an election. It is notorious that the latter resolution was flagrantly disregarded. The best way of securing the independence of voters from the undue influence of peers and others would have been to introduce the ballot. But this, though occasionally advocated, was never seriously considered.

Several laws were made to regulate the conduct of returning officers. An Act of 1696 prohibited false returns and directed returning officers to make returns in accordance with the last determination of the right of election by the House of Commons.<sup>7</sup> Offenders were to be liable to an action for damages in any of the courts at Westminster Hall. Further provision for the due conduct of elections was made by several other statutes.<sup>8</sup>

<sup>1</sup> 7 and 8 Will. III, c. 25. A more stringent oath was substituted by 10 Anne, c. 23. Yet another was appointed by 18 Geo. II, c. 18.

<sup>2</sup> 7 and 8 Will. III, c. 27. Quakers might substitute an affirmation.

<sup>3</sup> 6 Anne, c. 78. Quakers might substitute an affirmation.

<sup>4</sup> 2 Will. and Mar., Stat. 1, c. 7.

<sup>5</sup> 5 and 6 Will. and Mar., c. 20.

<sup>6</sup> 12 and 13 Will. III, c. 10, and 9 Anne, c. 11.

<sup>7</sup> 7 and 8 Will. III, c. 7.

<sup>8</sup> 7 and 8 Will. III, c. 25 and 27; 10 Will. III, c. 7; 10 Anne, c. 31; 12 Anne, c. 5 and 6.



Various conditions for eligibility were imposed during this period.

An Act of 1696 forbade the election of minors.<sup>1</sup> This, however, was sometimes disregarded. Another Act, of 1695, prohibited any member of the Commons, except the Commissioners of the Treasury, Land Tax, Customs, and Excise, from being concerned in farming or collecting any tax.<sup>2</sup> An Act of 1696 forbade bribery and treating by candidates, and provided that those who were guilty of such practices should, even if returned, be deemed not elected, and be prohibited from sitting or voting.<sup>3</sup> An Act of 1700 provided that no member was to be a Commissioner or officer of the Excise or of Excise Appeals.<sup>4</sup> The Act of Settlement excluded, as from the accession of any member of the House of Hanover, all persons born aliens and all holders of offices of profit under the Crown or of pensions therefrom. Another Act of that same year, 1701, excluded, as from the dissolution of the then Parliament, all Customs officers and Commissioners.<sup>5</sup> In 1706 the provisions of the Act of Settlement were thus modified.<sup>6</sup> After the dissolution of the then Parliament, members accepting offices created before October 25, 1705, were to vacate their seats thereby, but to be capable of re-election, unless they had been appointed to certain offices enumerated in the Act; persons holding offices created after October 25, 1705, or pensions during pleasure were to be incapable of being elected or of sitting or voting in the House; the Crown was also prohibited from increasing the number of commissioners for the execution of any office.<sup>7</sup> In 1716 pensioners for a term of years were excluded.<sup>8</sup>

During the reign of William III there developed a widespread

<sup>1</sup> 7 and 8 Will. III, c. 25.

<sup>2</sup> 5 and 6 Will. and Mar., c. 7. They were, however, allowed to become members of the corporation of the Bank of England. See 5 and 6 Will. and Mar., c. 20.

<sup>3</sup> 7 and 8 Will. III, c. 4.

<sup>4</sup> 11 Will. III, c. 2.

<sup>5</sup> 12 and 13 Will. III, c. 2 and 10.

<sup>6</sup> 4 and 5 Anne, c. 20. Re-enacted after the Union by 6 Anne, c. 41.

<sup>7</sup> The effect of this clause with regard to officers in the Army and Navy was that the acceptance of a first commission or appointment vacated their seats, if they were M.P.s, but that no disability was incurred by acceptance of a subsequent commission or promotion. Those whose seats had been thus vacated could, of course, be re-elected.

<sup>8</sup> 1 Geo. I, Stat. 2, c. 56. For the question of placemen see also *infra*, pp. 237 *sqq.*

demand that all members of the Commons should be required to be possessed of a certain income derived from real estate. This demand was an expression of the dislike felt by the country gentry for the merchants and financiers who sometimes secured seats that had hitherto been regarded as the preserve of the local landowners. Side by side with this feeling there was often a genuine belief that a landowner was the only real man of substance; other forms of wealth were regarded as highly precarious. Hence a bill to establish a real-property qualification for members of the Commons was passed by both Houses in 1696; Knights of the Shire were to have land bringing in an income of £600, Burgesses land bringing in an income of £300. The bill was naturally unpopular with the merchants, and so the King, not wishing to alienate them, vetoed it. A similar bill passed the Commons in the following year, with the modification that it allowed a merchant possessed of an estate of £5,000, real or personal, to sit for the borough wherein he resided. This bill, however, was rejected by the Lords. A like fate befell another Qualification Bill in 1703. But in 1711 it was enacted that every Knight of the Shire should have an income, derived from landed property, of £600, and every Burgess one of £300. This law did not apply to Scottish members, nor to the representatives of the Universities, nor to members for English seats who were the eldest sons of Lords of Parliament or of persons qualified to be Knights of the Shire.<sup>1</sup> The Act, however, was easily and often evaded by various legal devices.

After the accession of George I members of the Commons were for the first time enabled to resign by a curious use of the place clause in the Act of 1706. In 1715 a member was granted an office of profit, in order that he might vacate his seat, and the precedent then set has often been followed. But no member has ever been able to demand the grant of an office as a matter of right. For many years, indeed, this favour was only bestowed upon supporters of the Government.

Election petitions continued for some years to be tried in the old way. Early in 1708 the Commons, acting upon the recommendation of a select committee on the method of trying

<sup>1</sup> 9 Anne, c. 5. The last exception undoubtedly helped the bill to pass the Lords.

petitions, resolved that for the future all cases were to be heard at the bar of the House, and that voting was to be by ballot, if any member so desired. The former resolution was again adopted by the next House of Commons; the latter was rejected. In 1710 a return was made to the old practice, and petitions were again referred to a committee.

The Commons were jealous of royal interference in the choice of their Speaker. When, in March, 1695, Mr. Comptroller Wharton told the House the King gave them leave to elect a new Speaker in place of Trevor, who wished to resign, and then went on to propose Littleton, several members protested that one who brought a message from the King should not propose a candidate for the Speakership. None the less, Wharton's proposal was seconded, but, when it came to a vote, Littleton was rejected, and the House then chose Foley. It still remained true, however, that the leading Ministers strove to secure the election of a Speaker who was favourable to their policy. For as yet the Speaker neither was, nor was expected to be, completely impartial. In the spring of 1704 Speaker Harley was made a Secretary of State; but he continued in the chair until the dissolution of 1705. Some thought this conjunction of places a little undesirable; but Harley was not seriously attacked, and later Speakers sometimes held Ministerial offices, though never again one of such importance. It was not surprising, therefore, that the Speaker sometimes took part in debates when the House was in Committee.

Certain important questions touching the nature of privilege arose during this period.

At the general election of 1700 one Ashby claimed the right to vote in the borough of Aylesbury. The returning officers—a certain White and three other constables of the borough—refused to allow him to vote. Ashby thereupon brought an action against them, and recovered damages at the assizes. The defendants then took the case to the Queen's Bench and sought to have the judgment set aside, on the ground that no action could lie. The court, by a majority of three to one, adopted this view, and held that election disputes were only determinable in Parliament, and that the law by which they were triable was not *lex terrae*, but *lex Parliamenti*; of this last the Common Law courts could have no knowledge. Chief

Justice Holt, however, delivered a remarkable dissenting judgment. The right to vote, he said, was undoubtedly valuable—as Parliament had declared in the preamble to the Act giving representation to the County of Durham. This right was a species of property. Moreover, the provision in the first Statute of Westminster, that elections should be free, safeguarded the right to vote. Now, there was a remedy for every infringement of a legal right. In this case Ashby could only obtain a remedy from the Courts of Common Law. The House of Commons had indubitably the exclusive right of determining who had been elected, and, in so far as was necessary for this purpose, that of determining the qualifications for the franchise in any particular borough. But this did not debar one who claimed he had been wrongfully prevented from voting from seeking that redress which only a Common Law Court could grant. His right to vote was valuable, whether or no its exercise on any specific occasion would have affected the result of the election. But the House of Commons could not award him damages, or even take cognizance of his case, unless the election gave rise to a petition. The Queen's Bench, therefore, were bound to give him redress, since they alone could give it. Their jurisdiction was not ousted because privilege of Parliament was mentioned. Privilege was part of the law, and, though the court must respect privilege, it could not refuse to decide what was, and what was not, privilege. A mere resolution of the Commons with regard to their privileges did not make law. It was for the courts to say what the law was.

After his defeat in the Queen's Bench Ashby appealed to the House of Lords, and his appeal was allowed.<sup>1</sup> The effect of this decision was to establish the principle that the subject had certain rights of which he could only be deprived by statute. A House of Parliament could not withdraw a matter from the cognizance of the ordinary courts merely by resolving that privilege was involved. But if the courts could determine the extent of privilege, then the Lords were the ultimate judges both of their own privileges and of those of the Commons. The Commons were naturally loath to accept this interpretation of the law, and promptly passed several resolutions to

<sup>1</sup> The Lords consulted nine judges, who were divided in their opinions.

vindicate what they took to be their rights. They asserted that neither the qualifications of any elector nor the right of any person elected were cognizable in any place but the House of Commons, save in such cases as were provided for by statute, that Ashby was guilty of a breach of privilege, and that all persons bringing actions which involved the determination of the rights of electors or elected elsewhere than in the House were guilty, together with their counsel and attorneys, of breach of privilege. The Lords retorted by publishing the reasons for their decision. In this document they pointed out that the right to vote was a freehold and, as such, was secured by the Common Law; they also resolved that actions could be brought in the Queen's Bench for deprivation of this right, and that the resolution of the Commons which declared it a breach of privilege to bring such an action was an arbitrary interference with the course of justice.

As a result of the Lords' decision in *Ashby v. White* five other inhabitants of Aylesbury brought similar actions. The Commons, however, committed them to jail for contempt—in the autumn of 1704. Application was then made on behalf of the prisoners for a writ of *Habeas Corpus*. The Queen's Bench refused to grant it by a majority of three to one—the dissident again being Holt. An attempt was thereupon made to bring the matter before the Lords by a writ of error. The Queen was requested by the Lords to grant the writ, and by the Commons to deny it. She consulted the judges, and was advised, by ten of them, that it ought to be granted of right, and by two, that its grant was a matter of favour. But the quarrel between the two Houses had, by this time, grown so fierce that the Queen thought it expedient to prorogue Parliament, although she declared that, but for the prorogation, she would have granted the writ.<sup>1</sup> Thus ended this celebrated dispute.

These cases largely contributed to settle the subsequent

<sup>1</sup> There is little doubt that the writ of error should have been granted. But to say this is not to imply that the Lords should have granted the *Habeas Corpus*. Compare the following passage from Lord Birkenhead's judgment in *Secretary of State for Home Affairs v. O'Brien* (1923): 'he who applies unsuccessfully for the issue of the writ (sc. of *Habeas Corpus*) may appeal from Court to Court, until he reaches the highest tribunal in the land'.

attitude of the courts to privilege. They have, ever since, regarded it as incumbent upon them to determine what privileges a House of Parliament possesses, though they will not interfere with its exercise of its undoubted privileges. Thus, neither House can create a privilege by resolution. To this extent, then, the courts have followed Holt; but they have always declined to grant a *Habeas Corpus* in the case of a person committed by either House for contempt. The reasons assigned for the refusal to do so in the *Case of the Aylesbury Men* were that the Houses committed by *lex Parliamenti*, which was known to them alone, and that, moreover, the Commons were a superior court, with whose proceedings the Queen's Bench could not interfere. Holt, however, maintained that privilege did not enable the Commons to commit in that particular case. Holt, in fact, thought the commitment unjust, since it was designed to prevent men from seeking a remedy for an injury to their property, and so held it bad. But the courts have held that, if either House commits for contempt, the commitment is good, and that they have no power to inquire into the nature of the contempt. Thus the Houses have retained their right to commit at will.

The law relating to the frequency and duration of Parliaments was profoundly modified.

The Declaration of Rights stated that 'Parliaments ought to be held frequently', and it might have been expected that legislation to make this opinion effective would soon have followed. But the reformers were not agreed among themselves as to the nature of the change to be made. Some wanted frequent sessions of Parliament; others wanted frequent general elections; for they held that long Parliaments became corrupt and subservient to the Crown.<sup>1</sup> There was also a further subject of dispute. Was the bill for securing their desires to contain a clause which would ensure that its provisions were executed, whether or no the King gave orders to that effect? But a bill which contained a compulsory clause would probably be distasteful to the King, and might well be vetoed, even if it passed both Houses. For these reasons it was not until some years

<sup>1</sup> The Act of 1664 had been disregarded by Charles II, and in any case, did not definitely provide for frequent general elections. Hence the desire for further legislation.

had passed and several bills had failed to become law that a final settlement was reached.

We first hear of an attempt to legislate on the matter in 1689. The Lords, in November of that year, ordered the judges to prepare a bill for the repeal of the Triennial Act of 1664 and the revival of that of 1641. A bill to that effect was accordingly brought in and read twice. The Committee of the Whole House, however, reported that the bill should be dropped and a new one prepared, enacting that 'there should be a new Parliament at least once in three years'. The House concurred, and a new bill was introduced. Its provisions were as follows: the Parliament then in being was to be dissolved at the end of August, 1691; no future Parliament was to last longer than three years; within six days of a dissolution by efflux of time writs for a new Parliament were to be issued; the King was to have no power to prorogue or dissolve Parliament, without its own consent, until it had sat for fifty days; if he dissolved subsequently, writs for a new Parliament were to be issued within ten months and twenty days; finally, the bill contained clauses to ensure the holding of elections and the meeting of Parliament, whether or no the King issued orders to that effect. This bill was referred to a select committee, who had not yet reported, when Parliament was prorogued, in January, 1690.

The prorogation was followed by a dissolution and a general election, and the new Parliament made no attempt to tackle the question for nearly three years. But in January, 1693, Shrewsbury introduced a bill in the Lords which declared and enacted that there should be annual Parliaments, and commanded the Chancellor to issue the necessary writs, whether or no he was ordered to do so by the King. The Lords, when in Committee on the bill, decided to alter it drastically, and reported that they desired 'the House will appoint a committee to draw a clause that a Parliament meet and sit every year, that there shall be a new Parliament every three years, and that a blank be left in the clause for the determination of the present Parliament'. A committee was appointed to do this, and the bill, thus re-drafted, was accepted by the Lords, who also decided that the then Parliament was to be dissolved on January 1, 1694. The Commons passed the bill, though they altered the date of the compulsory dissolution to March 25,

1694, an amendment which the Lords accepted. The bill was, of course, disliked by the King, who, after some hesitation, decided to veto it.<sup>1</sup>

The vetoing of the bill only stimulated Parliament to tackle the problem anew when the next session began in November, 1693. It was at first hoped that the King would give up his opposition in order to placate Shrewsbury, whom he wished to take office, but it soon became plain that this was not to be. A bill was accordingly brought into the Commons, which resembled the one William had vetoed, but it was drastically amended. When it emerged from the committee stage, though it still provided for triennial elections, it no longer made annual sessions compulsory, while it safeguarded the prerogatives of dissolution and prorogation, if not by express words, at least by necessary intendment.<sup>2</sup> These changes were apparently made to placate the King and the supporters of the prerogative, but the result was astonishing. After the bill had received a third reading, a rider was proposed 'that within — years after the dissolution of this Parliament and so after every other Parliament there shall be a session of Parliament'. This rider, however, was rejected, and when the question was put 'that the bill do pass', there proved to be a majority of ten against it. We are given to understand by well-informed contemporaries that many thought the bill so emasculated as not to be worth having, and so, after the rejection of the rider, preferred it should be thrown out. However this may be, it is certain that the defeat of the bill caused much surprise.<sup>3</sup>

<sup>1</sup> The bill not merely limited the prerogative; it was also, in one respect, ambiguous. It required the King to 'hold' a Parliament annually. Many thought that a Parliament had not been 'holden', until one Act had passed; others denied this.

<sup>2</sup> We possess neither the text of the bill nor that of the amendments. I have tried to ascertain their substance from various scattered allusions. I do not think that what I have said above is far removed from the truth, though it is in part conjectural.

<sup>3</sup> According to the *Journals*, there was a blank in the rider in the place where the intervals at which there was to be a session of Parliament should have been specified. Had the rider been accepted, the blank would then have been filled. It would appear that of those who voted for the rider, some wanted provision to be made for annual sessions of Parliament, others for triennial sessions. It is curious that men could not see how idle the controversy was; for need of supplies could not but compel the King to summon Parliament annually as long as the forces were maintained by annual grants.



So strong was the desire for a drastic law, that another attempt was forthwith made to secure it. A bill was introduced in the Lords, identical in content with that vetoed by William. It passed the Upper House without amendment, though objections were made in debate both to its declaratory form and also to the requirement that a session be 'holden' annually. At the last moment, however, a proviso was added 'that a Parliament shall be understood to be holden, although no Act or judgement shall pass within the time of their assembly'.<sup>1</sup> The bill then went to the Commons, where, at the Committee stage, there was long debate about the proviso; but no amendment was carried. During the final debate in the House attempts were unsuccessfully made both to add a rider and to secure the deletion of the proviso. The bill itself, however, was rejected by a large majority.<sup>2</sup> Once more the endeavour to please both schools of thought had failed. During the following session it was to be successfully resumed.

In March, 1694, William persuaded Shrewsbury to become a Secretary of State, and probably came to an agreement with him about the terms of a future Triennial Bill. However this may be, the bill which was introduced early in the next session proved acceptable to both Parliament and the King. The Triennial Act of 1694 enacted—it was not declaratory—that the Parliament then in being was to be dissolved on or before November 1, 1696, and that, within three years of such or any subsequent dissolution, a general election was to take place, and a Parliament to be 'holden'. Further, no future Parliament was to last longer than three years.<sup>3</sup> Thus the Act was a

<sup>1</sup> This proviso was in the nature of a compromise. The King was to be compelled to summon Parliament annually, but not to allow it to sit for any specific time; he might prorogue or dissolve it before any Acts had been passed. Many, however, feared that he might use this power in such a way as to make the sessions a mere formality.

<sup>2</sup> The text of the proposed rider does not appear to be extant. But it was almost certainly designed to modify the proviso. The point at issue was the interpretation of the word 'holden'. Of course, not all who voted against this and the previous bill did so because they were too mild. Some objected to any bill which would weaken the prerogative; but it was the sudden opposition of the radical reformers which caused the defeat of the bills.

<sup>3</sup> 6 and 7 Will and Mar., c. 2. It will be noted that the term 'holden' was not defined. Its meaning soon ceased to be a matter of more than academic interest. For in every session of Parliament Acts were passed. Doubtless it was clear to some even in 1694 that this would be the case.

compromise, and one favourable to William. It may seem strange that Parliament should have yielded so much, but the probable explanation is that William's recent changes in the Ministry had appeased the radical reformers.

The Act of 1694 remained unaltered until 1716, when a law was made to fix the maximum duration of the then Parliament and of all future Parliaments at seven years; but the clause in the Triennial Act which required that a Parliament be 'holden' once in three years was not repealed.<sup>1</sup> The change was due to the fear of the chief Ministers that an election in 1718, which would have been necessary under the Triennial Act, would have increased the number of Jacobites in the Commons. The Opposition loudly contended that it was unconstitutional for a Parliament to prolong its own existence, but their efforts were unavailing. The general opinion, both in and out of Parliament, seems to have been that the Septennial Act was justified by necessity. Thus neither the Triennial nor the Septennial Act compelled the King to hold an annual session of Parliament. In point of fact, however, Parliament has met every year since the Revolution. That it should do so was a practical necessity. Unless Parliament granted the necessary sums, the King could not maintain the Army and Navy; for his life-revenue was quite insufficient for the purpose, and Parliament was careful never in any one session to grant more than a year's supply for the forces.

According to the law at the Revolution, a demise of the Crown automatically dissolved Parliament. But the alarm caused by the discovery of the Assassination Plot led to a change in 1696. It was then enacted that William's death was not to dissolve any Parliament then in being, and that, if no Parliament was in being, the last Parliament was to meet and sit forthwith. In either case Parliament might continue to sit for six months, unless sooner dissolved by William's successor.<sup>2</sup> In the next reign this provision was made to apply to the death of Anne and her successors.<sup>3</sup>

The speech from the throne at the beginning of a session now gradually acquired a new character. It was no longer followed

<sup>1</sup> 1 Geo. I, Stat. 2, c. 38. This Act, the Septennial Act, was not repealed until 1911.

<sup>2</sup> 7 and 8 Will. III, c. 15.      <sup>3</sup> 4 and 5 Anne, c. 20, and 6 Anne, c. 41.

by one from the Lord Chancellor, but itself became more and more a general exposition of the policy of the Government. By the end of the period it was understood to be the composition of the Ministers, and therefore a fit object of criticism in debate, since the Ministers were treated as responsible for it. Hence, too, the addresses of the Houses likewise changed their character and became expressions of opinion concerning the policies set forth in the royal speeches. Thus the debates on the addresses of the Houses acquired a new importance, since the addresses virtually committed them on important issues for the remainder of the session. As might have been expected, some objected to the change, and loudly deplored the new importance given to addresses. But the Houses were the gainers, even though some of their members did not realize it; for it was a concession on the part of the Crown to invite them to express their opinions in this way.

## IV

### LEGISLATION

ALL LEGISLATION during this period was statutory. The Declaration of Rights pronounced both the suspending power and the dispensing power, 'as it hath been exercised of late', to be illegal. The Bill of Rights went further, and provided that all dispensations 'of or to any statute' were void, save when permitted by the statute or by such bills as might be passed during the then session of Parliament.<sup>1</sup> No such bills, however, were passed. William and his successors duly refrained from any attempt to exercise a suspending or dispensing power. But William, though he did not claim to legislate independently, regarded his right to veto bills as real and important. Hence he used it, on more than one occasion, to defeat bills upon which the Commons had set their heart. For instance, in 1693 he vetoed the Triennial Bill, and in 1694 the Place Bill.<sup>2</sup> His action in the latter case stirred the Commons to active resentment, and caused them to send the King a representation, in which they pointed out that earlier kings had made a very sparing use of the veto, and termed those who had advised William to veto the Place Bill enemies to the kingdom. William returned a polite and non-committal reply, whereupon the Commons relapsed into quiescence. They could not deny that the King had a veto, though they had come near to denying his right to use it. Henceforth, however, it became increasingly plain that the use of the royal veto would provoke much opposition. Queen Anne employed it only once—against a bill for a Scottish Militia in 1708—and her successors have never employed it at all.<sup>3</sup>

<sup>1</sup> But this did not apply to charters or pardons, granted before October, 1689. These exceptions were of no great constitutional importance.

<sup>2</sup> See *supra*, p. 174.

<sup>3</sup> It was apparently thought that the loyalty of a Scottish Militia would be doubtful. The Queen's action in vetoing the bill did not lead to any protest from either House. Anne might have used her veto more frequently, had many bills passed the Houses which she disliked; but in this respect she was more fortunate than William.

## V

### REVENUE AND TAXATION

THE QUESTION of the revenue in the earlier part of this period is somewhat complex. During the interval between his arrival in London and his proclamation as King, William, acting as head of the administration, collected the revenue which James had hitherto enjoyed. That revenue—to leave out a few minor sources—was derived from the lands and hereditaments of the Crown, the hereditary Excise, the Hearth Tax and the Post Office, both of which were hereditary, certain Customs and Excise duties, granted to James for life, and other Customs duties, which had been granted him some for eight, some for five years. Now it was generally admitted that the lands and hereditaments of the Crown, together with the other hereditary sources of revenue and the duties which had been granted for a term of years, had passed to William and Mary on their acceptance of the Crown. The question at issue was whether they had a right to the duties granted to James for life, while the ex-King continued to live. Opinion was sharply divided among lawyers and laymen alike. The Commons came round to the view that the new sovereigns had no such right. But, though clear on that point, they were vague on all others. In 1660 and 1685 Parliament had given the King a revenue deemed to be sufficient for ordinary expenses in time of peace. That revenue was the King's property and he could spend it as he liked. It might have been expected that these precedents would be followed in 1689. But the situation was then complicated by two new factors. Firstly, Parliament could not decide forthwith whether to grant the revenue for life, for a year at a time, or for a number of years. They realized that a king in need of money could not dispense with Parliament. Secondly, the war with France, and the colossal expenditure it entailed, diverted the attention of the Commons from the problem of settling the ordinary revenue.

Parliament's first proceedings appear to indicate that, while intending to grant William—either for life or a term of years—a revenue adequate for ordinary expenses, they yet desired time for deliberation. They began by granting a supply to tide the King over his immediate needs, and also passed a bill granting him the revenue which had been payable to James II, until December 25, 1689. A later Act extended the time till December 25, 1690.<sup>1</sup> They likewise showed that they preserved the old attitude to the hereditary revenue by their conduct in regard to the Hearth Tax. Although the tax was very unpopular, no proposal was made for its abolition until William informed the Commons that he was ready to give it up. The preamble to the Act for removing the tax clearly shows that Parliament thought William had surrendered part of his property.<sup>2</sup> On the other hand, the proceeds of some of the duties that had been granted to James for a term of years were statutorily appropriated to the repayment of the expenses incurred by the Dutch in William's expedition to England.<sup>3</sup> Yet these moneys were just as much William's property as the Hearth Money. Nor does the fact that William consented to the bill affect Parliament's inconsistency.

When the Commons—in February and March, 1689—considered the question of the ordinary revenue, they demanded and obtained figures of expenditure and receipts from the Auditor of the Receipt of the Exchequer and the Auditor of the Excise. In the light of these they resolved that the revenue in time of peace should be £1,200,000, although they were well aware that this sum would be grossly inadequate. No bill to implement this resolution was passed, but the King was granted certain duties for three years to meet the expenses of the war.<sup>4</sup> The next Parliament, which met early in 1690, further considered the problem, but did not really solve it. Certain supplies were granted, which were intended for, and sometimes appropriated to, war expenditure. But Parliament could not make up its mind about the ordinary revenue. Two Acts, indeed,

<sup>1</sup> 1 Will. and Mar., Stat. 1, c. 14 and 1 Will. and Mar., Stat. 2, c. 3. The former Act also indemnified those who had collected the revenue since November 5, 1688.

<sup>2</sup> 1 Will. and Mar., Stat. 1, c. 10.      <sup>3</sup> 1 Will. and Mar., Stat. 1, c. 28.

<sup>4</sup> 1 Will. and Mar., Stat. 1, c. 24. The preamble refers to the cost of the war. There was no appropriation clause in the enacting part.

were passed, one for granting William and Mary certain Excise duties for their joint and several lives, the other for the grant of certain Customs duties for five years. These Acts contained one remarkable provision. Both authorized the King to borrow up to a specified maximum on the security of the duties. Further, the preamble to the latter Act implied that the revenue of the Customs was to be devoted to the war.<sup>1</sup> The King, that is, out of what should have been his own ordinary revenue, was to defray extraordinary charges and pay the interest on loans. Where, then, was he to find the money for his ordinary expenses? Both then and later Parliament deliberately kept William short of money. Thus, when they renewed the grant of the Customs duties, in 1694, for five more years, they appropriated part of them to the payment of war loans.

The subsequent proceedings of Parliament with regard to the ordinary revenue during William's life can be briefly narrated. From time to time they relieved the King's more pressing needs by granting him taxes and leave to borrow on their security. After the peace of Ryswick, indeed, they continued the practice, begun during the war, of providing for the forces by annual grants appropriated thereto. Thus the conception of a civil list began to emerge. In 1698 the Commons decided that the ordinary revenue should be £700,000, and it was enacted that, if the product of the taxes granted to supply it should exceed that sum, the surplus was not to be disposed of without the consent of Parliament.<sup>2</sup> In 1701, however, this provision was repealed and another substituted, that, for the next five years, £3,700 was to be paid weekly into the Exchequer out of the Excise, in order to defray the interest of a loan.<sup>3</sup> It is no wonder that William was in debt when he died in 1702. The position then was that the King was entitled to the income from certain sources, less a deduction of £3,700 per week and the payment of interest on certain loans. Out of this income he was expected to defray all the ordinary expenses of government, except the upkeep of the forces. Parliament knew the income was far too small, but could not know its exact amount. Nor did they really

<sup>1</sup> 2 Will. and Mar., Stat. 1, c. 3 and 4. The Acts make careful provision for the payment of interest and the repayment of the principal.

<sup>2</sup> 9 Will. III, c. 23.

<sup>3</sup> 12 and 13 Will. III, c. 12.

attempt to calculate the various expenses and to provide a fixed sum for each of them. In 1694, indeed, the Commons had resolved that the sums to be spent on various purposes should not exceed certain figures. But these resolutions were not embodied in a bill, and the Commons appear to have given up all thought of regulating the ordinary expenditure as a whole. To let the King do what he pleased with his own was traditional. What is remarkable is that Parliament did not hesitate to encumber the sources of the ordinary revenue.<sup>1</sup>

Anne was somewhat better treated than William. She was forthwith granted for life certain duties, previously granted to William, subject to a weekly deduction of £3,700. The Act makes it plain that this revenue was intended for the ordinary expenses of government. It also provided that she should not be able to grant or let any Crown lands for longer than thirty-one years or three lives.<sup>2</sup> There was further legislation with regard to the civil list on two subsequent occasions in the reign. It was enacted in 1711 that the English and Scottish Post Offices should be amalgamated and the postage rates increased, but that £700 per week and one third of the profits exceeding a certain sum were to be disposed of as Parliament should direct. In 1713 Parliament, on being informed that the Queen was in debt, permitted her to borrow £500,000 on the security of certain duties, which she was allowed to pledge for thirty-two years.<sup>3</sup>

George I, on his accession, was granted for life the same duties that had been granted to Anne.<sup>4</sup> His income, however, appeared insufficient, and in 1715 Parliament made further provision for his civil list. An 'aggregate fund' was created to defray various charges, one of which was the payment of £120,000 a year to the King. It was estimated that this sum, together with the product of the other civil-list taxes, would give him a revenue of £700,000, which was thought to be adequate. If, however, the total exceeded £700,000, the surplus was not to go to the civil list, but to be assigned to

<sup>1</sup> But Parliament did not protest, when, in 1690, William vetoed a bill to fix the salaries of the judges and charge them upon his ordinary revenue, because his consent to its introduction had not been asked.

<sup>2</sup> 1 Anne, Stat. 1, c. 1. The duties were granted as from William's death.

<sup>3</sup> 9 Anne, c. 11, and 12 Anne, c. 11.

<sup>4</sup> 1 Geo. I, Stat. 1, c. 1.



other purposes. If, on the other hand, it fell short of that sum, then Parliament pledged themselves to make up the deficiency.<sup>1</sup> Thus George I was the first King to have a fixed income. Nor was any attempt made to regulate its expenditure. The Commons even rejected, as derogatory to the Crown, a motion to call for a statement of civil-list expenditure.

This period saw a number of disputes between the two Houses on financial matters. The Lords did not, indeed, make any deliberate attempt to initiate a bill of supply, but their claims to amend money bills more than once produced friction. The first quarrel occurred in the following circumstances during the spring of 1689. An Act for a poll tax had provided that the commissioners who were to assess the taxpayers were to be appointed by the Crown from those named by an earlier Act to perform a similar function with respect to another tax. Now none of these persons were English peers. Accordingly, when the Commons sent up a bill for an additional poll tax, the Lords inserted an amendment, which provided that peers were to be assessed by peers for the first poll tax. The Commons refused to accept the amendment and argued that the Lords, having passed the first bill, could not alter its provisions by the insertion of a clause in the second bill, which dealt only with the taxation of commoners. The Lords contended that they had passed the first bill hurriedly, owing to the critical state of affairs, and so were entitled to remedy the ill effects of their negligence by an amendment in the second bill. Moreover, their claim to appoint special commissioners for the assessment of peers was supported by recent precedents. The Commons remained firm, and the bill, therefore, was lost. A like fate attended a bill for imposing duties on tea and coffee, which the Lords amended in order to secure the grant of a drawback on their export. The Commons took the line that this amounted to the lowering of a duty, which could not be done by the Upper House. However, on other occasions the Commons accepted small amendments of a different character to money bills.<sup>2</sup> But though they showed themselves thus compliant and even, in 1690, acquiesced in an amendment to

<sup>1</sup> 1 Geo. I, Stat. 2, c. 12. George, of course, also got certain sums from the Crown lands and from other minor sources of income.

<sup>2</sup> In 1689, 1690, and 1691.

a Poll Tax Bill, which provided for the assessment of peers by a number of their fellow-peers, their general attitude was one of increasing opposition to the claims of the Lords.

The Commons, early in William's reign, advanced the contention that bills which imposed a pecuniary penalty for offences were, to that extent, money bills. When, in January, 1690, the Lords amended a bill by inserting a clause for the imposition of a fine, the Lower House refused to concur. Again, in 1691, they refused to accept an alteration of the application of a pecuniary penalty in a Mutiny Bill. In 1702 they denied the right of the Lords to lower the amount of the fines prescribed in the Occasional Conformity Bill. The Commons also extended their claims in another direction. When, in 1693, the Lords amended a Land Tax Bill by inserting a clause for the assessment of peers by a body of peers, the Commons refused to concur, in spite of the excellent precedents adduced by the Lords. The latter, who dared not stop the grant of supplies, were thereupon compelled to yield, though they entered in their *Journals* a statement of their undoubted right to amend money bills. In 1694, indeed, they successfully amended the Land Tax Bill in a few trifling points; but the Commons took care to enter the amendments particularly in their *Journals*, 'to the end that the nature of them may appear'. A success of this kind could not alter the fact that the Lords were practically losing their power materially to amend money bills. Whenever there was a dispute between the two Houses, the Commons always remained firm, while the Lords never again showed the same obstinacy as in 1689, if a bill of any financial importance was at stake.

The Commons were quite alive to the fact that they had it in their power to force the Lords to accept any bill by the simple expedient of tacking it to a money bill. In 1692 a bill to appoint commissioners to examine the accounts was appended to a Poll Tax Bill. The Lords, who had earlier in the session rejected a bill for the taking of the accounts, were much embarrassed, and appointed a small committee to consider expedients for the preservation of their rights. But they eventually passed the whole bill, though they entered a statement in their *Journals* that their action was not to be taken as a precedent. Notwithstanding this, in 1698, they passed a bill

for the imposition of a tax and the regulation of the East India trade.<sup>1</sup> Again, in 1700, the Commons tacked a bill for the resumption of William's Irish grants to a Land Tax Bill. The Lords made a number of amendments, which the Commons refused to accept; thereupon the Lords gave up their amendments.<sup>2</sup> Had these precedents been followed, the Lords would virtually have lost all independence. The Upper House, indeed, were so alarmed at the prospect that they resolved in 1702 that tacking was 'unparliamentary and tends to the destruction of the constitution of this government'. These brave words, however, would not have saved them had there not been a change of temper in the Commons. In 1704 the Lower House rejected a proposal to tack the Occasional Conformity Bill to the Land Tax Bill, and this rejection was a turning point in Parliamentary history. Proposals for a tack in 1712 and 1713 were likewise defeated. Since then no motion for a tack has ever been made in the Commons.

The Commons in this period passed two important resolutions concerning procedure in the granting of supplies. On December 11, 1706, they resolved that they would receive 'no petition for any sum of money, relating to the public service, but what is recommended from the Crown'. This was only a sessional order; but on June 11, 1713, it was made a standing order. The immediate cause of the resolution was a flood of petitions from private individuals. The House found that they had tended to yield without due cause to importunities for money. But the order originally made to save the House trouble and the nation expense could not but enormously strengthen the power of the chief Ministers. For the natural consequence was that those who recommended expenditure were the persons expected to suggest ways and means.<sup>3</sup> Another standing order—made on March 29, 1707—was designed to secure proper deliberation. This was that 'the House will not proceed upon any petition, motion, or bill for granting any money, or for releasing or compounding any money owing to the Crown, but

<sup>1</sup> 9 Will. III, c. 44.

<sup>2</sup> 11 Will. III, c. 2.

<sup>3</sup> Of course, grants need not be proposed by a Minister; but the chief advisers of the Crown were naturally concerned with such matters as a rule.

in a Committee of the Whole House'.<sup>1</sup> To this rule the Commons adhered with few and unimportant exceptions.<sup>2</sup>

Early in William's reign the Commons began to show themselves averse to receiving petitions against bills for the imposition of taxes. After 1697, indeed, the House, save on two occasions—in 1704 and 1711—strictly refused to receive such petitions.<sup>3</sup>

The practice of appropriation developed rapidly.<sup>4</sup> The Commons did not, it is true, act with perfect consistency. At first they sometimes merely inserted a clause in an Act of Supply stating that the money was intended for a particular purpose. But it soon became usual to appropriate supplies either by a specific enacting clause in the bill which granted them or by a special Act which appropriated all the sums granted by different Acts during the session. In either case rules were made for the proper disposal of the money and penalties were imposed for disobedience. During William's reign sums were, in general, specifically appropriated every year to particular purposes. But during the War of the Spanish Succession Parliament sometimes appropriated a sum to the Army, Navy, and Ordnance indiscriminately, and left it to the Queen and her Ministers to apportion it among the three, though after the Peace of Utrecht a return was made to the former practice. But even the more specific appropriations often left the sovereign much discretion. For instance, a sum might be appropriated to the Navy without further stipulation. On occasion, too, expenditure was incurred without authority, though the retrospective approval of the Commons was always sought.

<sup>1</sup> Compare with this the order of 1668. See *infra*, p. 97.

<sup>2</sup> These exceptions usually occurred at the end of a session, when the Committee of Supply was closed and it was not desired to open it again. On such occasions the Commons sometimes addressed the Crown to advance money for various purposes, and gave assurances that the money so advanced would be repaid out of the grants of the following session. The sums involved were generally small, though not easy to determine in advance. Thus the departures of the Commons from their rule did not really weaken their control of the purse to any serious extent. That control, indeed, slowly but steadily increased throughout the eighteenth century, at least in years of peace.

<sup>3</sup> This rule did not apply to petitions from the City of London, since the form of receiving such petitions prevented the House from knowing their contents till they had been read.

<sup>4</sup> I refer here to grants other than those for the 'civil list'.

The Commons, in voting and appropriating supplies, were assisted by estimates from the Government departments concerned. William, at the very beginning of his reign, had estimates for the Army and Navy prepared and laid before the House. In the second session of his first Parliament the Commons asked William for an estimate of the cost of war for the ensuing year. The King complied, and estimates for the Army were presented by the Paymaster, and for the Navy by a Lord of the Admiralty. A similar practice obtained in later years, though the House did not always ask for estimates.<sup>1</sup> But the Commons, though they had not at first understood the use of estimates, soon came to appreciate their nature and value. These estimates were discussed in the Committee of Supply, and a real attempt was often made to examine them in greater or less detail.<sup>2</sup> The Committee decided how many soldiers and sailors were needed for the coming year and voted a grant of the appropriate sum. Nor, be it said, did they always accept the Ministerial figures.<sup>3</sup>

Parliament more and more controlled public borrowing as well as public expenditure. A series of statutes authorized loans of fixed amounts on the security of taxes. Parliament thereby virtually pledged themselves to make good any deficiency. These Acts, too, laid down careful rules for the payment of interest and the repayment of the principal. On the other hand, Parliament provided against unauthorized loans of large amounts. The Act establishing the Bank of England forbade that corporation to lend money to the Crown without Parliamentary sanction.<sup>4</sup>

The Commons very naturally wished to be certain that the large sums which they gave and appropriated were properly spent. The Exchequer possessed an elaborate, though dilatory,

<sup>1</sup> Later the estimates for the Army were usually presented by the Secretary at War.

<sup>2</sup> This subject is, as yet, somewhat obscure.

<sup>3</sup> The official estimates, in war time, were usually too low, and Parliamentary grants always too small. Moreover, taxes seldom brought in as much as had been expected. Hence supplementary grants were often needed. It has never been possible to estimate future expenditure with any degree of precision in war time; it is inevitable that large expenditure should be incurred without regard to estimates or, often, to nice considerations of legality. This was again proved in 1914-18.

<sup>4</sup> 5 and 6 Will. and Mar., c. 20.

system of auditing, but this was regarded as existing solely for the benefit of the King. The Commons had no confidence that it would be a check on the misapplication of money by the King's order. They therefore had recourse once more to the creation of a commission of accounts. Nor was William greatly averse to making a concession which would encourage them to grant further supplies. Though a bill for the creation of a commission was killed by a prorogation in the spring of 1690, a similar bill was carried at the beginning of 1691.<sup>1</sup> A commission of nine M.P.s, who were to receive a salary, was thereby set up to take the accounts of all the revenue since November 5, 1688; they had power to examine any person on oath, and the officers of the Exchequer were directed to give them information. In the autumn of 1691 they presented to the Commons, at the request of the House, a report on income and expenditure. It is clear that they did not understand the financial system and that they did not make proper use of the services of the Exchequer officers. The Commons, however, desired to continue the commission, and passed a bill for its prolongation until April 25, 1693. When this bill came before them, the Lords inserted an amendment for the appointment of four additional commissioners who should not be M.P.s. Their reason for so doing was that they wished to be able to examine some of the commissioners, but could not easily do this if they all belonged to the Lower House. But the Commons, ever jealous in money matters, rejected the amendment, and the bill was lost. In consequence, the Commons tacked a clause for the commission to a Poll Tax Bill, which the Lords dared not reject.<sup>2</sup>

Similar commissions were subsequently appointed every year till 1697, when a bill for a further commission failed, somewhat unexpectedly, to pass the Commons. The fact was that these commissions had been pretty nearly useless. All of them, save the first, had confined themselves in their reports to stating the figures of income and expenditure given them by the Exchequer. Such figures, it is true, were of some value to the House, but they could have been obtained directly.

<sup>1</sup> 2 Will. and Mar., Stat. 2, c. 11.

<sup>2</sup> 4 Will. and Mar., c. 3. See also *supra*, p. 204. None of the members of this or later commissions were placemen.

Nor had the commissioners supplemented their figures with pertinent comments; though on occasion they had used their powers in order to obtain information out of which they could make party capital.

In March, 1701, a bill for a commission of accounts of the old type was once more passed by the Commons. The commission was to consist of seven M.P.s, who were to be unpaid. The Lords, however, amended the bill, the Commons refused to accept their amendments, and, before the Lords had had time to reconsider their attitude, Parliament was prorogued. But at the beginning of Anne's reign it was enacted that a commission should be appointed for a year.<sup>1</sup> This commission was authorized to examine any accounts which had been examinable by any commission in William's reign. They could, that is, seek to incriminate any Minister of that period whom they disliked. The commission, which was a partisan body, brought charges against certain members of both Houses, and so indirectly caused a quarrel between Lords and Commons, which was embittered by the refusal of the commissioners to attend a committee of the Lords for examination. Hence, when a bill for a new commission was sent up to the Lords, in 1704, they inserted an amendment for the appointment of three commissioners who were not M.P.s, and could, therefore, be examined by the Upper House. The Commons, of course, refused to concur, and the bill was lost.

No further commission was appointed until 1711, when one was set up with power to take the accounts of all moneys which were in the Receipt of the Exchequer or thereto due on and since December 13, 1701, and also, in general, of all money granted to the Crown since that date, and of all naval and military stores. They were further empowered to inquire into any suspected cases of corruption among those who had handled public money. This commission presented a report, which incriminated several persons without good ground and evinced throughout a spirit of reckless political partisanship. The commission expired after a year; but further annual commissions were created, the last of which expired on March 25,

<sup>1</sup> 1 Anne, Stat. 1, c. 4. The commission was continued for a second year. There were seven commissioners, all of them M.P.s; none of them was allowed to accept a place from the Crown.

1714. In July of that year the Lords threw out a bill, sent up by the Commons, for another commission. No more such commissions were created.<sup>1</sup> The Commons, indeed, refused leave to introduce a bill for the appointment of a commission of accounts in 1715. These commissions had sometimes been mischievous, but never useful. Nor had the Commons ever succeeded in so using them as to turn them into a kind of ministry of finance.

<sup>1</sup> For the commission in George III's reign see *infra*, p. 346. That commission, however, was of a different nature, and the results of its labours were positively useful.



## VI

### PRIVY COUNCIL AND CABINET

THE SETTLEMENT of 1689 did not directly alter the position of the Privy Council or of the Cabinet. The former remained a recognized council, the latter an extra-legal body. In point of fact, the importance of the Privy Council continued to diminish, and that of the Cabinet to increase.

The numbers of the Privy Council varied from forty-seven to eighty-two. But the average attendance was small, and the quorum was only six. Membership of the Council was, indeed, regarded, by the end of Anne's reign, as little more than an empty honour, the bestowal of which did not give the recipient any claim to be consulted on matters of moment. It was symptomatic of the new state of affairs that Anne never struck the name of a dismissed Minister off the Council list.

The Council met frequently to transact business, but that business became increasingly formal in character. It is true that petitions were dealt with, proclamations issued, treaties approved, and many decisions were nominally taken on Colonial matters. But the Council often acted either on the recommendation of a Government department or on that of one of its own committees, to which the point in question had previously been referred. On other occasions the Council met merely to hear, or to give formal approval to, a decision really taken by the sovereign after consultation with an informal group of advisers. There were numerous committees of the Council, both temporary and standing, and in most cases they were committees of the whole Council—that is, committees of the few who cared to attend.<sup>1</sup> These included all or some of the sovereign's confidential advisers. Thus the council was really controlled by them. In a word, the

<sup>1</sup> The sovereign was usually present at Council meetings, but not, it would seem, at committee meetings.

Privy Council, after the Revolution, was a useful piece of governmental machinery rather than a great advisory body.

To this generalization one important exception must be made. When Anne was on her death-bed, a Privy Council was held, at which the Dukes of Argyll and Somerset were present, though unsummoned. The Council unanimously decided to advise the Queen to make Shrewsbury Lord Treasurer—the office was then vacant—and this she did during one of her last intervals of consciousness. The action of the Council was undoubtedly of great importance, but it is easily explicable in view of the crisis. After this the Council once more became what it had been before.

It must be added that in 1708 the Scottish Privy Council was abolished.<sup>1</sup> Henceforth there was only one Council in Britain.

As has already been indicated, William, like his two immediate predecessors, often consulted a small body of men upon important matters. But, like them, he was under no obligation to consult any particular person or group of persons upon any specific matter. We know, indeed, that he conducted foreign policy much as he pleased, and took many critical decisions without properly consulting any Englishmen.<sup>2</sup> But government could not have been carried on had he not frequently consulted the holders of the great offices. Throughout the reign there was in existence a small group, consisting of Ministers and, at times, of a few others, which met often to advise the King. When William was in England, he usually attended their meetings. During his absences Mary, while she lived, regularly consulted with a similar group. After her death Lords Justices were appointed to act for the King when he was abroad, and they, or occasionally some of them, were his trusted advisers.<sup>3</sup>

The Lords Justices were, of course, known to the law, and formed a recognizable body. But the King's advisers at other times were an extra-legal group. They were not an official committee of the Privy Council, nor had they any other regular status. They were simply a number of men whom the King

<sup>1</sup> 6 Anne, c. 40.

<sup>2</sup> Bentinck, Earl of Portland and Groom of the Stole, was much trusted; but he was a Dutchman by birth.

<sup>3</sup> The leading Ministers were always among the Lords Justices.

chose to consult. He might ask, or refrain from asking, their advice on any point. It is not strange that contemporaries were somewhat uncertain as to the name, nature, and functions of this group. It would seem that they called it, now the 'Cabinet', now 'the Committee', or 'Lords of the Committee'. It will be remembered that Charles II had used as his confidential advisers both a formal, and an informal, committee of the Privy Council. Hence the members of this body had come to be designated as 'the Lords of the Committee'. That body in which the important decisions were taken was emphatically '*the* Committee'. But the name 'Cabinet', a colloquialism of rather uncertain meaning, was also applied to it. Both names apparently continued to be used without definite distinction after the Revolution.

About the membership of this group we are tolerably well informed. It regularly included the Secretaries of State and some other leading Ministers, such as the heads of the Treasury and Admiralty, the Chancellor or Lord Keeper, the Lord President, and the Lord Privy Seal. Moreover, the Lord Chamberlain and Lord Steward, as well as other holders of minor offices, were sometimes among its members. The Primate was always a member, though he attended comparatively seldom. The holding of certain offices, however, did not involve a right to be regularly summoned to meetings. Some persons, indeed, seem to have been summoned only intermittently.<sup>1</sup> Nevertheless, it may be said that some holders of important offices, among them at least one Secretary, were always present. Membership of this group naturally became an object of ambition, and its size tended to increase. By the end of the reign the King's confidential counsellors were too numerous, and he was advised—by Sunderland—that they should be reduced to thirteen. Even then, however, there was not a Cabinet with a fixed membership. Attendance at meetings fluctuated, and it would appear that small meetings were sometimes held either finally to transact particularly momentous business or to prepare such business for a larger meeting. But it would be rather misleading to speak of a regular committee of the Cabinet or of an inner Cabinet.

<sup>1</sup> *E.g.* Sunderland, while Lord Chamberlain, attended frequently; his predecessor, Dorset, infrequently.

The King simply consulted whom he pleased, and when he pleased. Those excluded from any meeting might grumble, but they could not deny that the King was within his rights in leaving them unconsulted.

During the reign of Anne we still hear of 'the Committee' and of 'the Cabinet', nor is it, as a rule, easy to distinguish between them. But it would seem that the Queen was nearly always present at 'the Cabinet', while she attended 'the Committee' somewhat infrequently in the first part of her reign, and very seldom, if ever, in the latter part. It has been conjectured that—after the first years of the reign—a group of advisers meeting without the Queen to prepare business for the 'Cabinet' was known as 'the Committee', while a similar group, meeting with the Queen, was known as 'the Cabinet'. In the earlier years of the reign, however, 'the Committee' sometimes reported directly to the Queen, just as would a modern Cabinet. Still, it is possible that, throughout the period, some members of the group of confidential advisers met together to talk over business, with or without the Queen's orders, before a meeting of 'the Cabinet', at which she would be present. Anne was inevitably far more dependent on her Ministers than William had been, and there is no doubt that the Cabinet gained strength during her reign.

By the time of Anne's death the membership of 'the Cabinet' was pretty generally known to contemporaries. It included the heads of the great departments and some holders of less important offices. The Primate was nominally a member, though seldom summoned. Other members also might not be regularly summoned, but probably the leading Ministers were regarded as having a kind of right to a summons. This 'Cabinet' met once a week. It was not, however, necessarily informed of everything. Sometimes very secret matters were known only to the Queen and a very few others. Thus Mr. Secretary St. John, in 1711, could state to an ambassador that a certain negotiation was known only to Anne, to Harley, to the Lord President, and to himself. Can we regard these persons as constituting an inner ring of 'the Cabinet'? They were certainly not a formal committee of that body. Moreover, knowledge of all such secrets was not necessarily shared by the same persons at any one time. All that can be said

is that the nature of their office made it almost inevitable that some Ministers should be consulted about some kinds of business. Apart from that, no rule can be laid down. If it is impossible to make very definite statements now, that impossibility is due to the fluctuations of practice then.

George I, at the outset of his reign, appointed a Cabinet of fifteen persons.<sup>1</sup> Its numbers did not, for some long time afterwards, greatly increase or diminish. The holders of the great offices were henceforth always members, as well as some other Ministers. The Primate, too, remained a member, but rarely attended. Of the others, the Secretaries and the head of the Treasury came almost always, and the Chancellor, Lord President, Lord Privy Seal, and the head of the Admiralty came very frequently. The remaining members, on the whole, only attended irregularly.<sup>2</sup> George himself attended Cabinet meetings for a time. But after 1717 he was very rarely present.<sup>3</sup> Whatever the reasons for the change, its consequences were of the first importance. Henceforth the advice of the Cabinet had to be reported to the King. In his absence its members could speak with greater freedom, and if they were of one mind, the resulting pressure on His Majesty would be considerable.<sup>4</sup>

<sup>1</sup> Henceforth I speak of the Cabinet without putting the word between inverted commas. I do not think this can lead to confusion.

<sup>2</sup> The Cabinet, in 1717, consisted of the Primate, Chancellor, President, Privy Seal, First Lords of the Treasury and Admiralty, Secretaries of State, Lord Chamberlain, Lord Steward, Lord Lieutenant of Ireland, and the Chief Justice of the King's Bench. The Chief Justice was often a member in the earlier part of the eighteenth century.

<sup>3</sup> The same is true of his successors. But the King continued to attend both those meetings—very full meetings—held to hear the speech from the throne before the opening of a session or a prorogation, and those meetings at which it was decided whether or no to pardon persons capitally convicted. George I is usually supposed to have ceased from attendance at ordinary meetings, because he knew no English. But another reason may also be given. The Cabinet then contained a number of men with strong personalities. Debates must often have been warm. The King, who in Hanover had been an autocrat, may well have thought it beneath his dignity to be present at such discussions. The members of the Cabinet, on their part, must have been glad when he ceased to attend; for his presence was inevitably to some extent a check upon the freedom of their discussions. Neither George I nor anybody else can have foreseen the eventual results of the change. George certainly did not wish to diminish the kingly power.

<sup>4</sup> The advice of the Cabinet was frequently, if not always, embodied in written minutes, drawn up by a Secretary of State, of which a copy was presented to the King. No minute book, however, appears to have been kept.

While George continued to attend Cabinet meetings, business was usually prepared for them at meetings of Ministers which he did not attend. Similar meetings for the preparation of business may well have been sometimes held after 1717. Such meetings seem to have been attended by only a small part of the full Cabinet. Moreover, matters of foreign policy were often not discussed in Cabinet.

What was the attitude of Parliament to the Cabinet? Strong and continuous opposition to the development of such an institution would not have been surprising. For Parliament wished to know whom they could hold responsible for particular measures, and such knowledge was not, at first, always easy to come by. Nor did uncertainty stop here. During the early part of William's reign the Commons could not always tell whether certain Privy Councillors in the House were advocating the Government's policy or were merely speaking for themselves. Yet, on the whole, Parliament showed themselves reluctant to interfere with the King's methods of seeking advice. In 1689 some members of the Commons alluded to the Cabinet in debate. Their language indicates that they regarded it as a mysterious thing of doubtful legality, but no resolution about it was passed. In 1691, again, it came in for a good deal of sharp criticism in the Lower House. Several speakers contended that the King should consult the Privy Council, and not a body unknown to the law; but the House was finally persuaded to let the matter drop by a plea that secrets could not be kept if communicated to the Privy Council. The Cabinet was attacked once more in 1692, when it was urged that all advice to the King should be given in writing and signed by those who gave it; but yet again the House forbore to pass any resolution. The question was then allowed to drop for some years, only to be revived by the indignation felt by Lords and Commons alike at the manner in which the negotiations for the Partition Treaties had been conducted. Hence a clause was inserted in the Act of Settlement which required that, after the accession of the first Hanoverian, 'all matters and things relating to the well governing of this realm, which are properly cognizable in the Privy Council by the laws and customs of this realm, shall be transacted there, and all resolutions taken thereupon shall be signed by such of the Privy

Council as shall advise and consent to the same'. The first part of this clause is little more than a tautology, but the second is of vital importance. The whole clause, however, was repealed in 1706. Parliament apparently came round to the view that no man would consent to be a Minister on such terms. Certainly, had the clause ever come into operation, its effect would have been pernicious. For Parliament would have continually demanded to see the signed advices. Of the Ministers consulted, some would have been reluctant to set their hands to anything, while others would often have given contradictory advices. Thus their differences of opinion would have come continually before Parliament, and the doctrine of collective responsibility would never have developed.

The Cabinet was not again a subject of debate in the Commons during this period; but in 1711 there were some interesting references to it in the Lords. The Upper House carried a resolution censuring 'the [late] Ministers' for their management of the war in Spain. In the course of the debate it was said that the expression 'Ministers' was vague and that 'Cabinet Council', a suggested alternative, was a term unknown to the law. But the supporters of the resolutions replied that this point was a mere quibble, designed to save the guilty parties. And so, in a sense, it was; for the House had a pretty shrewd idea who were intended by the expression the 'Ministers'. The speeches, however, on this matter were somewhat jocular in tone, and it is plain that the Lords were not seriously hostile to the Cabinet.<sup>1</sup>

<sup>1</sup> Of this debate we possess a fairly good report. The absence of any serious hostility to the Cabinet is remarkable. Even though the majority were indifferent, it might have been expected that some constitutional purist would have raised his voice in denunciation; but there is no hint of this. By this time, therefore, the Cabinet must have become a generally accepted institution, although its nature may often have been misunderstood. References to it in the pamphlets of the period are, I think, very few, and any subject of contemporary interest obtained frequent mention in these publications, which were extremely numerous after 1688.

## VII

### KING, PARLIAMENT, AND MINISTERS

LEGALLY THE relations between the sovereign and his Ministers and between the Ministers and Parliament were in no way altered by the settlement of 1689. William, like his predecessors, was still free to appoint and dismiss Ministers at pleasure, nor had Parliament any direct means of influencing his choice. The shaping of policy, too—apart from legislation—was for the King alone. William, on his part, had no desire to see the royal power lessened. None the less, his position was very different from that of Charles II. Every year need of supplies compelled him to summon Parliament; but Parliament did not confine itself to granting money; the Houses, and, in particular, the House of Commons, often strove to influence policy and the composition of the Ministry.<sup>1</sup> Many attempts were also made to change the constitution by statute. The conduct of the Commons appears highly inconsistent; but that inconsistency only reflects division of opinion among politicians. There were several schools of thought, and none had a majority throughout the period in either House. William thus found Parliament both difficult to handle and unstable. Though many contemporaries failed to realize the situation clearly, it is now obvious that the Revolution could not but lead to a radical change in the position of the executive. It was imperative that there should be harmony between the executive and the legislature; but that harmony—in view of the increased importance of Parliament—could not be easily secured. As time passed the problem became too pressing to be ignored, and various solutions were proposed. But by the end of the period a solution was beginning to be found.

The age was one of acute political strife, and many called

<sup>1</sup> I use the word 'Ministry' not in its modern sense, but simply as a collective designation of the Ministers.



themselves either Whigs or Tories. But to speak of a Whig or a Tory party without qualification is rather misleading. Not only were there a large number of men who refused to label themselves as either Whigs or Tories, but even those who did so were not held together by an organization of the modern type. Nor were either Whigs or Tories closely united by common principles. At no time can it be said that all Whigs or all Tories stood for exactly the same things. Thus the names Whig and Tory, though then in common use, scarcely have a fixed meaning.<sup>1</sup> Moreover, it must be remembered that party was generally regarded as an unnecessary evil, which should, and probably soon would, disappear. These facts help to explain the hesitation and confusion which characterize the period.

William in choosing his first set of Ministers paid less attention to their administrative ability than to their popularity in and out of Parliament. He wished to strengthen the new régime by associating men of influence with it, and therefore gave office to a number of persons who had nothing in common except their readiness to serve him. This was probably wise, but it inevitably led to quarrels between the leading Ministers. In this there was nothing new, but it was of great moment that the disputants strove to mobilize their adherents in Parliament for their support in the struggle. Thus almost every branch of administration became the subject of fierce controversy in the Houses. There was, however, one notable exception—foreign affairs. With these few Englishmen were familiar, and by a tacit agreement the King was for some years allowed to conduct this branch of business much as he pleased. Even the Secretaries of State often allowed themselves to be excluded from the knowledge of important transactions. It sufficed that the King's policy was substantially in accord with the wishes of Parliament, to whom he occasionally gave a little information.

Direct attacks in Parliament on the Ministers began early. In August, 1689, a motion was made in the Commons for an address to the King praying him to dismiss Halifax, the Lord Privy Seal; it was rejected by a small majority. But a few

<sup>1</sup> When I speak of 'Whigs' or 'Tories', I simply refer to those who so termed themselves and were so termed by their contemporaries.

months later an address was presented requesting William to tell the Commons who had recommended Commissary Shales—then accused of gross misconduct—to him, in order that they might be able to tender advice for the preservation of the realm. It was urged by the opponents of the address that this request was improper; the House should have confined themselves to asking William to withdraw his confidence from those who had advised him to employ Shales. William, as might have been expected, refused to give the information. None the less it was he who provoked, though indirectly, the next Parliamentary attack upon a Minister. In opening the session of 1692-93 he asked the Houses to give him their advice on the conduct of the war. A motion was thereupon made in the Lords for the establishment of a joint committee of both Houses to inquire into the conduct of the administration. Such an innovation appeared dangerous, and the motion was defeated. But each House made separate inquiries, and the management of the Army and Navy was sharply criticized. The Commons reflected on Secretary Nottingham in two resolutions passed in Committee, which implied he was responsible for the ill-success at sea; the Lords upheld Nottingham and showed a disposition to blame Admiral Russell. Eventually, however, the Commons grew tired of their investigation, which had become more and more trivial, and none of the resolutions of the Committee was adopted by the House. In the next session the Commons again inquired into the conduct of the war at sea, and resolved there had been notorious and treacherous mismanagement; but nobody was censured by name, though it is probable that Nottingham would have been condemned had he not been dismissed from the Secretaryship just before the debates.

These proceedings in Parliament, together with the obvious disadvantages of a divided Ministry, had important results. William's dismissals and appointments at the end of 1693 and at the beginning of 1694 resulted in the composition of a Ministry of which the chief members were in tolerable agreement with each other and were acceptable to Parliament. It cannot be said that the King aimed at creating a homogeneous and responsible Ministry of the modern type; such a weakening of the Crown would have been abhorrent to him.

A Ministry, indeed, as we now know it, was then inconceivable. It is significant that Nottingham refused to resign, when asked to do so, on the ground that resignation would be a tacit confession of misconduct, and insisted on being dismissed.<sup>1</sup> William, however, was not influenced by any constitutional theory. Sheer necessity drove him to adopt what seemed the best expedient for carrying on business. He found, too, that he had to make concessions in order to get men to serve him. Thus Shrewsbury, who had resigned the Secretarial seals in 1690 because he disliked William's policy, only consented to resume office in 1694, when the King promised not to veto the Triennial Bill on its next presentation to him. Granted that many thought Shrewsbury's conduct somewhat factious, he was yet strong enough to get his way.

William's expedient proved successful; for relations between Parliament and the executive were fairly good until after the peace of Ryswick. Subsequently William's difficulties began again. For the first troubles he himself was responsible. Against the wishes of many of his Ministers, he made Vernon Secretary of State and strove to keep Sunderland as Lord Chamberlain.<sup>2</sup> In consequence an attack on Sunderland in the Commons was projected and only averted by the prompt resignation of that timid Minister. In 1698 there was a general election, which resulted in the return of a majority very hostile to the principal Ministers. Nevertheless it did not occur to them to resign or to the Commons to ask the King to dismiss them forthwith. The prevailing assumption still was that the latter should be done only if the Ministers were strongly suspected of illegal conduct. It was only natural, therefore, that relations between the Commons and the Ministers should become strained. In the session of 1698-99 the Commons rejected the proposals of the Chancellor of the Exchequer for the raising of a loan, and indicated in other ways that he had

<sup>1</sup> Lord Chancellor Somers did the same thing in 1700.

<sup>2</sup> Vernon was a minor figure in the political world. But he was a protégé of the influential Duke of Shrewsbury and a good man of business. William, however, seems to have picked on him because he could treat him much as he pleased. The candidate of several of the chief Ministers was Wharton, whom William would have had to treat as a person of weight. Sunderland was peculiarly odious to many because he had once been Secretary of State to James and had turned Roman Catholic to keep his favour. This was not forgiven when he became a Protestant again.

lost their confidence.<sup>1</sup> They also inquired into the administration of the Navy, and passed several resolutions which reflected on certain Ministers connected therewith. After the session had come to an end, William made a few changes in the Ministry; but it is noteworthy that he did not dismiss either the First Lord of the Admiralty or the Chancellor of the Exchequer. It is true that the former resigned, but his reason for so doing was, not the censure of the Commons, but the King's refusal to remove a junior Lord of the Admiralty Board.<sup>2</sup> The Chancellor of the Exchequer retained his office until the eve of the following session, and his resignation was then due to his own reluctance to face Parliament again rather than to the King's wish. The general effect of these changes was to make the Ministry less homogeneous and only slightly less distasteful to the Commons.

The following session witnessed yet further friction. The Commons took prompt exception to a phrase in the King's speech, which they interpreted, and wrongly interpreted, as implying that confidence did not exist between him and his Parliament. They drew up an address in which they requested William to show marks of his high displeasure towards all who had misrepresented, or should in the future misrepresent, their proceedings to him. William replied that nobody had ever dared to do such a thing, and assured the Commons he would always repulse those who calumniated them. As might have been expected after such an inauspicious beginning, the remainder of the session was stormy, and William eventually saw fit to bring it to a close by an abrupt prorogation. He was, however, thereafter induced to make certain Ministerial changes. Parliament was dissolved at the end of 1700, and the new House of Commons proved favourable to the reconstructed Ministry. They were, on the other hand, markedly hostile to some of the late Ministers, and a series of discoveries gave them an opportunity of showing their hostility in a concrete form.

The speech from the throne at the opening of Parliament in February, 1701, included a reference to the international

<sup>1</sup> He was Charles Montague, afterwards Lord Halifax; he then also held the office of First Lord of the Treasury.

<sup>2</sup> The First Lord was Edward Russell, Earl of Orford.

crisis caused by the recent death of Charles II of Spain. The Commons thereupon resolved they would stand by William and take measures to support the interests of England; the Lords, on their part, requested the King to make alliances for the preservation of the balance of power. Both Houses asked that all treaties made by William as King of England since the peace of Ryswick be laid before them. To this request the King nominally acceded, and some treaties were laid before the Houses. The Lords then asked for the documents concerning the negotiations, and obtained a number of papers. They next proceeded to examine the second Partition Treaty, and passed resolutions condemning both the terms of that treaty and the manner in which it had been concluded; they further asked and obtained the permission of the Commons to examine Mr. Secretary Vernon, one of their members. They then presented an address to the King complaining that the terms of the treaty had not been discussed in any of the King's councils before its conclusion, and praying him to make use of a council in similar cases for the future. During these investigations several peers who had been concerned with the making of the treaty spoke in their defence by leave of the King, and as a result a good many secrets were revealed; in particular the existence of the first Partition Treaty, hitherto unknown to the public, came out.

When the Commons heard of the inquiries that were being prosecuted by the Lords, they desired to be officially informed of what was passing. A conference was held at their request, and they obtained certain relevant papers from the Lords. Having thus secured ammunition, they resolved to use it; Portland, who had played a prominent part in negotiating the treaties, was forthwith impeached of high crimes and misdemeanours. He held only a minor office—that of Groom of the Stole—but he was William's most trusted counsellor in matters of foreign policy and, being a Dutchman by birth, had few friends.<sup>1</sup> The impeachment of Somers, Orford, and Halifax, three Whig ex-Ministers, followed speedily. Against Somers the Commons had a just grievance. The negotiations

<sup>1</sup> There was a great outcry at the time against the employment of persons of foreign birth; this is reflected in the Act of Settlement.

for the first Partition Treaty had been conducted by William and Portland, while the leading Ministers had been scarcely informed of what was passing, much less properly consulted. When the treaty was ready for signature, William had directed Mr. Secretary Vernon to obtain the opinion of a few Whig Privy Councillors. Somers, Orford, Montague—later Lord Halifax—and Shrewsbury had then been confronted with the accomplished fact and had expressed a feeble acquiescence, as they could hardly have avoided doing. Further, Vernon, by William's orders, had prepared a commission authorizing plenipotentiaries to sign the treaty, without inserting any names, and Somers as Lord Chancellor had affixed the Great Seal to this document, although he had received no warrant for so doing; his sole authority had been a letter from the King. Subsequently, however, he had obtained a warrant. It was small wonder that this use of the Great Seal was one of the charges against Somers. But the other charges against him were of different character. He was accused of having advised the King to make the Partition Treaties, and of not having taken the opinion of the Privy Council about his use of the Great Seal; he was, moreover, charged with having enriched himself unlawfully, and with having misconducted himself in his judicial capacity. The charges against Orford and Halifax may be briefly summarized. Both were accused of corruption and inefficiency, the former as First Lord of the Admiralty, the latter as Chancellor of the Exchequer. Orford, too, was accused of having advised the making of both Partition Treaties; Halifax was only accused of having advised the making of the first Treaty. Against Portland no articles of impeachment were ever presented.

What was the significance of these impeachments? The Commons were certainly well within their rights in endeavouring to bring to trial any persons whom they believed to have been guilty of corruption or illegal conduct while they held Ministerial or judicial office. The method of impeachment may have been clumsy, but it was the only one open to the Commons. It would, however, be rash to affirm that the majority of the Lower House genuinely believed their charges of corruption were justified. Somers's use of the Great Seal was perhaps the one illegal act that could be proved against

any of the four men impeached.<sup>1</sup> Moreover, on what grounds could the Commons fairly make the giving of advice on questions of foreign policy a criminal matter? That advice, whether it was good or bad, cannot by any straining be called illegal. Orford, Halifax, and Somers, again, were out of office. Had they still been Ministers, the Commons might have asked the King to dismiss them, though even that would have been a strong thing to do. But the Commons at this time appear to have been very confused in their ideas. They did not openly claim, and perhaps did not wish to claim, that the King should dismiss every Minister whom they disliked. On the other hand, they seem to have been bent on ruining the political careers of the particular persons they had impeached, and the impeachments seem primarily to have been designed, not to secure the punishment of criminals, but to remove the impeached from the political field.<sup>2</sup> None the less it would be unfair to deny that they were also, though in a secondary way, a protest against the King's manner of conducting foreign affairs; for the Commons appear really to have wished that the chief Ministers should be consulted on important matters. That the Commons were influenced rather by purely political animosities than by love of justice is made plain by the fact that after the impeachments they addressed the King, praying him to remove the four accused peers from his presence and counsels for ever. The Lords thereupon requested William not to inflict such a censure upon the accused until they had been tried and condemned. William, as might have been expected, refused to prejudge the issue and returned a completely non-committal reply. The Commons were doubtless afraid that the accused peers, or some of them, might continue to tender William secret advice. But their method of guarding against this was peculiarly unfortunate. Nor, in any case, had they a right to request the King never to consult any of the four. At the most they might, supposing no trial had been pending, have asked the King to remove them from his presence and counsels for the time being. The wishes of

<sup>1</sup> This statement may be too strong. I am not sure that Somers's action was definitely illegal.

<sup>2</sup> It is worth noting that Vernon was not impeached. He was as much responsible for the Treaties as any Minister. But he was not a great figure in the political world, and had not made himself personally unpopular.

the then House of Commons could not debar the King from employing any of the four, should a new Parliament wish him to do so. On the other hand, it would have been perfectly proper for William to declare that he was in no way bound to choose his advisers by the direction of the House of Commons, though such a declaration would then have been grossly impolitic.

Eventually the four peers were acquitted, as the Commons had probably expected from the first.<sup>1</sup> Nor had the Lower House succeeded in their aim of driving them out of public life for ever. Thus their efforts had no obvious result for the moment. The Act of Settlement, indeed, reflected their view of the proper function of the Privy Council. But the clause dealing with this matter was repealed before it came into operation. Some contemporaries, too, thought they had given way to reckless animosities, and unwarrantably endeavoured to restrict the prerogative. Certainly neither William nor his successor was led to conclude that a responsible Ministry was desirable, or even necessary. At the end of 1701, however, William dissolved Parliament, and the ensuing elections resulted in the return of a House of Commons favourable to the Whigs. William thereupon made a few changes in his mainly Tory Ministry; one of these, the dismissal of Mr. Secretary Hedges, was caused by the conduct of that Minister in voting against the Government candidate for the Speakership. Shortly afterwards William died.<sup>2</sup>

The accession of Anne led to a not inconsiderable change in the position of the Ministry. The Queen had neither the energy nor the ability of William, and never attempted to keep the conduct of foreign affairs in her own hands. But she was a woman of great determination, and never allowed herself to become a mere cipher. On occasion, indeed, she dismissed powerful Ministers. None the less she was not capable of carrying on the government without the aid of able and vigorous servants. Her choice, therefore, was rather limited. The leading Ministers, too, often quarrelled about the

<sup>1</sup> See *infra*, pp. 288-9.

<sup>2</sup> It is to be noted that during the sessions of 1701 and 1702 he had kept Parliament fairly well informed of his foreign policy, and had obtained assurances of support from the Houses.



distribution of power between them. Thus the reign saw a further weakening of the power of the Crown.

At the beginning of her reign, both the Queen and the nation were united in their desire to win the war with France which then broke out. On several other issues, however, opinion was sharply divided. Anne's first Ministry was largely Tory, though the Toryism of its two chief members, Marlborough and Godolphin, was nominal rather than real. The Queen's political sympathies account for the character of her Ministry, though she was assuredly no believer in party government. But even at the outset of her reign she had not a perfectly free hand in her choice of Ministers. For Nottingham only agreed to become Secretary of State on the condition that the other Secretaryship was given to Hedges. As time passed, Anne was compelled by various circumstances to make a number of changes in the Ministry. The need for unity among the Ministers, especially strong in time of war, drove her to part with some of them in 1704 in order that she might retain others. The dismissals of that year were followed by a significant appointment. Harley was made a Secretary of State. Now Harley, then Speaker of the House of Commons, had long been an active politician, but had never held office before, nor was he a man of great administrative ability. His strength lay in his Parliamentary skill and his popularity with the Lower House, and it was because of these things that he was now given one of the great offices of business. The general election of 1705 greatly increased the number of Whigs in the Lower House, and this change had its effect upon the structure of the Ministry in no long time. Much against her inclinations, Anne yielded to the counsels of certain of the chief Ministers and gave a Secretaryship to the extreme Whig, Lord Sunderland.<sup>1</sup> She was again compelled to give more offices to the Whigs in 1708 and 1709; for the election of 1708 was also a triumph for the Whigs.

The events of these years showed pretty plainly the growing power of the House of Commons. For things had come to such a pass that the war could only be carried on if the Ministry was on the whole agreeable to the Lower House. The year

<sup>1</sup> This was Charles, the third Earl and the son of Robert, the second Earl, mentioned *supra*, p. 221.

1710, however, appeared to witness an abrupt reversal of this tendency. For Anne at brief intervals filled a vacant office—that of Lord Chamberlain—without consulting any of her Ministers, dismissed a Secretary of State, Sunderland, and finally dismissed the great Lord Treasurer, Godolphin. She then proceeded to construct what was virtually a new Ministry of a Tory character, in which the leading spirit was Harley, who now returned to office after his dismissal in 1708. Her desire appears to have been to retain in it some of the Whig Ministers; but most of them refused to stay in office, and she was forced to rely almost, though not quite, entirely on Tories. The making of this change required great courage on Anne's part, but it was in no way unconstitutional by the standards of the age. Many, indeed, welcomed her action, because they thought it was designed to liberate the Crown from the tyranny of a faction. Godolphin and his colleagues missed their only chance of averting the downfall of the Ministry by their failure to threaten joint resignation after the dismissal of Sunderland. Their failure to act, however, was less due to their mutual jealousies, real though they were, than to their lack of any genuine belief in Ministerial solidarity. What was surprising was not the break-up of the Whig Ministry, but the refusal of some of its members to retain office after the dismissal of Godolphin. Anne was to find that she had only exchanged one yoke for another, and the new yoke was rendered the more heavy by the Tory triumph at the election of 1710. For Anne dissolved Parliament upon the advice of her new Ministers. This election was in substance, though not in form, an appeal to the country to approve of her action in changing her Ministers. Nor were the constitutional implications of the dissolution any the less important because she probably failed to realize them.<sup>1</sup>

During the last years of the reign the Ministry was mainly Tory. With the support of the Queen and the Commons they were able to make the peace of Utrecht; when the Whig majority in the Lords created a difficult situation for the Government, Anne made a batch of twelve Tory peers to

<sup>1</sup> The dissolution, however, was not the result of a Ministerial defeat in the Commons. The change of Ministers occurred during a recess, and the new Ministers did not meet Parliament until after the election.

convert the minority into a majority. But, for all that, the Ministry did not long remain united. Bolingbroke intrigued against Harley, who in 1711 had become Lord Treasurer and Earl of Oxford, and in 1714 encouraged the introduction of the Schism Bill against his wishes. Shortly after its enactment he persuaded Anne to dismiss Oxford. He seems to have desired the creation of a Ministry of extreme Tories; but Anne's death four days later frustrated his plans.

The accession of George I was marked by one feature of great constitutional interest. There then took place a practically complete and pretty nearly simultaneous change of Ministers. No such change had occurred since the Revolution, nor was the precedent set in 1714 followed for over two generations. George I, however, was not guided by any new constitutional theory in his choice of Ministers. He simply desired to appoint men upon whose loyalty he could depend. He was not attached to any party as such, though he believed, for reasons good or bad, that the bulk of the Tories were not to be trusted. But he did not hesitate to include that stout Tory, Nottingham, in a predominantly Whig Ministry, though it might have been predicted without great acumen that Nottingham would not work cordially with his colleagues for any length of time. Nottingham, however, had been a great champion of the Hanoverian succession.

One of the first acts of the new Ministry after the general election of 1715 was to promote the impeachment of Oxford, Bolingbroke, and Ormonde.<sup>1</sup> The reasons for these impeachments were diverse in character. There is no doubt that all who were attached to the Hanoverian succession had been in a state of great apprehension on the eve of Anne's death. They had feared that the Queen herself, and still more her Ministers, might favour and even promote the cause of the Pretender; the whole Revolution settlement had appeared to be in danger. It is now known that though Oxford and Bolingbroke had been in touch with the Pretender, neither of them had definitely committed himself to an attempt to place him on the throne. But their conduct had certainly been such as to arouse justifi-

<sup>1</sup> Oxford had been regarded as the chief man in the Ministry until his dismissal; Bolingbroke had been a Secretary of State; Ormonde had been Captain-General during Anne's last years.

able doubts of their loyalty. Ormonde, too, had behaved in a suspicious manner. Hence their impeachment, whatever else it may have been, was a blow at three suspected traitors. But it was also something more. All three were great political figures; Ormonde, at least, enjoyed an enormous popularity. There was a prospect that, if they were left unmolested, any or all of them might win the King's favour and gain office. By promoting their impeachment, therefore, the Ministers were safeguarding themselves from possible rivals. But the evidence against them was none too strong, and the charges were for the most part, even if capable of proof, not really criminal. For in substance they were that, contrary to treaty obligations, they had promoted the making of a disadvantageous peace.<sup>1</sup> But it is hard to see how there can have been anything illegal in this. Nor is there much doubt that the Ministers were very pleased when Bolingbroke and Ormonde fled the country. Oxford remained to stand his trial, and thereby caused them some embarrassment.<sup>2</sup> The proceedings against him, however, raised some points of constitutional interest. For in his answer to the articles of impeachment he largely relied on the defence that he had always acted by the late Queen's commands. This plea the Commons brushed aside as irrelevant. There is, indeed, evidence that there were then many both in and out of Parliament who held the chief members of a Ministry to be collectively responsible for all important decisions; but this belief was yet far from universal. Oxford's real defence from a modern point of view was that the Utrecht settlement had been substantially approved by two Parliaments. If one Parliament was to treat as criminals the authors of a policy which another Parliament had sanctioned, the lot of a Minister would have been a far from happy one. Even at the time the impeachments were condemned by many as vindictive, and since 1715 no ex-Minister has ever been impeached merely because his policy has ceased to find favour with the House of Commons.

Another sign that new constitutional ideas were making headway was the conduct of Robert Walpole in 1717. For he then insisted on resigning the First Lordship of the Treasury,

<sup>1</sup> Ormonde was also accused of wrongful conduct as Captain-General.

<sup>2</sup> For Oxford's trial and acquittal see *infra*, p. 289.

although the King implored him not to do so, because his brother-in-law, Townshend, had been dismissed as the result of a dispute about policy. Walpole was bitterly attacked for this both by speakers in Parliament and by writers in the press, since it was still widely held that it was a man's duty to serve the King as a Minister when called upon to do so. This view is well put by the man who wrote, with reference to Walpole's resignation, 'quitting of places is no crime, but, if several cabal to throw up, when the Government has most need of their services, in order to force it to comply with their unreasonable demands, this is a very criminal conspiracy'. From a conservative point of view this pamphleteer was perfectly right. If Walpole's views were to win general acceptance, then the King's right to appoint and dismiss Ministers at pleasure would become little more than nominal. Walpole, however, stoutly defended the propriety of his conduct, and continued to behave in a modern manner. For he promptly went into violent opposition and denounced the Government's measures, even when he really approved of them. He was, however, unable to force the King to get rid of his chief Ministers, but he and the group which followed him made themselves such a nuisance that in 1720 overtures were made to him and his brother-in-law, with the result that they once more joined the Ministry. Their return to office was undoubtedly a tribute to Walpole's importance in the Commons, which made his support well worth buying.<sup>1</sup>

Throughout the period 1702-19 Parliament showed a great deal of interest in foreign policy. The Commons at Anne's accession promised to support her attempt to reduce the power of France, and asked that copies of existing treaties of alliance be laid before them. With this and several later similar requests Anne complied. In the speech from the throne at the beginning of each session she regularly made a statement about the course of the war and her relations with foreign powers. The Houses, too, frequently asked for, and obtained,

<sup>1</sup> I refrain from enumerating the other Ministerial changes of the period 1714-20 because they offer little of strictly constitutional interest. The King simply employed his powers of appointment and dismissal as seemed best to him. Even the celebrated quarrel between Stanhope and Townshend in 1716, though of great importance in political history, is not of much significance in the present connection.

papers concerning the conduct of the war. They sometimes also presented addresses advising a particular policy. Thus in 1705 they asked the Queen to preserve a good correspondence with the United Provinces, and in 1709 'to take care at the conclusion of the war to continue and establish a good and firm friendship among the allies, and that the French King may be obliged to own Your Majesty's title and the Protestant succession, and that your allies be engaged to become guarantees for the same'. At the end of 1711 Nottingham carried his celebrated motion in the Lords that no peace could be safe or honourable which left Spain and the West Indies in the possession of any member of the House of Bourbon.<sup>1</sup> A statement to that effect was accordingly inserted in the address of thanks for the speech from the throne.<sup>2</sup> This resolution was, indeed, opposed as an encroachment upon the prerogative, since the making of peace and war belonged exclusively to the Crown. But it was no more so than the joint address of 1709, of which Anne had expressed her approval. Whatever her views of the prerogative, Anne was at some pains to humour Parliament. Her reply to this address stated, though in vague terms, her desire to see the Bourbons deprived of Spain and the Indies. She further informed Parliament in 1712 that the terms of the coming peace would be imparted to them before its conclusion, and this promise she fulfilled in June of that year, although she declared at the same time that 'the making of peace and war is the undoubted prerogative of the Crown'. The Houses thereupon presented addresses approving of the terms. The Ministers certainly had every reason to get what support they could from Parliament, since their policy was bitterly opposed by a strong minority both within and without Parliament. Nay, more, at their instance the Barrier Treaty of 1709 was laid before the Commons, and the House voted that those who had advised its ratification were the enemies of the nation. This censure of the late Ministers may have helped Oxford and Bolingbroke, but it undoubtedly strengthened Parliament's claim to interfere with the conduct of foreign policy.

<sup>1</sup> By 'West Indies' were meant Spain's colonies in the Americas and the adjacent islands.

<sup>2</sup> Exception was taken by some peers to this insertion, because it was foreign to an address of thanks, and because nothing in the Queen's speech called for advice on the subject.

George I, as Anne had done, regularly alluded to the state of foreign affairs in his speech at the beginning of the session, and in consequence the Houses had an opportunity to express approval or disapproval of British policy and its advisers. In point of fact, they always expressed their approval. But it must not be believed that either Anne or George was completely candid and accurate in disclosures to Parliament. Some information they had to give in order to keep the Houses in good humour and obtain supplies, but both they and their Ministers—when speaking in debate—were very guarded in their statements, and on occasion even deliberately misleading. The Houses were seldom given enough information to enable them to debate foreign policy properly. Parliament, however, were satisfied with the concessions made to them, and did not attempt to force disclosures. Nominally what the King told them he told them of his own volition.

This brief survey may perhaps serve to indicate the changes in the relations of King, Parliament, and Ministers that occurred after the Revolution. It will be seen that the Crown could not in practice ignore Parliamentary opinion in choosing Ministers or in forming policy. Indeed, it might seem that a Parliament with the power of the purse which met annually could not but have the whip hand. That such was not actually the case requires some explanation, and that explanation cannot be simple. For there are numerous factors to be taken into account. As has been said already, the prerogative, except in so far as limited by the Bill of Rights, nominally survived the Revolution unscathed. Its use at the King's discretion generally appeared natural and proper to most Englishmen. When Parliament overtly strove to control the exercise of the prerogative in any way, the King could as a rule command the support of a large body of conservative opinion. Thus William was able to veto important bills without provoking a great crisis. Parliament, too, after the Revolution lacked the knowledge and experience, even if they had had the desire, completely to control the executive. Moreover, the absence of organized parties as we now know them prevented the formation in the Houses of stable majorities with a definite policy. Nor must it be forgotten that, besides Whigs and Tories, there were always a large number of men in Parliament who thought it their duty to shun party connections and to

give a general, though not an unvarying, support to the Ministers of the Crown. Even among the Whigs and Tories there was often an absence of clear and definite ideas. Again, the precise functions of Parliament were still in dispute. It was not at first realized that when Parliament met annually, they could hardly be expected to confine themselves to the passing of bills, the granting of supplies, the representation of grievances, and the accusation—by the Commons—and trial—by the Lords—of criminous Ministers. Some members, however, had no wish to control the executive, while with others the wish was intermittent or subconscious. Hence, especially during the reign of William III, Parliament was often inconsistent and foolish, a nuisance to the executive, but not its master. There was, indeed, a danger that Parliament, containing as it did many energetic and ambitious men, would make the Government, at the best weak, and at the worst impotent. That danger was averted by the discovery that Parliament could be managed.

The Ministers, since in practice they always sat in one or other House, were the natural links between the Crown and Parliament, and, as time passed, it was found that the Crown, by entrusting to certain Ministers the use of its patronage, could do much to render Parliament tractable. Positions and favours of all sorts could be given to members of the Lords and Commons, and also to such persons as they might recommend. In return for these favours support of the Government's policy could be secured. It was not, indeed, as yet an established convention that place-holders must never vote against the wishes of the Crown; but there was a tendency in that direction. Thus in 1705 certain persons were dismissed from minor offices because they had voted against the Government's candidate for the Speakership. But this tendency, though it gradually became more pronounced, could not develop into a fixed convention until it was recognized that the leading Ministers should be unanimous, and the case of Walpole in 1717 shows that such recognition was as yet far from general.

In the opinion of many, the royal influence on Parliament appeared to depend upon corruption, and its speedy eradication was their ardent desire. Nor was it easy to see that Parliament was likewise acquiring influence over the executive. Majorities



in Parliament, it must be remembered, could not simply be bought for hard cash. Its members were, for the most part, too rich to be tempted by such sums as the Crown could offer, and too honest to sell themselves outright for any sum. Office, indeed, was a common object of ambition, but office was generally sought as much for its dignity as for its emoluments, and was regarded quite as much as a reward for faithful services as an inducement to surrender principles. The Crown by a judicious use of its patronage was gradually able, not to buy a majority, but to weld a mass of loosely connected men into a fairly reliable and solid block. But Parliament was never easy to manage. The men who could do it were few, and from that small number the King had to select some of his Ministers. The fact that his choice was so restricted enormously increased the power of those chosen. They were thus often in a position to impose a policy of their own upon their master. But that policy had to be defended in Parliament; nor was Parliament ever quite docile. To mention only a few instances from the latter part of this period, in 1713 the Commons refused to pass a bill to put into effect the essential clauses of the commercial treaty that had just been made with France; in 1718 the bill for the relief of the Dissenters had to be modified to meet the wishes of the Lords;<sup>1</sup> in 1719 the Commons threw out the Peerage Bill.<sup>2</sup> Granted that a single defeat in either House did not necessarily involve, and was not supposed to involve, any changes in the Ministry, yet such defeats were sharp reminders that Parliament did not merely meet to record its approval of the measures proposed by the Ministers. Moreover, if the independence of the Houses is to be duly appreciated, it must be remembered that the Ministers would as far as possible avoid the introduction of unpopular bills. If they were usually victorious in their Parliamentary struggles, it was because they often avoided fighting upon unfavourable ground.

The new development, moreover, turned to the advantage of the House of Commons in another way, one which was not properly realized at the time. Though a peerage was still an object of ambition to most politicians, the Lower House was by far the more important of the two chambers. The Lords

<sup>1</sup> See *infra*, p. 276.

<sup>2</sup> See *supra*, p. 185.

could, indeed, thwart the will of the Commons, and on more than one occasion actually did so. But the increased financial powers of the Commons made the executive completely dependent on them. Had they not voted supplies, no war could have been carried on, nor could the forces have been maintained even in time of peace. For the civil list was not even adequate to defray the other charges of government. It is true that the Commons refrained from so using their powers as to make the executive their mere tool, but there was always a possibility, and at times a very real danger, that they would depart altogether from the old practices. Nor had the Crown any direct means of controlling the composition of the House.<sup>1</sup> The House of Lords, on the other hand, enjoyed no such immunity. On the one occasion when it seriously threatened to impede the execution of a policy upon which the Crown was determined, a majority was suddenly turned into a minority by the creation of a batch of peers. But normally the Lords were inclined to follow the wishes of the chief Ministers even at the sacrifice of what they held to be the rights of their House.<sup>2</sup> The management of the Lords, therefore, gave comparatively little trouble. With the Commons it was otherwise. The Ministers charged with the task had to be carefully chosen; they had to be men skilled in the ways of the House and personally popular with the House.<sup>3</sup> Hence we

<sup>1</sup> It is very probable, however, that the Treasury and the Admiralty could bring pressure to bear on a number of voters, and so virtually determine the elections in some boroughs. But the electoral history of the period has yet to be written. It is also true that after William's death, at least, a general election always returned a majority to support the Ministers then in office. But I am inclined to think there were real changes in electoral opinion during these years, nor do I believe that the apparent wishes of the monarch were of decisive importance at an election. In the present state of knowledge, however, no definite statement can be made.

<sup>2</sup> See *supra*, pp. 204-5, for examples. It must be remembered that the Crown appointed the Bishops and was continually creating peers, though not in large batches. Thus it was fairly easy to keep a dependable majority in being. The refusal of the Lords to pass the Occasional Conformity Bill in the form desired by the Commons during the years 1702-5 was not really disagreeable to some of the chief Ministers. The concessions made to please them concerning the bill for the relief of the Dissenters in 1718 were largely due to the attitude of the Bishops, who usually gave docile support to the Ministers.

<sup>3</sup> I cannot but think that William III was ill-served in the Commons. He does not seem to have been able to find the right men to manage the House. Montague was not personally popular, though an able financier. Anne was better served, whatever may have been the reason.

find Ministers who owe their rise solely to their career in the Commons. For some time, indeed, they took advantage of their rise to gain a seat in the Lords. But it gradually became more and more obvious that their gain in rank was likely to be counterbalanced by their loss in power.<sup>1</sup> Robert Walpole was the first great politician to realize this, and he had his reward. But the fact that the greater part of his career lies outside this period shows the gradual nature of the change. Those Ministers, however, who had risen by their Parliamentary talents could not but retain an outlook influenced by their experience in the House and a disposition to magnify the importance of the House. Thus the Commons, by producing great Ministers, in a sense did but assert their own greatness. But though this is obvious enough now, it was far from easy to perceive at the time. The monarchs who then occupied the throne had no desire to weaken the prerogative, while the Commons viewed the new developments with intermittent alarm.<sup>2</sup>

Since the solution outlined above was rather the result of a series of tentative experiments on the part of the Crown than of a deliberate and carefully-planned policy, it was only natural that Parliament should fail to realize exactly what was happening and that their attitude to the new developments should vary from time to time. When the Commons saw the Crown using its patronage to increase its influence in the House, many felt that its future as an independent assembly was threatened. Was it not one of the functions of the Commons to impeach criminous Ministers? Yet how could this be done if the House contained a majority of placemen? They saw, too, that new places were continually being created and given to M.P.s, and that in a time of war, when the nation was groaning under an unprecedented weight of

<sup>1</sup> Harley and St. John both became peers. The latter at least is said to have regretted his promotion. Stanhope, however, followed their example a few years later. But after that I do not think any man of first-rate abilities and Parliamentary talents, except Pulteney, took a peerage, while his health was good.

<sup>2</sup> I am inclined to think that Walpole was one of the few to realise the nature of the new developments. Had he written reminiscences in a candid mood, they would have been invaluable to the student of constitutional history. But we know comparatively little even of his Parliamentary speeches.

taxation. Hence those who wanted economy were as ready to join in the cry against placemen as those who were opposed to what seemed to them an unconstitutional innovation. Accordingly a great outcry against placemen began shortly after the Revolution and continued in varying degree for many years.

Several attempts were made to settle the problem by legislation.<sup>1</sup>

All these attempts had their origin in the Commons, and all the bills introduced dealt solely with the question of place-holders in relation to the Lower House. The Commons apparently regarded their own independence as more important and more in danger than that of the Lords. Perhaps it was thought that the Crown had fewer places to offer which could tempt a peer to sacrifice his principles. For there were many offices which it would be beneath the dignity of a peer to accept, and comparatively few of which the emoluments were very considerable. The members of the Commons had a wider choice of posts, and were, in general, men of less wealth. It must be remembered, too, that members of both Houses could hold commissions in the Army and Navy, and that the enormous increase of the forces, owing to the war, had greatly increased the number of officer M.P.s; further, new civil posts were being continually created. It seemed possible, therefore, soon after the Revolution that the Commons might come to contain a large majority of placemen. It was to guard against that danger that the first Place Bill was introduced. This, which was passed by the Commons in January, 1693, provided that no M.P. who should be elected after February 1, 1693, was to hold an office of profit under the Crown. The Lords, however, rejected the bill by two votes. Nothing daunted, the Commons carried another similar bill in the following session,

<sup>1</sup> It is of some interest to note that it was desire for economy which gave rise to the first proposal for a change in the law concerning placemen. In December, 1691, the Commons, while in Committee, passed a motion that the emoluments of all offices in so far as they exceeded £500 a year should be applied to defraying the cost of the war, except in the case of the Speaker, the Commissioners of the Great Seal, the judges, envoys, and officers of the Army and Navy. However, a motion for the insertion of a clause to that effect in a bill of supply was rejected shortly afterwards; for the absurdity of the proposal soon became obvious; it applied, of course, both to those who were and to those who were not members of the Commons.

which the Lords accepted with the important amendment that an M.P. who accepted a place, though he thereby forfeited his seat, was to be capable of immediate re-election. With this amendment the Commons concurred, but William vetoed the bill. After this the agitation for a general Place Bill died down for the time being, perhaps because the Triennial Act seemed to many an adequate guarantee of the independence of Parliament.<sup>1</sup> Towards the end of William's reign, however, the movement revived. The result was the immediate exclusion of the officers of the Customs and Excise from the Commons.<sup>2</sup> Far more important than this was the insertion of a clause in the Act of Settlement which excluded all placemen and pensioners.

This clause was not due to come into operation until the accession of the first Hanoverian. Hence there was still room for controversy. Some wished placemen to be excluded forthwith. Others held that their exclusion would be an unwarrantable infringement of the prerogative and a weakening of the Commons at the expense of the Lords. Others, again, thought that some sort of compromise was desirable. Each of these views was reflected in one or more of the proposals of the next few years. In December, 1702, the Commons resolved that placemen should not have seats in their House; but they refused leave a few days later for the introduction of a Place Bill. Instead they passed a bill providing that all M.P.s should have landed property of a certain value.<sup>3</sup> For this was also regarded as a security that the House would be independent. In 1705, however, two bills were introduced in the Commons, each of which dealt with the question of placemen. The first was to exclude from the House the holders of all offices created since the death of Charles II; this bill easily passed the Commons, but was only accepted by the Lords in an amended form; for they so altered it that it excluded only the holders of certain specified offices. These changes made it unpalatable to the Commons, who accordingly let it drop. The second bill was to exclude all those who by their offices were entitled to receive any benefit from public annual taxes.<sup>4</sup>

<sup>1</sup> The Commons threw out a Place Bill in 1695.

<sup>2</sup> See *supra*, p. 187.

<sup>3</sup> See *supra*, p. 188.

<sup>4</sup> I have not seen the text of the bill, nor do I know whether it is extant; but I infer from its description in the *Journals of the House of Commons* that it

It was rejected by the Commons themselves on the third reading.

In 1706 that compromise was reached which had been foreshadowed in certain earlier proposals. The Lords in that year sent down to the Commons a Regency Bill, which provided machinery for securing the peaceful succession upon Anne's death of the person appointed by the Act of Settlement. The Commons took advantage of the opportunity to insert a clause which drastically modified the provision concerning placemen in the Act of Settlement; the effect of their amendments would have been to allow only the holders of certain civil posts, five officers of the Navy, and five officers of the Army, to sit in their House. These amendments were much altered by the Lords. The Commons were reluctant to accept their changes, and two conferences were held to debate them. Finally each House made concessions, and the bill became law.<sup>1</sup>

For a few years the compromise of 1706 appeared generally acceptable. But later on attempts were made still further to limit the number of placemen in the Commons. A bill passed the Lower House in February, 1710, which provided for a drastic reduction of the number of Ministers and a narrow limitation of the number of officers who could hold seats. This bill the Lords rejected, and the same fate befell similar bills in 1711, 1712, and the spring of 1714. After the accession of George I, however, the desire for a Place Act speedily waned. The Commons did, indeed, pass a Place Bill in 1715, which was allowed to drop by the Lords, and in 1716 an Act was passed for the exclusion from the Commons of pensioners for a term of years.<sup>2</sup> But after that little was heard for some time of the need for a Place Act.

The effects of this legislation may easily be exaggerated. It was, indeed, of the highest importance that all placemen had not been excluded from the Commons. Had that happened,

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would have affected officers in the Army and Navy, whose pay was annually granted by Parliament. The salaries of Ministers were paid from the civil list.

<sup>1</sup> For the relevant provisions of the Act of 1706 see *supra*, p. 187.

<sup>2</sup> 1 Geo. I, Stat. 2, c. 56. Pensioners during pleasure had been excluded in 1706; but pensioners for a short term of years were almost as much liable to pressure as pensioners during pleasure.

the development of a responsible Ministry would have been impossible. It is less certain, however, that the power of the Lords would have been greatly augmented; an entirely new type of executive might have been evolved at the expense of the rights of the Crown.<sup>1</sup> But though the compromise of 1706 saved the prerogative with a few limitations, and by making possible the development of responsible government ultimately tended to increase the power of the Commons, its immediate effects were not so great as some contemporaries thought. It is true that the King retained the right to bestow a large number of places and an unlimited number of commissions upon his faithful servants in the Commons. Much had been made by the opponents of Place Bills of the desirability that the King should be able to reward merit where he found it; privately, no doubt, many politicians must have been ready to admit that it was expedient for the Crown to have means of influencing the Commons. But both they and the supporters of the Place Bills seem to have assigned to them an efficacy greater than they could possess. If a majority of the Commons were so corrupt that the bribe of a place could induce them to support any measures, it would have availed little to make membership of the House incompatible with the tenure of a place. For such men could just as easily have been influenced, if not by bribes in hard cash, then by those other favours which the Crown had at its disposal. M.P.s had relations, friends, and constituents. They were continually using, and being asked to use, such influence as they possessed on their behalf. The Ministers were continually being bombarded with applications from M.P.s on behalf of innumerable persons. As long as the Crown had patronage it had means of influencing M.P.s. But nobody then thought it wrong for an M.P. to make use of such interest as he possessed on behalf of a relative or friend, or any person whom he wished to oblige. Until entry into the Civil Service was by competitive examination, and promotion in that and the other Services was by seniority or merit, the Crown had plenty of loaves and fishes to distribute, although never enough to feed all the hungry.

During the reigns of William III and Anne attempts were made to develop an entirely new type of executive. These

<sup>1</sup> See *infra*, pp. 242 *sqq.*

attempts proved abortive, but they are none the less interesting, because they show that Parliament was not averse to making experiments which, if they had been a success, would have radically altered the constitution. The right of the King to appoint and dismiss all his servants at pleasure was a generally admitted proposition.<sup>1</sup> But Parliament now showed a tendency to entrust executive functions to committees of its own members appointed by statute and with duties statutorily determined. Such committees were really independent of the Crown; for in no sense could their members be called the King's servants, since he neither appointed them, nor could dismiss them, nor could give them orders.<sup>2</sup> The creation of such committees was in substance a return to the practice of the Civil War, and it is highly curious to find the experiments of that time renewed in a period when conservatism was professed by so many.

In 1689 an Act was passed for the enforcement of the laws which prohibited the export of wool. That Act also constituted a commission of eighty-six persons, many of them M.P.s, who were charged with its execution and were authorized to employ a staff.<sup>3</sup> It is difficult to believe that William understood what he was doing when he gave his assent to the bill. For it would have been easy for him to veto it and to satisfy Parliament by appointing a commission for the same purpose under the Great Seal. Such a commission had indeed been appointed by James II in 1686. No parallel to this Act can be found in the previous generation. It is true that statutes for the levying of certain direct taxes had appointed commissioners to assess the same; their duties, however, were both temporary and very specialized, being, indeed, judicial rather than executive. Moreover, all other revenue commissioners were appointed by the Crown.

<sup>1</sup> The provision with regard to the judges in the Act of Settlement did not really contradict this doctrine. For the judges are not the King's servants in the ordinary sense of the word. He cannot, for instance, order them to decide any case in a particular way.

<sup>2</sup> It may be argued that, since the King gave his assent to the bills which constituted these committees, his authority was at least in part preserved. But by assenting to such bills the King was really giving the Houses a share, and as regards the particular bills, the lion's share, of a power which, according to generally accepted constitutional theory, should have been exclusively his own.

<sup>3</sup> 1 Will. and Mar. Stat. 1, c. 32. The quorum was five.



The Commissioners for Wool did not, owing to the war, actually begin to undertake their duties until 1698. For in war time the Admiralty were charged with the duty of preventing communication with France. When they commenced work, they tried to act with energy, and appointed a large staff. But they soon discovered that they had no financial resources of their own, but were dependent upon what the Treasury might choose to give them. Naturally the Treasury viewed the Commission with hostility, and though it considered their requests, did not grant them, but pointed out that the Customs officers were adequately performing the duties which Parliament had entrusted to the Commission.<sup>1</sup> Early in 1701 the Commons inquired through a committee into the activities of the Commissioners, but took no steps to provide them with funds. Meanwhile their employees, being unpaid, had been guilty of much misconduct. Thus the Commission came to an inglorious end. Before that, however, it had been an occasion of great annoyance to the King, when one of its agents had seized a French ship for carrying English wool, at a time when William was particularly anxious to maintain friendly relations with Louis XIV. The episode afforded a striking example of the disadvantages of creating executive bodies over which the King had no control.

On two other occasions proposals for the limitation of the King's right to choose his servants were seriously considered. In 1691 there was a heated debate in the Commons on a motion that the Houses should choose the commanders of the forces; it was eventually rejected after a member had made an eloquent defence of the prerogative. In 1696 there was a strong movement in favour of the creation of a statutory Council of Trade. William had hitherto been advised on matters relating to trade and the Colonies by a committee of the Privy Council. But the Commons felt that commerce defence had been neglected during the war. Hence they passed a number of resolutions, of which the gist was that a Council of Trade should be appointed by statute and be empowered to inquire into, and report upon, the state of

<sup>1</sup> The Treasury could only have found money for the Commissioners from the civil list, which was heavily in debt. The annual grants were all appropriated by statute.

trade in various respects; this body was further to be authorized to send 'directions' to the Admiralty for the protection of merchant vessels, which 'directions' were to be 'controllable by his Majesty under his sign manual'. This last provision was a concession to the King, and was also inserted to avoid confusion in the direction of naval operations. Even so, however, these resolutions, which were embodied in a bill, were strongly attacked as an encroachment on the prerogative, and as savouring of republicanism. While the Lower House was still considering the bill, the Assassination Plot was discovered, and William took advantage of the ensuing outburst of loyalty to preserve the rights of the Crown. He appointed by Order in Council a Council of Trade and Plantations with nearly but not quite the same powers as the proposed statutory body; the Commons were content with this concession and let the bill drop.<sup>1</sup>

After 1696 the Commons, with one exception, refrained from attempts to encroach upon the prerogative. That exception was the constitution of statutory Commissions of Accounts, which were in a sense executive bodies. There was, indeed, a danger that they might develop into something like a finance ministry. But they so discredited themselves by partisanship and inefficiency that they were eventually dropped.<sup>2</sup> After 1714, therefore, the Crown was safe from this particular peril.

Though the creation of statutory executive bodies was thus abandoned, the period witnessed the steady, though slow, development of another tendency of no less ultimate importance. Parliament imposed a number of statutory duties upon the holders of certain offices, especially the Treasury and the War Office. Every Act which imposed duties on a Minister, even though it extended his sphere of office, was yet a diminution of the prerogative in so far as it subjected him to an authority other than that of the Crown alone. Such Acts, however, were as yet comparatively few, nor was their significance fully recognized by contemporaries.<sup>3</sup>

<sup>1</sup> William's Council was not allowed to interfere with the control of the Navy.

<sup>2</sup> See *supra*, pp. 207 *sqq.*

<sup>3</sup> Of course, such Acts had been passed before the Revolution, but after 1688 they became regular and of steadily increasing importance. It was not, however, until the second half of the nineteenth century that they began to play the part that they do now.

In conclusion, something must be said of the relations of the House of Commons with the electorate. The general view was that the M.P.s represented not so much their constituencies as the commons of England or Britain; once elected, it was for them to act as they thought best for the national interest; they were, moreover, representatives, not delegates; their constituents had no control over them. Attempts on the part of the public to influence the votes of the Commons on matters of high policy were regarded in many quarters as improper. Thus in 1701 the House of Commons were indignant at the presentation of a petition signed by the Grand Jury of the Quarter Sessions of Kent and a number of freeholders of that county, since the petition prayed them to support the King's foreign policy and vote him liberal supplies. The House resolved that it was 'scandalous, insolent, and seditious, tending to destroy the constitution of Parliaments', and committed to jail five of the signatories who had brought the petition to London. But their action was unpopular with many to whom the imprisoned men appeared as martyrs. Further, at the next general election, the last to be held during William's reign, the voters, or a portion of them, in several constituencies 'instructed' the successful candidates as to the line they were to take in Parliament on certain questions. This, though not unprecedented, had not been done for some time, and was a sign that the electorate was not wholly ready to accept the older view of the functions of Parliament. Again, in 1715 many M.P.s were 'instructed' to press for the impeachment of some of the late Queen Anne's Ministers. None the less, the giving of 'instructions' remained exceptional, and the Commons on the whole still tended to regard themselves as free, both morally and legally, to disregard the wishes of the electors. Practically, however, there is little doubt that they were often influenced by the force of public opinion—the opinion, that is, of those who happened to be interested in politics at any particular time. Such an influence, however, cannot in the nature of things be precisely estimated, but its existence should not be forgotten.<sup>1</sup>

<sup>1</sup> The great outburst of pamphleteering which began at the end of 1688 and continued throughout the period is significant in this connexion.

## VIII

### THE UNION WITH SCOTLAND

THE REIGN of Anne witnessed the definitive accomplishment of a legislative union between England and Scotland. Such a union had been desired by James I, and had actually been achieved for a few years during the Interregnum. During the reign of Charles II there had been another project for a union, but nothing had come of it.<sup>1</sup> William III had ardently wished for a legislative union, but had been unable to achieve it.<sup>2</sup> After his death the position was such that a union was for many reasons more desirable than ever, though the difficulties in the way of bringing it about seemed even greater than before. )

The situation was, indeed, at once critical and peculiar. There had been since 1603—to omit the Interregnum—a purely personal union between England and Scotland; the same King ruled both countries.) (But the English Parliament could not make laws for Scotland, nor the Scottish Parliament for England. Nor was there freedom of trade between the two countries; the Scots, indeed, were jealously excluded from trade with the English Colonies, a privilege which they greatly coveted.) It was true that Scotsmen born after James I had become King of England were not aliens in England;<sup>3</sup>

<sup>1</sup> Charles II had been authorized by Acts of the English and Scottish Parliaments to appoint commissioners for England and Scotland, who were to treat concerning a legislative union, though no agreement was to be binding until confirmed by the Parliaments. The commissioners had been appointed, and had met in 1671, but no agreement was reached. Thereafter the project of union was allowed to lapse. It will be noted that the procedure then adopted served as a precedent. The English Act authorizing the appointment of commissioners is 22 Car. II, c. 9.

<sup>2</sup> A Scottish Act of 1689 had nominated certain Scottish commissioners to treat with English commissioners concerning a union. The English Parliament, however, had done nothing in the matter. Hence no English commissioners with statutory authority could be appointed, and the scheme of a union could not then be proceeded with.

<sup>3</sup> This was decided by *Calvin's Case* in 1608. The Scottish Parliament passed an Act in 1607, which allowed Englishmen to hold land in Scotland.

they could hold land there and be elected to the House of Commons. But this did not alter the fact that England and Scotland were separate countries. (The King, however, who ruled over them in distinct capacities, resided in England, and was inevitably more influenced by English than by Scottish advisers.) Nor in many respects could English and Scottish business be separated; to divide domestic affairs might be fairly easy, but it was impossible for the King to have a different foreign policy for each country. In these circumstances Scottish interests might easily be sacrificed or, still more easily, appear to be sacrificed to English interests. And this was not all; for there was nothing to prevent the King from taking decisions upon Scottish domestic matters on the advice of an English Minister.

After the Revolution the situation became yet more difficult. The decisions of the Convention at Westminster did not apply to Scotland. Had the Scots continued to acknowledge James II as King, the English would not on any political theory have had a right to object; the practical result, of course, would have been war between the two countries. However, there was never any danger of this; for James was even more unpopular in Scotland than in England. William, therefore, was able to achieve his purpose in Scotland as well as in England. A convention met by his summons at Edinburgh and settled the fate of Scotland. They drew up a Claim of Right in which they declared that James had attacked 'the fundamental constitution' of Scotland, and enumerated a number of his acts which they condemned as illegal.<sup>1</sup> For these reasons they declared that James had forfeited his right to the Crown of Scotland, and that the throne was thereby vacant. This Crown was now disposed of as the English Crown had been. But the offer of it to William and Mary

<sup>1</sup> Among these were James's claim to be able to suspend laws, particularly ecclesiastical laws, his encouragement of Roman Catholicism and efforts to make converts, his appointment of Romanists to important posts, his maintenance of a standing army without the consent of Parliament, and his interference with the proper course of justice. All these acts were described as 'utterly and directly contrary to the known laws, statutes, and freedoms of this realm'. It will be noted that in this respect the Scottish convention behaved much as the English Convention had done. They condemned as illegal many acts which may well not have been so. Thus the Scottish Convention professed to be upholding the good old constitution of their country. In reality, however, the Scottish Revolution was just as illegal as the English.

was accompanied by a statement of Scottish rights which they claimed and demanded. William accepted the Crown and promised to respect these rights.

It will be noticed that the Scottish Convention simply deposed James; there was no reference to abdication. From this it was a fair inference that any other king who was deemed to have acted in a manner grossly illegal might be similarly deposed. Thus the Revolution in Scotland was marked by an overt assertion of the power of the Scottish Parliament, and this is all the more curious because that Parliament had hitherto been very weak, not at all comparable in respect of power to the English Parliament. In other ways, too, it was very dissimilar. It was a unicameral assembly; in this sat together the Scottish peers, the representatives of the shires, elected by the freeholders, the representatives of the royal burghs, and, prior to 1689, the Bishops. Over a body so composed the King had naturally had much influence; for the Bishops had been very subservient to his will. That influence, too, had been greatly increased by the institution known as the Lords of the Articles; these were a committee, on which each class of the members of the Parliament was represented, elected at the beginning of each Parliament. Their task was to prepare bills for submission to Parliament, which could accept or reject, but not amend, them. Nor could Parliament discuss any bill not submitted by the Lords of the Articles. Now, the Lords of the Articles had in practice always been persons agreeable to the King. The existence of such a body, therefore, not merely deprived Parliament of the initiative, but came near to making it a tool in the hands of the King.

The Revolution strengthened the Scottish Parliament in two ways. The Claim of Right had stated that 'prelacy . . . ought to be abolished'. There followed in 1690 the establishment of Presbyterianism and the abolition of the royal supremacy. Hence Bishops ceased to attend Parliament, and the King lost the support of a group of members upon whom he could depend. Secondly, William was compelled by Parliamentary pressure to give his assent to an Act abolishing the Lords of the Articles.<sup>1</sup> Thus liberated, the Scottish Parliament now began to enjoy a vigorous political life.

<sup>1</sup> Bills in Scotland were called 'Acts'.

The Revolution moreover, could not but bring about a crisis in the relations of England and Scotland, and that for more reasons than one. Firstly, the Act of Settlement, which only applied to England and her dependencies, made it very possible that a time would soon come when England and Scotland would have different rulers; for the Scots had made no provision for the succession to the Crown of Scotland in the event of Anne's death without issue. It was plainly desirable from an English point of view that the same person should wear the Crown of both countries; but the Scottish Parliament had a perfect right to dispose of the Scottish Crown as they pleased. Even if Anne could be induced by the advice of her English Ministers to veto a Scottish Act which disposed of the Scottish Crown in a manner contrary to their wishes, the only effect of such a course would be to leave the Scottish succession unprovided for. Secondly, the Scottish Parliament, being conscious of its newly acquired strength, was very difficult to manage. Scotland, too, had grievances which made her hostile to England. There was good ground for believing that their monarch was influenced by English advisers to the disadvantage of Scotland. Of this the ill-fated Darien scheme had afforded more than one proof. Though the royal assent had been given in 1695 to the Scottish Act which created the 'Company of Scotland trading to Africa and the Indies', William had done all he could in his executive capacity to frustrate the plan for founding a Scottish colony in Spanish America. He had professed, indeed, that the giving of his assent had been due to the incompetence of his Scottish Ministers. But his refusal to give even diplomatic support, much less that of armed force, to the enterprise had inevitably appeared to spring from a desire to pursue a foreign policy which, however calculated to serve the interests of England or of the United Provinces, paid but scanty regard to those of Scotland. It was true that it would have been practically impossible for William to go to war with Spain as King of Scotland, while he remained on good terms with her as King of England. But this only served to show the disadvantages of the personal union. Such a union, it was plain, was too much or not enough.

¶ It may seem strange that the two countries could bring themselves to consider a legislative union at this time. For

if the Scots held the English had treated them ill, the English were jealous of the Scots. Both Houses of the English Parliament had shown their hostility to the Darien scheme at an early stage by representing in an address to William that it would be dangerous to English commerce.) The Scots were feared and disliked as potential commercial rivals, and the animosity caused by such feelings is notorious. Why, then, did the English not reject all thoughts of the closer union freely negotiated and resolve that on the death of Anne they would compel Scotland by force of arms to acknowledge the new King of England as King of Scotland? After all, England had conquered Scotland before, and could presumably do so again. The explanation is probably complex. (England, while engaged in the War of the Spanish Succession, had no desire to face a war with Scotland at the same time,) and none could have foretold that Anne would live as long as she did. (Moreover, a hostile Scotland would almost certainly have gone over to the Pretender, whose adherents in England would have been increased and encouraged by such an event.) (There was also one great bond between the two countries, which must not be forgotten—their common Protestantism. Though many Englishmen hated Presbyterianism with a bitter hatred, few of them hated it as much as they did Romanism. For these reasons there was a fair readiness in England to accept a legislative union with Scotland.)

It was obvious to sensible men that England had much to gain from a peaceful union, and even if they feared she might suffer by granting the Scots the same economic privileges as the English, there was no danger that England would be dominated by Scotland. (It might, however, have seemed to the Scots that establishment of a legislative union would make them into a dependency of England. For the strength and wealth of England so far exceeded those of Scotland as to leave her relatively helpless. This fact, it is true, may also have made the Scots feel that they could not fight England, but it certainly was a difficulty in the way of the union. England, however, had one privilege to offer which Scotland greatly wanted: freedom of trade between the two countries and the permission for Scotsmen to trade with the English Colonies on the same terms as Englishmen.) Desire for this



was stronger than many fears. But nevertheless there were certain things which the Scots so valued that they would never give them up; for instance, their ecclesiastical settlement and their legal system. Any terms of union, to be acceptable, must appear to guarantee that these would be preserved. (On the other hand, the Scots were not devotedly attached to their Parliament; that body had not played such a part in Scottish political life as to make its disappearance seem unendurable. The General Assembly of the Church was far more valuable and important in the eyes of most Scots. |

It is noteworthy that the form of union which was most talked of, and was finally achieved, was the union of the two countries in a unitary state. A federal union was not wanted by the English and not seriously desired by most Scots.) Yet from a modern point of view a federal union would seem to have had many advantages. A federal constitution would have enabled the Scots to secure those things on which they had set their hearts. But the principles of federal government were not generally understood at the time, nor were there many examples of federal states in recent history. Hence federalism could be dismissed as impracticable.<sup>1</sup> Moreover, belief in fundamental law made it possible for men to disregard the danger of Parliamentary absolutism. They believed that the terms of any agreement between the two countries would be substantially respected by the Parliament of the united kingdoms.

(A serious attempt to bring about a union was begun on Anne's accession. In her first speech to the English Parliament she desired them to 'consider of proper methods towards attaining of an union between England and Scotland'.) The request did not come as a novelty to Parliament, for William had openly striven to secure the same end during his last years. (The Lords, at his wish, had passed a bill in 1700 to enable the King to appoint commissioners to treat concerning the terms of a union with Scottish commissioners. The Commons, however, had thrown it out. Again, a few days before his death William had sent a message to the Commons recommending consideration of a union. The Houses were

<sup>1</sup> The United Provinces can hardly be called a federal state; nor was their constitution a subject of much admiration.

now ready to listen to Anne's suggestions, and an Act was promptly passed which indicated that they really wanted a union. (The Act empowered the Queen to appoint commissioners under the Great Seal, who were to be authorized to treat with commissioners deriving their authority from the Parliament of Scotland about a union of the two countries and such other matters as might seem proper; such propositions as the two sets of commissioners might agree upon were to be put into writing and submitted to the Queen and to the Parliaments of England and Scotland; but nothing was to have any force until confirmed by an Act of the Parliament of England.<sup>1</sup> Shortly afterwards the Scottish Parliament met and passed an Act which authorized the Queen to nominate commissioners to treat with the English commissioners; but it was provided that no agreement should be binding until confirmed by Parliament. Further, the Scottish Parliament informed the Queen by letter that they trusted she would uphold the national Church and would choose such commissioners as were loyal to it.)

Thus the initiative was the Queen's. The two Parliaments merely responded to her suggestions. Moreover, they showed their good will towards the project of union and their confidence in the Queen by allowing her to select the commissioners. For it was obvious that she would appoint men who were favourable to a union and more or less ready to compromise on disputed points. It was true that the Parliaments would have the final word. But it was not likely that either of them would be eager to take the responsibility of rejecting any scheme that was not on the face of it grossly unfair. For the Commissioners were not merely to investigate and inquire: they were charged with the duty of preparing a draft law, if they could agree upon its terms. Hence the importance of this method of procedure is difficult to overrate.

(The Commissioners, who included some of the most eminent political figures in England and Scotland, assembled in London, and negotiations began. Upon some vital points agreement was quickly reached. The Scots were ready to concede that there should be an incorporating union, that there should be one Parliament for the united kingdoms,

<sup>1</sup> 1 Anne, Stat. 1, c. 8.

and that the Crown should descend in accordance with the Act of Settlement. But the English were loath to make the necessary economic concessions, which alone could induce the Scots to accept the union; they were not in favour of complete freedom of trade between England and Scotland, nor did they see eye to eye with the Scots on certain other economic questions. Eventually, therefore, the sittings of the commission were suspended by the Queen; before the date for their resumption had arrived, the Scottish Parliament put an end to the authority of the Scottish commissioners.)

Before the end of 1702 the Scottish Parliament had been dissolved.<sup>1</sup> The new Parliament, which first met in 1703, were at first in no friendly mood towards England. They forthwith passed a number of Acts which were most distasteful to the Queen. Of these one was to secure the Presbyterian establishment; another provided that Anne's successor on the Scottish throne should not be empowered to involve Scotland in a war without the consent of her Parliament; yet a third Act permitted the importation of French wines, although Scotland was then at war with France, and it had been the Queen's wish to restrict trade with the enemy. To these Acts Anne gave her assent, although most reluctantly. A fourth measure, however, was even less to her liking. This was the celebrated Act of Security, of which the provisions were as follows: in the event of Anne's death without issue the Scottish Parliament were to meet forthwith and elect a new monarch, who was to be both a Stuart and a Protestant, but not the person upon whom the Crown of England had devolved, unless before that date the Parliament of Scotland should have so legislated as to secure the institutions, Church,

<sup>1</sup> This was the Convention Parliament of 1689, which had lasted for fourteen years. The legality of its continuance after William's death was disputable and disputed. For though an Act of 1696 had provided that it was to meet upon William's death and continue for six months unless sooner dissolved, the conditions therein laid down as to its meeting had not been properly observed. Moreover, the Convention Parliament was no longer felt to be truly representative of electoral opinion, and this fact robbed it of much moral authority. The new Parliament had, therefore, far more real power; what it did was regarded as truly binding upon the nation. To say this, however, is not to imply that Scotland was a democracy; the Scottish Parliament only contained direct representatives of a small minority, nor did many inquire whether or no the majority were indirectly represented therein. The important thing was that the new Parliament was felt to have full authority.

and trade of Scotland, and the English Parliament should have granted the Scots 'a free communication of trade, the freedom of navigation, and the liberty of plantations'. The purport of this was that unless Scotland could have her own terms, she would adopt a course of action which would be most dangerous to the English Revolution settlement. It is small wonder that Queen Anne refused her assent to the Act of Security and prorogued the Scottish Parliament. Yet that assembly had shown its real moderation by refusing to insert in the Act of Security limitations of the power of the Crown after Anne's death, although several had been proposed.

Subsequent events rendered the situation yet more critical. Anne and her English Ministers were informed of a Jacobite plot which was hatching in Scotland, and this information they laid before the English Parliament.<sup>1</sup> By so doing they were clearly inviting that body to concern itself with Scottish affairs. The House of Lords, in no way reluctant to do so, appointed a committee to investigate the plot, and, after it had reported, presented an address to the Queen, in which they stated 'that nothing has given so much encouragement to your enemies at home and abroad, to enter into this detestable conspiracy, as that after Your Majesty and the heirs of your body, the immediate succession to the Crown of Scotland is not declared to be in the Princess Sophia and the heirs of her body'; they then requested the Queen to use her endeavours to bring this about. There can be no doubt that the action of the Lords was highly improper. They would, indeed, have been perfectly within their rights in expressing their desire for a legislative union between England and Scotland. But they were not entitled formally to advise the passing of any measure by the Scottish Parliament, and still less to request Anne to take any action in her capacity of Queen of Scotland. As was only natural, bitter indignation was felt in the Northern kingdom, and when the Scottish Parliament met again, the Queen's hopes that they would settle the Scottish Crown as the English Crown had been settled soon proved vain. She was even forced to accept the Act of Security, which was again passed by Parliament, in

<sup>1</sup> There was doubt about the real nature and extent of the alleged plot. I am here concerned only with its constitutional repercussions.

order to obtain a grant of supply. Further, she was presented with an address from the Scottish Parliament, in which they denounced the interference of the House of Lords with Scottish affairs.

Early in the session of 1704-5 the English Parliament once more considered the question of a union. The Act of Security had given just cause for alarm in England, and it was only proper that the English Parliament should deal with the problem that it had created, provided they remembered that Scotland was an independent kingdom. In the course of debates in the Lords sharp things were said about the Act of Security, and certain speakers talked as though Lord Treasurer Godolphin was responsible for having advised the Queen to give her assent to it. But the House rejected a motion for the reading of the Act, which would have been a preliminary to further motions concerning it, on the ground that the English Parliament had no right to treat Scotland as subordinate to their authority. The House instead passed a remarkable bill, which the Commons rejected because of its provisions for pecuniary penalties. But they themselves had passed a very similar bill, which was accepted by the Upper House, and received the royal assent. This Act empowered the Queen to nominate commissioners who could treat with Scottish commissioners concerning a union. No terms, however, on which the two sets of commissioners might agree were to be of any force until confirmed by the English Parliament; but the Queen was not to have power to appoint the English commissioners until a Scottish Act had empowered her to nominate the Scottish commissioners;<sup>1</sup> nor were the English commissioners allowed to treat of any alteration of the 'liturgy, rites, ceremonies, discipline, or government' of the English Church. The Act further provided that after December 25, 1705, no Scots, except those already settled in England or serving with the forces, should be capable of inheriting land in England or of enjoying any of the benefits of a natural-born subject; after that date all Scots were to be aliens, until the succession to the Scottish Crown had been settled by a Scottish Act in the

<sup>1</sup> Thus the English Parliament stipulated that the Scottish commissioners were to be appointed by the Queen; this indicates their genuine desire for a union.

same way as that to the English crown; further, until this condition had been fulfilled, no Scottish cattle or coal or linen were to be imported into England.<sup>1</sup> This measure was a threat to Scotland, but one which the English Parliament was quite entitled to utter; for it in no way assumed a right to determine the proceedings of the Scottish Parliament.

The Scottish Parliament met once more in the summer of 1705, and faced the situation created by the recent English Act. They did not settle the Scottish Crown upon the Electress Sophia and her issue, but they were ready to permit the resumption of negotiations for a union; they passed an Act which permitted the Queen to appoint commissioners; nor was any wrecking restriction imposed upon the commissioners; for a motion that a clause be added to the Act prohibiting them from considering any union which in any way derogated from the 'fundamental laws, ancient privileges, offices, rights, and dignities' of Scotland was rejected by two votes. Had it been carried, only a federal union would have been possible; but it was well known that the English were determined that, if there was to be a union, it must be one which would merge England and Scotland in a unitary state.<sup>2</sup> The Scottish Parliament likewise rejected a motion for a clause forbidding the opening of negotiations until the English Parliament should have repealed those parts of the Act of 1705 which made Scots aliens in England and prohibited imports of Scottish cattle, coal, and linen, after December 25, 1705. Instead they presented an address to the Queen in which they requested her not to allow negotiations to begin until such repeal had taken place.

The English Parliament duly repealed the clauses disliked by the Scots early in the session of 1705-6. In April, 1706, the English and Scottish commissioners named by the Queen assembled in London. They first agreed on a method of procedure: every proposal from either set of commissioners, and all articles upon which both agreed, were to be put in

<sup>1</sup> 3 and 4 Anne, c. 6. 'An Act for the effectual securing of the Kingdom of England from the apparent dangers that may arise from several Acts lately passed in the Parliament of Scotland.'

<sup>2</sup> However, the Scottish commissioners were forbidden to treat of any alteration in the discipline and government of the established Church of Scotland. But this was not a barrier to a union.

writing; nothing was to be binding unless and until complete agreement had been reached; the proceedings of the commissioners were to be kept secret while negotiations were in progress. \ Agreement upon the Articles of the proposed union was arrived at fairly quickly.) The matter had then to come before the Parliaments.) It was necessary that the independence of each legislature should be respected, and yet concurrent, though not contemporaneous, action was required. The arrangement adopted was peculiar. The Articles of Union were first considered by the Scottish Parliament. That body passed an Act providing that they should, in a slightly amended form, come into force upon May 1, 1707, provided that they had been confirmed and enacted by an English statute. The Scottish Act of Union, however, included an Act previously passed by the Scottish Parliament for securing the Scottish Church. It will be observed that the Scottish Parliament had made some amendments to the Articles of Union, though none of major importance. But the form of the Scottish Act prevented the English Parliament from making any alterations at all; they were, however, at liberty to make one addition; since the Act for the security of the Scottish Church said that the English Parliament might make provision for the security of the Church of England within the bounds of England.<sup>1</sup> The English Parliament duly did what was expected of it. The English Act of Union contains a preamble reciting the Articles of Union, as set forth in the Scottish Act, and the Scottish Act for the security of the Scottish Church, and also an English Act for the security of the English Church; there follow two enacting clauses which provide that the Articles and the Act for the security of the Scottish Church are confirmed and ratified, and that this Act and that for the security of the English Church are to be 'fundamental and essential conditions' of the Union and are to be in force for ever. There follow a recital of the Scottish Act regulating the manner of electing the Scottish representatives in the Parliament of Great Britain and an enacting clause ratifying it as though it had been one of the Articles of Union.<sup>2</sup>

<sup>1</sup> Thus the Scottish Parliament ratified any such measures as might be enacted by the English Parliament.

<sup>2</sup> 6 Anne, c. 11. The drafting of the bill made amendment impossible.

The provisions of the Articles of Union were as follows: upon May 1, 1707, the two kingdoms were to be united into one kingdom under the name of Great Britain; the Crown of Great Britain was, upon the death of Anne without issue, to go to the Electress Sophia and her issue; there was to be one Parliament for the united kingdoms; in the Upper House of this Scotland was to be represented by sixteen Scottish peers, in the Lower by forty-five members; these peers and commoners were to be chosen in accordance with the terms of an Act to be passed by the Scottish Parliament before the Union; the Queen was to have power to declare that the Lords and Commons of the English Parliament were to be members of the respective Houses of the first Parliament of Great Britain, which Parliament was to meet within fifty days of the Union.<sup>1</sup> Members of the British Parliament were to take the oaths of allegiance and supremacy and make the declaration required by the Test Act of 1678; those Scottish peers who had no seats in Parliament were none the less to enjoy all the other privileges of the peers of Great Britain;<sup>2</sup> there was to be complete freedom of trade between England and Scotland, and Scots were to be allowed to trade with the Colonies and dependencies of the British Crown on the same terms as Englishmen; in general, the same laws for the regulation of trade and tariffs were to apply to both England and Scotland, except for certain minor concessions to Scotland; the Scottish quota of any land tax that the Parliament of Great Britain might grant was fixed; the Scottish judicial system and Scots private law were to be preserved, as also were such heritable jurisdictions as existed in Scotland; no appeals were to go from any Scottish court to Chancery, Queen's Bench, Common Pleas 'or any other court in Westminster Hall'.)

The Act for the Security of the Scottish Church can be

<sup>1</sup> Anne availed herself of the power to continue the Lords and Commons of the English Parliament as members of the first British Parliament. Thus the Union did not lead to an immediate general election. The provisions of the Triennial Act, however, were applicable to the Parliament of Great Britain, and a dissolution, followed by an election, came in 1708. The previous English general election had been in 1705.

<sup>2</sup> After the union no peers of either Scotland or England could be created; all new peerages were British peerages. In a different sense the Union made all existing peerages peerages of Great Britain.



briefly summarized: it confirmed the doctrine, discipline, and government of that Church as by law established; all teachers in the Scottish universities, which were to continue for ever, were to profess conformity to that Church; no Scot was to be required within Scotland to take any oath or test inconsistent with the doctrines and government of the Scottish Church; Anne's successors, upon their accession, were to swear that they would preserve the Scottish establishment; the provisions of the Act were to be perpetually observed 'as a fundamental and essential condition of any treaty or Union . . . without any alteration'.

(The Act for the security of the English Church provides that all Acts then in force for the 'establishment and preservation of the Church of England, and the doctrine, worship and discipline thereof, shall remain and be in full force for ever'; Anne's successors, at their coronation, were to take an oath 'to maintain and preserve inviolably the said settlement of the Church of England'; the provisions of the Act were to be 'for ever holden and adjudged to be a fundamental and essential part of any treaty of union', and the Act was to be inserted in any Act for ratifying such a treaty of union.<sup>1</sup>)

(The Articles of Union constitute a contract or treaty, and were regarded as such at the time. They were, moreover, the result of a negotiation on equal terms, and were eventually ratified by the English and Scottish Parliaments; the two nations, in fact, acting through their legislatures, agreed to unite in one body politic on certain conditions.) It was evidently understood at the time that the Articles were to remain substantially unaltered; again, the Acts for the security of the English and Scottish Churches were described as fundamental laws of the united kingdoms. But what of the power of Parliament? If the Parliament of Great Britain could pass whatever Acts it pleased, then there was no security that the terms of the Union would be observed. Certainly no court was created in 1707 which could determine the validity of Parliamentary statutes and quash them in so far as they were contradictory to the conditions of the Union. But the conception of judicial review was not familiar to either English-

<sup>1</sup> This Act had been passed earlier in the session.

men or Scotsmen at the time. Can it then be said that they wished Parliament to have the power to do anything it thought fit? Scarcely so. The explanation seems to be that the Scots had never thought of their Parliament as sovereign, and the English had not yet generally come to believe in Parliamentary sovereignty, though their Parliament had been a far mightier body than the Scottish. It was assumed therefore that the Parliament of Britain would on the whole respect the conditions of the Union.<sup>1</sup>

That union was of a peculiar character. The English had insisted upon their great point that it must be an incorporating and Parliamentary union; there must be only one legislature in Great Britain. The Scottish commissioners had rather diffidently suggested a loose federal union, but when the English had firmly repulsed the proposal, they had been very ready to let it drop. Nor, as has been said, was there any legal obstacle that could prevent the British legislature from doing anything it pleased. In that legislature, moreover, the English members were to be in an overwhelming majority. The Scottish members alone would have been powerless to protect the privileges of their country. But in reality there was no prospect that all the English would ever be in agreement, and the Scots, if united, could form a weighty element in the Houses, and especially in the House of Lords, where motions were often won or lost by small majorities. None the less it was obvious that the English would have more power in Scottish affairs than the Scots in English affairs. On the other hand, the Union left to Scotland her legal system and her Church. Both of these were as secure as men thought they could be made. The makers of the Union were enlightened enough to see that there could be two established Churches within one state, which was a marvellous thing at the time. That they should have been free from the urge to bring about complete uniformity in other matters was far less strange, though equally commendable. The economic Articles were both just and, as regards Scotland, in some respects generous. Thus Scotland gave up her Parliament, gained great trading advantages, and retained all that could be retained consistently with the Union. As a practical guarantee against

<sup>1</sup> See also *infra*, pp. 264-5.

future oppression by the British Parliament she had to rely upon the good sense and good feeling of the English.)

It is noteworthy that apart from the question of the nature of the union, only two points gave rise to much difficulty in the negotiations. The first of these concerned the number of representatives to be given to Scotland in the British Parliament, particularly in the House of Commons. Now, had taxation been taken as the basis, Scotland would only have been entitled to some thirteen seats in the Commons. Had population been taken as the basis her share would have been eighty-five; but the theory that representation should be based on population was not then generally held. The former number, however, was obviously too low to be acceptable, and the English commissioners had originally suggested that Scotland should have thirty-eight seats, while the Scots had asked for fifty. The eventual figure of forty-five was a compromise. The determination of the way in which they and the sixteen representative peers should be chosen was left to the Scottish Parliament, which settled the matter thus. In the first instance the peers were to be chosen by the Queen's Commissioner, and the members of the Commons by the Parliament itself. After that the peers were to be elected for each Parliament by their fellows, and the members of the Commons were to be chosen according to the provisions of an Act then passed. One member was given to each shire, except that the shires of the following pairs were to take it in turns to elect a member; Bute and Caithness, Nairn and Cromarty, Clackmannan and Kinross; the other fifteen seats were allotted to the burghs; Edinburgh was to have one member; the other royal burghs were divided into fourteen groups, containing four or five burghs each; each group was to choose one member by the following method of indirect election; each burgh was to elect a commissioner, and the commissioners of the burghs in a group were to elect the member; when the votes were equal, the presiding commissioner was to have a casting vote; the presidency was to be held by the commissioner for each burgh in turn.

There was also a difficulty with regard to the question of appeals from Scottish courts. Apparently there was a fairly strong feeling in Scotland against the hearing of Scottish appeals

by English courts. On the other hand, it was plainly advantageous that there should be one final court of appeal for the whole of Great Britain. Accordingly the Articles were so worded that they explicitly prohibited all English courts from hearing Scottish appeals, but said nothing about the right of the House of Lords to do so; for the Lords were not a court in Westminster Hall. But it must be observed that after the Union the Lords were not an English, but a British, court. The Lords soon began to hear Scottish appeals, as must have been expected, and in 1711 they decided in the case of James Greenshields that the exercise of the episcopalian form of worship was lawful in Scotland, a decision of great consequence.<sup>1</sup>

( It is here convenient to mention certain Acts of the Parliament of Great Britain which applied to Scotland. In 1708 the Scottish Privy Council was abolished, and the Queen was given power to appoint Justices of the Peace in the Scottish shires and boroughs; these Justices were to have the statutory powers of English Justices, but the legal procedure and the judgements at trials were to be in accordance with the laws of Scotland; further, all officers civil and military in Scotland were to take an oath of allegiance to Anne, to abjure the Pretender, and to promise to support the provisions for the succession contained in the Act of Settlement.<sup>2</sup> An Act of 1709 provided that from July 1 of that year those offences which in England were treason or misprision were likewise to be treason or misprision in Scotland, and nothing was to be treason or misprision in Scotland unless it was so in England.<sup>3</sup> In 1712 it was enacted that episcopalians were to enjoy toleration in Scotland, provided that their clergy took the oaths of allegiance and abjuration and promised to support the succession as determined by the Act of Settlement; these obligations were at the same time imposed upon the Ministers of the Scottish established Church. Another Act of that year restored lay patronage in the Scottish Church.<sup>4</sup> )

<sup>1</sup> It was doubtful how far a right of appeal to the Scottish Parliament from the Court of Session had existed before the Union. Many Scots would have resented the explicit admission of the right of the Lords to hear Scottish appeals, because Bishops sat there and voted on judicial issues. These two considerations help to explain the wording of the Articles of Union on this point.

<sup>2</sup> 6 Anne, c. 40 and 41.

<sup>3</sup> 7 Anne, c. 21.

<sup>4</sup> 10 Anne, c. 10 and 21. It will be observed that these Acts were contrary to the terms of the Union. See *infra*, p. 265.

## IX

### THE PROBLEM OF SOVEREIGNTY

FROM ONE point of view the Revolution could be regarded as a successful defence of fundamental law. Nor is there any doubt that most of those who supported the settlement of 1689 thought of themselves as conservatives. Hence that settlement may be taken as proving that there was then no general belief in the existence of a sovereign. It could not be denied that the Convention had done a very strong thing in replacing James by William and Mary and drawing up the Declaration of Rights. The reference to abdication was, after all, something very like a fiction, though for the time being it undoubtedly helped to ease some scrupulous consciences. But as the years passed it became more and more difficult to ignore the fact that the Convention had deposed James. Again, the Declaration of Rights purported to state what the law on certain points already was rather than to alter the law; it resembled, that is, the judgement of a court. What, however, was the Convention which thus assumed power to interpret the constitution? It was certainly not a Parliament. Yet its actions were not commonly regarded as those of a revolutionary assembly, justifiable only on other than legal grounds. The nation's acquiescence in the acts of the Convention can only be explained by the prevalence of a belief that in a crisis fundamental law must be maintained by whatever means were available. Everything, moreover, was done to make the Convention seem as much like a Parliament as possible. 'In almost every word and act', says Macaulay, 'may be discerned a profound reverence for the past'. Hence its proceedings did not imply that the Lords and Commons claimed to be sovereign.

Belief in fundamental law, however, did not then imply a clear conception of what that law was. Granted that certain

statutes, such as Magna Carta, were regarded as fundamentals, nobody could have given a clear and generally accepted statement of fundamental law as a whole; nobody could have assigned definite and generally accepted limits to the powers of Parliament. No court in this period, any more than before, ever declared a statute void on the ground that it was contrary to fundamental law. Moreover, some of the Acts passed by the Convention Parliament—after it had been turned into a Parliament by statute—and by subsequent Parliaments were of the first importance. Statutes altered the succession, limited the prerogative, gave toleration to the Dissenters, united England and Scotland, and—the supreme example—prolonged the duration of a Parliament beyond the term fixed for its dissolution by an earlier statute. Yet most men still shrank from the view that the King in Parliament was sovereign. The following passage taken from a pamphlet published in 1695 is typical of the opinion which prevailed throughout the period: ‘The King with the consent of the two Houses may, without any forgoing limitation or restriction, arbitrarily and with an absoluteness of power either enact and establish, or cancel or abrogate, whatsoever laws he pleases, provided they overthrow not the constitution nor alter the first and main essentials of it. For the preservation of and adherence to the constitution is the measure and standard of the whole legislative power and authority of England.’

In practice the legislature was the sole judge of its own powers. It could and did do whatever it pleased and when it pleased. Naturally it never claimed to be able to overthrow the constitution; any particular statute could be represented as being in accordance with fundamental law. It was not necessary, even had such a claim been conceivable, to claim that the legislature was omnipotent; it was enough to maintain that it was within its competence to do this or that specific thing.<sup>1</sup> Some Acts, indeed, seem to imply that the Crown in Parliament is sovereign; but others imply the reverse. Thus the legislation of the period reflects the confusion in men’s thoughts. The English Act of Union strongly resembles the

<sup>1</sup> Much in the same way, as Wharton shrewdly said, the Church of England, while disclaiming all pretensions to infallibility, did in practice come near to claiming that it was never wrong.

ratification of a treaty; it is a fair inference that the Articles of Union were supposed to be in the main unalterable. The Acts, moreover, for the security of the English and Scottish Churches which are incorporated in the Act of Union are explicitly said to be fundamental laws. Yet in 1712 a statute of the Parliament of Great Britain restored lay patronage in the Scottish Church. That statute was a plain breach of a law declared to be fundamental. In 1713 a motion was made in the House of Lords for leave to bring in a bill for the repeal of the Act of Union. The motion was defeated, but in the course of the debate the question of Parliamentary sovereignty was inevitably raised. The opponents of the motion denied that Parliament was competent to repeal the Act. Yet many of them had voted for the bill to restore lay patronage. Those who supported the motion were somewhat embarrassed, for they did not, most of them, wish to assert that the legislature was sovereign, and it was not easy to maintain that it could repeal the Act of Union unless it was sovereign. Again, early in the reign of George I two Acts were passed which plainly contradict each other on this point. The Act of Settlement had provided that after the accession of the first Hanoverian only natural-born subjects should be capable of holding office. In order to implement this clause it was enacted in 1715 that no person was thereafter to be naturalized unless there was a clause in the bill of naturalization declaring him incapable of office, nor was any bill of naturalization to be received in either House that did not contain such a clause.<sup>1</sup> This Act purported to restrict the power of future Parliaments; if it was not assumed to be declaratory of a fundamental law, it was obviously without meaning. In any case it could not be enforced. Yet a year later the same Parliament which had passed this Act also passed the Septennial Act, the Act which is always quoted as a striking example of Parliamentary sovereignty. The Septennial Bill was naturally the subject of much discussion. Its opponents argued that it was unconstitutional for the then House of Commons to prolong its own existence; the Bill was to them plainly incompatible with fundamental law. Nor did the supporters of the Bill deny that there was a limit to the powers of the legislature. They either

<sup>1</sup> 1 Geo. I, Stat. 2, c. 4.

ignored the question of its competence or asserted that the Triennial Act was not a fundamental law, and so was repealable.<sup>1</sup>

It may be said, then, that though the legislature did not claim sovereignty, it nevertheless exercised it. But this statement would by itself give a misleading impression. The very prevalence of the belief that there were some things the legislature could not do, though what they were no man precisely knew, was in a sense a check upon the legislature as a whole and upon each of its component parts. After all, this period was marked by a number of great compromises, and it is not wholly fanciful to suppose that attachment to the good old constitution was in part responsible for them. Englishmen hated arbitrary power, and though the legislature sometimes behaved in an arbitrary way, it could not but be influenced and restrained by the spirit of the age.<sup>2</sup>

<sup>1</sup> Even this, however, was an evasion. Granted that the Triennial Act could be repealed, that did not imply that a Parliament could prolong its own existence.

<sup>2</sup> Other legislatures during a revolutionary period have acted in a very different way as a rule. Comparison only serves to bring out the essential moderation of the English—and British—Parliaments during the years 1689-1719.



## X

### CHURCH AND STATE

THE REVOLUTION inevitably raised once more in an acute form the problem of the relations of Church and State. The Convention Parliament, indeed, promptly asserted their right to legislate on ecclesiastical matters, although many questioned their competence to legislate at all, and still more questioned the validity of their ecclesiastical legislation. There were, however, several points which required to be settled forthwith. Were the clergy to be compelled to swear allegiance to William and Mary, and if so, in what form? Was any species of toleration to be granted to the Dissenters? Was comprehension to be attempted? Were the Test and Corporation Acts to be maintained? It was a practical impossibility for the Convention Parliament to ignore these questions, and they did not allow nice considerations of legality to restrain them.

One of the first things they did was to establish new coronation oaths, and the debates on the bill for so doing illustrate in an interesting way the opinions of the Commons as to the relations of Church and state. The bill required the King to swear that he would maintain 'the Protestant reformed religion established by law'. Some members were afraid lest the King should thus be bound to refuse his assent to any bill which provided for changes in matters ecclesiastical. The majority, however, were clearly of opinion that what had been enacted by one statute could be repealed or altered by another. The House even refused to accept a motion for the insertion of a clause permitting the King to assent to any changes save the abolition of fixed forms of prayer or of episcopacy, on the ground that this would amount to a restriction on the legislative power.<sup>1</sup>

<sup>1</sup> The bearing of this debate on the question of sovereignty is obvious nowadays; but it should not be assumed that the Commons then explicitly believed that the King in Parliament was sovereign. There was, however, a tendency in that direction.

Over a century later, as is well known, George III came to the conclusion that the oaths he had taken at his coronation prevented him from assenting to Catholic Emancipation; nor was he singular in his opinion. Thus the Act of 1689 was misinterpreted in spite of the clear intention of the Commons.<sup>1</sup>

The changes in the coronation oaths were generally acceptable at the time. But the Act requiring all holders of ecclesiastical and secular office or employments to take the revised oaths of allegiance and supremacy aroused much opposition. Those ecclesiastical persons who refused to take the oaths before August 1, 1689, were to be suspended, and, if they did not take them within the following six months, were to be deprived.<sup>2</sup> Many contended that the oaths could not conscientiously be taken by those who had sworn allegiance to James, and many more thought it inexpedient to confront the clergy with the cruel choice between taking the oaths and being deprived. The Lords, indeed, in whose House the bill originated, wished to exempt those already in office from the necessity of taking the oaths, unless specifically and individually called upon to do so by the Government. But the Commons insisted that all be required to take them, and the Lords gave way. Nor is there much doubt that the Commons were right. If the oaths were to be required at all, it was far better that everybody should be under a statutory obligation to take them than that the executive should pick out certain persons whose loyalty it desired to test. The result of the Act was that, while the majority submitted, seven Bishops and some four hundred other persons refused to take the oaths, and were eventually deprived. These persons were known as Nonjurors. Their opponents usually denounced them as Jacobites, and not with-

<sup>1</sup> 1 Will. and Mar., Stat. 1, c. 6.

<sup>2</sup> 1 Will. and Mar., Stat. 1, c. 8. The new oath of supremacy ran thus: 'I A.B. do swear that I do from my heart abhorre, detest, and abjure, as impious and heretical, that damnable doctrine and position, that princes excommunicated or deprived by the Pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare that no foreign prince, person, prelates, state or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual within this realm'. The oath of allegiance was as follows: 'I A.B. do sincerely promise and swear that I will be faithful and bear true allegiance to their Majesties King William and Queen Mary'. The Act also provided that the declaration repudiating resistance, contained in the Act of Uniformity, was no longer to be taken by any person.

out some reason, since the general reason for refusal to take the oaths was belief in the divine right of Kings, and those who held this belief for the most part naturally desired to see James restored to the throne.

This, though true of most of the Nonjurors, was not true of all; for there were some who, while believing that a King might be deposed for misgovernment, thought that James's conduct had not been bad enough to justify his deposition. A good number, too, were prepared to submit to the rule of William and Mary, but scrupled to swear allegiance to them. Hence, though they were deprived, they did not engage in seditious activities or desire to see the Revolution settlement undone. But with the great majority it was otherwise. Yet the new oaths had been so worded as to make compliance easy. The position of conscientious clergymen was far less difficult in 1689 than had been the position of many incumbents in 1662. The latter had been required to renounce the Covenant, whether or no they had taken it, as an unlawful oath, and to declare that all resistance to the King was wrong. In 1689, however, nobody was required to abjure James, and, though the declaration condemning resistance was abolished, nobody was required to profess belief in its lawfulness. But the Nonjurors, as was only natural, sharply criticized the imposition of the new oaths. Most of them, moreover, contended that the deprivation of Bishops by secular authority was null and void, and some of them used language which might be taken to imply that the Church as an independent spiritual authority was not rightfully subject to Parliamentary control. Yet all the Nonjurors were staunch Anglicans; they could not deny that several Bishops had been deprived at the outset of Elizabeth's reign in virtue of a statute.<sup>1</sup> But if the Church of the Elizabethan settlement was not a true Church, or a part of the true Church, their whole position was undermined. Again, James's ecclesiastical commission had suspended Compton, Bishop of London.<sup>2</sup> In spite of the probable illegality of the Commission, the suspension had not been denounced as invalid by the majority of the Nonjurors. If a Commission appointed by James could suspend, how could it be denied that a statute, to which William and Mary had given their assent, could deprive,

<sup>1</sup> 1 Eliz., c. 1.

<sup>2</sup> See *supra*, p. 138.

except on the assumption that James had ruled by divine right, while William and Mary were usurpers? That this was so most of the Nonjurors steadily proclaimed. But those who believed that James had ruled and should still rule by divine right, and was therefore possessed of the supremacy, could not with any degree of consistency maintain that the Church was wholly independent of the state.

The extreme Nonjurors—and they were the great majority—claimed that they and their adherents were the true Church of England, and that the established Church was in schism. Some, however, held that it would cease to be so when the last of the deprived Bishops had died, and acted on that view when the time came. But the greater number were of another opinion, and the Nonjurors continued to exist as a separate religious community for a long time.<sup>1</sup> But that community was never large, since it did not number among its adherents many laymen apart from those who had themselves refused the oaths. The ordinary Anglican layman, whatever his political views might be, continued to attend his parish church. Only a great alteration of the Act of Uniformity could have alienated a great body of the laity, and no such alteration was made. The Nonjurors did indeed obtain a few recruits after the passing of the Abjuration Act of 1702, since this imposed a new obligation to which some would not submit.<sup>2</sup> But even that gain was soon outweighed by losses due to death and defection.

The year which witnessed the passing of the Oaths Act saw also the triumph of toleration and the failure of the last great attempt to secure comprehension. There was a general agreement in the Convention Parliament that something must be

<sup>1</sup> Some of the deprived Bishops consecrated Hickes and Wagstaff in 1693 as suffragans of the deprived Bishop of Norwich, with a view to securing the continuance of a Nonjuring episcopate. This they did with the permission of the exiled James and nominally in accordance with the provisions of a statute (26 Henry VIII, c. 14). It is, however, doubtful whether that Act could be regarded as authorizing what then took place, even if James were King in law; for its provisions were not carefully observed. Nor was it certain that the commissions of the suffragans did not die with the diocesan. In 1713 Hickes, with the assistance of two Scottish Bishops, consecrated Collier, Hawes, and Spinckes. These three were Bishops at large: they had no see. Thereby Hickes claimed episcopal authority after the death of his diocesan.

<sup>2</sup> Those persons who refused to take the abjuration oath were known as Non-Abjurors. Their principles were but little different from those of the original Nonjurors.

done to ease the Dissenters, and the bill for that purpose had a quick passage. The Toleration Act gave substantial relief to the great majority of the Dissenters, but its provisions were curious and inconsistent.<sup>1</sup> It repealed no penal statute; it merely provided that those who took the oaths of allegiance and supremacy, and subscribed the declaration against transubstantiation, should not be liable to the penalties imposed by various earlier Acts for non-attendance at Church services and attendance at conventicles. Further, Dissenting ministers who, in addition to complying with the above requirements, subscribed thirty-five of the Thirty-Nine Articles and a part of a thirty-sixth—that is to say, the doctrinal as opposed to the purely disciplinary portion of the Articles—were not to be liable to the penalties imposed by the Act of Uniformity, the Five Mile Act, and the Conventicle Act.<sup>2</sup> Baptists, however, were not obliged to profess belief in infant baptism. For the Quakers special provision was made; they were not required to take any oaths, but only to make a declaration of allegiance and one of belief in the Trinity and the inspiration of the Bible. Finally, the Act explicitly stated that it gave no relief to Papists or to those who denied the doctrine of the Trinity.

The Toleration Act, it will be noticed, required more of Presbyterians and Independents than of Baptists, and much more of all three sects than of the Quakers. But it imposed no obligation on any of them to which the great majority were not prepared to submit. Hence its glaring inconsistencies were regarded with indifference. The Act, indeed, was probably all the more acceptable because in so many ways it belied its popular name of 'the Toleration Act'. With the exception of the Quakers, it restricted toleration to those who were ready to accept most of the dogmas of the established Church and affirmed their belief in them in opposition to all who denied them. Thus the Act could be regarded, if the clauses relating to the Quakers were ignored, as in a sense a measure of comprehension rather than of toleration; from this point of view

<sup>1</sup> 1 Will. and Mar., Stat. 1, c. 18. The Act soon came to be known as 'the Toleration Act', but its real title is 'An Act exempting Their Majesties' Protestant subjects, dissenting from the Church of England, from the penalties of certain laws'.

<sup>2</sup> They were not required to subscribe Articles XXXIV, XXXV, and XXXVI, or the clause in Article XX which says the Church has power to decree rites and ceremonies.

it merely substituted a somewhat wider for a narrower conception of religious unity. Nor is there any doubt that at the time real and complete toleration was desired by few; such a toleration would have seemed sinful to many, and to far more a danger to the state. In practice, however, the Toleration Act not merely gave most of the Dissenters what they wanted, but indicated a great change in the relationship of the state to the established Church. Henceforth that Church, though enjoying many privileges, was not the only Church permitted by law to exist in England.

The very success of the Toleration Act contributed to the failure of the project of comprehension. Some staunch Anglicans in 1689 hoped, by carrying a scheme for comprehension, so to weaken Dissent that it would become insignificant. Accordingly a Comprehension Bill was introduced in the Lords, and had no difficulty in passing that House. When it reached the Commons, the Lower House already had a Comprehension Bill of their own before them. It might have been expected that one or other bill would become law. But many Churchmen thought the first bill went too far, and few Dissenters had any great liking for comprehension. The Toleration Act had given them the liberty they desired, and, since no scheme of comprehension would have united more than a portion of them with the established Church, they feared that the passing of any Comprehension Act would perhaps lead in the course of time to the repeal of the Toleration Act. For once the number of the Dissenters had been reduced, a plausible case for the withdrawal of toleration from the remainder could easily have been made.<sup>1</sup> Hence zeal for comprehension speedily grew cool in most quarters. The House accordingly requested the King to take the opinion of Convocation as to the project and, when he had agreed to do

<sup>1</sup> When the Toleration Bill was before the Commons, a motion had been made that it should only grant a temporary toleration; the term suggested was seven years. The House refused to agree; but this episode shows that the Dissenters had reason to fear that persecution might be renewed. About the provisions of the Comprehension Bill that originated in the Commons I have not been able to discover any information. The Bill of the Upper House freed the clergy of the established Church from the obligation to subscribe the Articles and only required them to profess approval of the Church's 'doctrine, worship, and government'. It further recognized the validity of Presbyterian orders and made a few concessions in matters of ceremonial.

so, let the bills drop, pending the delivery of that opinion. Convocation, however, showed no desire to make any of the concessions required for comprehension, and Parliament never considered the scheme again.<sup>1</sup>

In this same year Parliament took another decision of great moment with respect to the Dissenters. Many had hoped that they would be made capable of holding offices once more, and the King had informed Parliament that such was his wish. Accordingly a bill for the repeal of the Corporation Act was introduced in the Commons and received two readings, but on April 1 a motion was made that the committee which was to consider the bill be instructed so to amend it that it would still exclude from municipal office all who had not received the sacrament according to the rites of the established Church within twelve months of entering upon their offices. The opponents of the proposal, not wishing to divide against it, carried a motion for the adjournment of the debate, and after this no more was heard of the bill. In the Lords two vain attempts were made to modify the Test Act of 1673. A motion was made for the insertion of a clause in the Oaths Bill which would have abolished the requirement that all holders of office under the Crown must take the sacrament according to the rites of the Church of England. But it was defeated, as was a more moderate proposal that persons might qualify themselves by receiving the sacrament according to the rites of any Protestant Church.

Dissenters who were prepared to receive the sacrament according to the rites of the established Church could always qualify themselves for office, and the practice of 'occasional conformity' was not uncommon. Nor was it always adopted from motives of ambition. Some Dissenters held that it was a laudable practice, since it testified to the underlying unity of Protestants. Towards the end of William's reign, however, it began to arouse the fierce opposition of High Churchmen,

<sup>1</sup> To be precise, it was the Lower House of the Convocation of Canterbury which showed unwillingness even to consider comprehension. Many, perhaps the majority, of the Bishops were in favour of it. The Lower House wrangled with the Upper about various matters and wasted time on things of minor importance. Eventually, therefore, Convocation was prorogued without having formally expressed any opinion or comprehension. A commission of divines appointed by William had previously recommended various changes in the liturgy and ceremonies of the Church.

who denounced it as 'occasional hypocrisy' and a danger to the Church.<sup>1</sup> Feeling ran high against it in Anne's first Parliament, and at the end of 1702 the Commons passed a bill to put an end to the practice. The first Occasional Conformity Bill provided that any person who, after entering upon a national or municipal office, should, while holding that office, be present at a conventicle was to incur the penalty of a heavy fine; further, persons convicted were to be disabled to hold any office unless and until they had conformed to the established Church for one year. The attitude of the Lords to this bill was very different from that of the Commons; the majority of them disliked it both because of its intolerance and because it was a blow to the electoral influence of the Dissenters, but they thought it prudent to adopt an indirect method of wrecking the bill rather than to reject it outright. Accordingly they so altered the bill that it no longer applied to the holders of municipal offices or councillorships, and also reduced the pecuniary penalties.<sup>2</sup> The Commons, of course, refused to accept these amendments, and raised once more an old constitutional issue by asserting that the Lords had exceeded their powers in altering the pecuniary clauses in the bill. A conference was held, but naturally failed to produce agreement. The Lords resolved to adhere to their amendments, and the bill failed to become law. A similar bill, though one with milder penalties, was passed by the Commons in 1703, but was thrown out by the Lords. In 1704 a further attempt to prohibit occasional conformity was made. On this occasion it was proposed in the Commons that the Occasional Conformity Bill be tacked to the Land Tax Bill, but the proposal was defeated as unconstitutional, largely owing to the efforts of the Ministry. So the Occasional Conformity Bill was sent up alone to the Lords, and again rejected by them.

No more bills against occasional conformity were introduced for some years. But in 1711, as the result of an alliance between

<sup>1</sup> The expressions 'High Church' and 'Low Church' came into general use at the beginning of the eighteenth century.

<sup>2</sup> The Commons certainly desired to reduce the electoral influence of the Dissenters; by endeavouring to exempt holders of municipal offices from its provisions, the Lords, were, therefore, making it largely valueless in the eyes of the Commons. This the Lords knew full well. But not wishing the fight to centre upon that issue, they deliberately altered the fines in order to provoke a dispute concerning the rights of the two Houses.



various opposition groups in the Lords, another Occasional Conformity Bill was introduced—this time in the Lords—and rapidly passed both Houses. The bill of 1711 was modelled on the bill of 1702, but the penalties were much lighter.<sup>1</sup> None the less it pressed very hardly on the Dissenters, because, according to an interpretation of the law which long continued to obtain, they might be compelled to accept certain local offices on pain of a fine; yet the Occasional Conformity Act made them liable to a fine if they accepted these offices and continued to attend conventicles while holding them.<sup>2</sup> Nor can it have been a great comfort to them that the Occasional Act explicitly confirmed the Toleration Act.

In 1714 the Dissenters received yet another blow. The Act of Uniformity had forbidden persons to act as schoolmasters unless they were conformists and had been licensed by their diocesan. But in spite of that the Dissenters had long maintained numerous schools and places of higher education. The Schism Act of 1714 was designed to enforce compliance with these provisions of the Act of Uniformity. It provided that none was to act as a schoolmaster or teacher unless he had made a declaration of conformity and obtained a licence from the Bishop; nor were licences to be granted except to persons who had received the sacrament according to the rites of the established Church within the previous year, had taken the oaths of allegiance, supremacy, and abjuration, and had made the declaration against transubstantiation. Unlicensed teachers or licensed teachers who had attended conventicles were to be liable to three months imprisonment upon conviction in any court of record at Westminster, or at the Assizes, or before Justices of Oyer and Terminer. The Act, moreover, extended to Ireland. But, it must be noted, it did not apply to those who only taught reading, writing, or navigation. Thus the Dissenters could still make some provision for elementary education.<sup>3</sup> Nevertheless the Act would have led in time to a

<sup>1</sup> The bill of 1711 was supported by the Whigs in order to conciliate Nottingham and his friends, who, though Tories, were not supporters of the Ministry. In return Nottingham and his followers sided with the Whigs on questions of foreign policy. This bargain is surprisingly modern in character. See 10 Anne, c. 6.

<sup>2</sup> See *infra*, p. 407.

<sup>3</sup> 13 Anne, c. 7. The Bill, when it left the Commons, gave Justices of the Peace power to convict and applied to all teachers whatsoever; the changes were due to the Lords.

great diminution of their numbers, had it been enforced. It so happened, however, that Queen Anne died on the very day on which the provisions of the Act were to come into force. George I was not in favour of persecution, and so the Act remained almost a dead letter.

In 1718-19 the Ministers of George I succeeded in carrying two measures for the relief of the Dissenters. The first was for the repeal of the Schism Act and of the Occasional Conformity Act—save in so far as it confirmed the Toleration Act.<sup>1</sup> But for the opposition of the High Churchmen in the Lords it would also have contained clauses exempting Dissenters who wished to hold office from the necessity of receiving the sacrament according to the rites of the established Church, if they could prove that the parson of their parish had refused to give it them. Had this provision become law it would in practice have enabled most Dissenters who wished for office to avoid occasional conformity and would have put a stop to what would now be generally regarded as a profanation of a solemn service. But at the time it seemed to the Upper House to threaten the security of the established Church. The second Act, 'for the quieting and establishing Corporations', provided that members of municipal corporations were no longer to be required to take the oath against resistance and to sign the repudiation of the Covenant contained in the Corporation Act. Those who had omitted to do so were confirmed in their offices and indemnified; so, too, were those who had omitted to take the sacramental test; for the future no person who omitted to take it was to be removed or prosecuted, 'unless such person be removed or such prosecution be commenced within six months of such person's being placed or elected into his respective office'.<sup>2</sup> Thus the election of persons who omitted to take the sacrament was henceforth voidable only within a limited period.<sup>3</sup>

<sup>1</sup> The repeal of the Schism Act did not make it legal for the Dissenters to maintain schools; but in practice they did so with but little molestation. In 1779 they were given full liberty to maintain their own educational establishments. See 5 Geo. I, c. 4, and *infra*, pp. 405-6.

<sup>2</sup> 5 Geo. I, c. 6. The preamble says the provisions of the Corporation Act have often been disregarded.

<sup>3</sup> In 1727 an Act was passed permitting holders of state or municipal offices who had not qualified themselves sacramentally to do so within a certain time and indemnifying them for their breach of the law. Similar Acts were passed in most, though not all, subsequent years until the abolition of the sacramental test in 1828.

There was also some legislation during this period which applied specifically to the Quakers. An Act of 1696 allowed them to substitute an affirmation for an oath in most cases where the law had previously required an oath; but it explicitly provided that no Quaker was to give evidence on affirmation in a criminal case or serve on a jury or hold any office of profit under the Crown; it further permitted proceedings to be taken against Quakers for non-payment of tithe, when the sum involved did not exceed £10, before the J.P.s instead of in the ecclesiastical courts or in the secular courts in London.<sup>1</sup> The duration of this Act was limited to seven years, but in 1702 it was continued for a further eleven years, and in 1715 it was made perpetual and extended to Scotland.<sup>2</sup>

Thus, practically if not theoretically, the position of the Dissenters at the end of this period was by no means uncomfortable. They were able to worship in their own way without being molested, and in many cases they were able to hold municipal offices without being occasional conformists. Yet this did not alter the fact that their legal position was one of inferiority. Bare nonconformity still remained a statutory crime, though many nonconformists enjoyed the benefits of the Toleration Act. No nonconformist stood on an equal footing with members of the established Church as regards capacity for holding office. For the obligation, though to some extent relaxed, to receive the sacrament according to the rites of the established Church might exclude nonconformists, while it could not exclude conformists.<sup>3</sup> The Dissenters naturally wished for further concessions, but the general opinion was that the law was very indulgent. Even those Anglicans who thought the sacramental test might safely be abolished were, most of them, inclined to hold that the time was not yet ripe for the change. The trend of opinion was, indeed, toward the view that the existing law was perfect. Hence the prospects of the Dissenters did not improve after 1719.

Though these concessions were made to certain classes of

<sup>1</sup> 7 and 8 Will. III, c. 34. Proceedings before the Justices of the Peace were both less costly and more expeditious.

<sup>2</sup> 1 Geo. I, Stat. 2, c. 6 and 13. Minor changes were made by 8 Geo. I, c. 6 and 22 Geo. II, c. 46.

<sup>3</sup> I do not know that any conformist ever refused to qualify himself sacramentally on the ground that to do so was a profanation of a holy thing.

Dissenters, the laws against Roman Catholics and heretics were made more severe.

In 1700 an Act was passed which made any Roman Catholic priest liable to imprisonment for life if he exercised sacerdotal functions in England; it also provided that all Romanists who, on attaining the age of eighteen, did not take the oaths of allegiance and supremacy and subscribe the declaration against transubstantiation were to be incapable of inheriting land; lands which would otherwise have gone to them were to be enjoyed by their nearest Protestant kin; further, no Papist was to be capable of purchasing lands. The Act, however, was rather carelessly drafted, and its provisions with regard to lands were difficult to enforce.<sup>1</sup> Hence it did not prove so damaging to the Romanists as had been expected.

An Act of 1698 bore witness to Parliament's zeal for orthodoxy. It rendered incapable of office all persons who, having been educated as Christians, denied either in writing or advised speaking the doctrine of the Trinity, the truth of Christianity, or the divine authority of the Bible. Repetition of the offence was punishable by incapacity to hold land, bring an action, or receive a legacy, and by a term of imprisonment not exceeding three years.<sup>2</sup> It does not appear, however, that many persons were punished under this Act. Nor is this strange, for the courts at Westminster might well have found difficulty in determining exactly at what point a learned exposition of views on the Trinity or Biblical inspiration went beyond the bounds of permissible argument and became criminal under the Act of 1698.

The history of Convocation during this period requires some notice. In accordance with the request of the Commons, William summoned the Convocation of Canterbury to meet in November, 1689.<sup>3</sup> This body was authorized by the Crown to consider the question of revising the ceremonies and liturgy of the established Church with a view to comprehension. It soon became apparent, however, that the Lower House was violently averse to any changes. Convocation was thereupon prorogued, and neither it nor its successors were permitted to

<sup>1</sup> 11 Will. III, c. 4.

<sup>2</sup> 9 Will. III, c. 35.

<sup>3</sup> The Convocation of York did not meet. Hereinafter when I refer to Convocation, I mean that of Canterbury.

transact business for some years. But towards the end of William's reign there arose a loud demand from several quarters that Convocation should be allowed to do business. It was contended that by law Convocation ought to meet whenever Parliament met, even though the Primate had received no writ, and to be free to transact business without restriction; for the need and force of royal letters of business were denied. These claims were neither well-founded nor generally admitted.<sup>1</sup> However, in 1700 Convocation was once more allowed to do business, since the King hoped that this concession would put an end to a dangerous agitation.

The results of the experiment were not happy. During this and subsequent sessions there were a number of quarrels between the two Houses. The Lower House contested with great bitterness the right of the Primate to prorogue them. The High Churchmen who were in a majority there, while firm in their devotion to episcopacy as a divine institution, in practice showed very little respect for the Right Reverend Bishops of the Upper House. They were, however, strong believers in the royal supremacy. In 1702 they petitioned Queen Anne to decide the dispute between them and the Upper House concerning the question of prorogation; but Her Majesty made no reply to this request. On the other hand, they showed a somewhat different temper in 1707. The Archbishop of Canterbury then prorogued Convocation for a short time in obedience to the Queen's command.<sup>2</sup> When it reassembled, the Lower House sent a representation to the Upper, in which they argued that such a prorogation, while Parliament was sitting, had been unprecedented since the Act of Submission. The Primate in reply informed them that there were numerous precedents, and the Queen in a subsequent letter to the Primate declared the representation of the Lower House to be an invasion of her supremacy. Henceforth that House abstained from such protests. Convocation was not allowed to transact any business in the sessions of 1708-9 and

<sup>1</sup> The case for the first claim rested upon the *praemunientes* clause in writs summoning Bishops to Parliament. That for the second upon the Act of 25 Henry VIII, c. 19, which was alleged to give Convocation a right to prepare canons without the King's licence. Neither case was sound.

<sup>2</sup> This was to prevent them from endeavouring to impede the passage of the Act of Union.

1709-10, but it was given permission to do so in subsequent sessions for some years. In 1717, however, the Lower House commenced an attack on two works written by Hoadley, Bishop of Bangor, on the ground that they were subversive of ecclesiastical discipline, of the royal supremacy, and of the authority of the legislature in matters ecclesiastical. But a prorogation put an abrupt end to their proceedings, and Convocation never again received a licence to transact business until the nineteenth century was well advanced.<sup>1</sup>

Two interesting points with regard to the powers of Convocation came up during this period. In 1689 the Lower House desired certain books to be condemned. The Primate sought legal advice, and was advised that Convocation had no jurisdiction. In 1701 much the same thing occurred; the Bishops took counsel's opinion, and were this time advised that Convocation could not judicially censure a book without a licence from the Crown. In 1711 the Lower House once more wished proceedings to be taken against a book alleged to be heretical, and also against its author. The Bishops were in doubt, firstly, whether Convocation had jurisdiction, and, secondly, whether, if it had, an appeal could go to the Crown from its decisions. They accordingly requested the Queen to refer the matter to the judges, and this she did. Eight of the judges, together with the Law Officers, agreed that Convocation had jurisdiction over cases of heresy, although the former reserved the right to alter their opinion 'upon application for a prohibition on behalf of the persons who shall be prosecuted'. They were, however, certain that there was an appeal from Convocation to the Crown. The other four judges were of a different opinion; they held that, since the Statute of Appeals, Convocation had had no jurisdiction in cases of heresy; such cases should be tried by the ecclesiastical courts. The Queen in Council concurred with the majority, and Convocation was given permission to act. But the Bishops were still uncertain as to the part, if any, to be played by the Lower House in the trial of a heretic; nor did they know

<sup>1</sup> Convocation, however, continued to be summoned. But its activities were only such as were possible without a licence. It could present addresses to the King and also consider grievances; but it rarely discussed the latter. The chief exception was in 1742; but the results were unhappy, and thereafter only formal business was transacted.

whether it was necessary that the sentence, if any, of the Convocation of Canterbury should be confirmed by the Convocation of the Northern Province. Hence they decided to proceed first with the simpler task of censuring the book. Certain propositions extracted from it were condemned, first by the Upper House, and then by the Lower, as false and heretical. This condemnation was communicated to the Queen, who promised that she would consider it. But nothing had been done when the next session of Convocation began; the Bishops inquired what Her Majesty's intentions were, only to be informed that the document containing the condemnation had been lost. No more was heard of it after this, nor did Convocation ever try the author of the book.<sup>1</sup>

The King on various occasions endeavoured to regulate the conduct of the clergy in virtue of his supremacy. William III in 1695, acting at the instance of the Primate, issued a proclamation enjoining the Bishops to be prudent in the choice of ordinands and diligent in the supervision of their clergy. The most recent precedent for such a proclamation was to be found in the reign of Charles I. Again, in 1696 William issued injunctions for the regulation of preaching; these prohibited all preachers from discussing the Trinity except in the language of the Scriptures, the Creeds, and the Articles. William thereby did more than require preachers to be orthodox; he virtually restricted them to the use of a few formulæ when treating of a central point of theology.<sup>2</sup> George I renewed this prohibition at the end of 1714, and at the same time commanded the clergy not to introduce politics into their sermons, although they might preach in defence of the royal supremacy.<sup>3</sup>

<sup>1</sup> Since Anne had not confirmed the condemnation it was apparently of no effect. There can be little doubt that the Queen chose this not very dignified way of nullifying Convocation's proceedings in order to avoid creating an awkward situation. She wished to show outward respect for the claims of that assembly, but she must have realized that to confirm the condemnation would have aroused opposition to the Church in many quarters. Sooner or later the matter would have been raised in Parliament.

<sup>2</sup> Charles II, it is true, had forbidden the clergy to 'discuss deep points of election and reprobation'. But he had not dictated the terms to be used in handling any particular question.

<sup>3</sup> I must confess that I do not see how this last prohibition could have been enforced, nor do I know whether any attempt at enforcement was made. What could have been done to a clergyman who preached on political questions, if his sermon was not seditious? Before what court could he have been tried, and on what charge? The High Commission was no longer in existence to enforce the royal will.

## XI

### JUSTICE

DURING THE interval between the flight of James and the proclamation of William and Mary the courts did not function. The Convention Parliament remedied the inconvenience so caused by an Act for the continuance of all cases depending and for supplying defects in processes.<sup>1</sup>

William refrained from reappointing any of the Judges who had been in office immediately before the Revolution, though some of his nominees were persons who had been dismissed by Charles or James. William's appointments, moreover, were all during good behaviour, as, indeed, were those of Anne. Even patents in these terms, however, were determined by a demise of the Crown, and both Anne and George I made certain changes in the composition of the bench on their accession. Nor is there much doubt that the reasons for these changes were political.

The Acts of Settlement gave the judges security of tenure, except in the event of a demise, by providing that their commissions were to be made *quam diu se bene gesserint*, and their salaries ascertained and established; they were not to be removable save upon the address of both Houses of Parliament.<sup>2</sup>

Parliament in 1689 inquired into several matters connected with the administration of justice under Charles II and James II. A number of judges who had been dismissed by one or other of them were summoned before the Commons and asked to explain the circumstances of their dismissal. Their statements made it plain that they had been dismissed for political reasons. The Commons also investigated the methods by which the judgement in *Godden v. Hales* had been procured. Moreover, Pemberton was called upon to defend before the House his judgement in *Jay v. Topham*, which he did in a somewhat

<sup>1</sup> 1 Will. and Mar., Stat. 1, c. 4.

<sup>2</sup> 12 and 13 Will. III, c. 2.



hesitating and apologetic manner.<sup>1</sup> The Lords, on their part, after hearing the judges in the case, resolved that the fining of the Earl of Devonshire for an assault committed at the court of James II had been a breach of privilege. No punishment, however, was inflicted on those who had given these judgements.

At this same time Oates appealed to the Lords against his sentence for perjury. The nine judges who were consulted by the Upper House concurred in the opinion that it was illegal. But the Lords, forgetting that a scoundrel has as much right to justice as a saint, upheld the sentence. The Commons held there had been a miscarriage of justice, and passed a bill to reverse the judgement in Oates's case as being erroneous. Not content with this, they described the verdict—in the preamble to the bill—as corrupt. The Lords made several amendments to the bill and, in particular, struck out the reference to the verdict. The Commons refused to agree, and a deadlock occurred. Thus the Lords were able to secure the failure of a detested bill without the odium of rejecting it outright. On the other hand, bills were easily passed for the reversal of the judgements in several other political cases.<sup>2</sup>

Parliament had undoubtedly good grounds for making these inquiries and passing these bills; but there was a certain danger that these proceedings might stimulate the Houses to interfere unwarrantably with the courts. Such interference was actually attempted by the Lords in 1698. What happened was this. Holt, Chief Justice of the King's Bench, had had to try one Knowles for murder. Knowles had pleaded in abatement that he was a peer and, as such, should be tried by peers. The replication had been that Knowles had petitioned the Lords to be tried by peers, and that they had then resolved he was not a peer. Holt, after hearing argument, had held that Knowles's plea was good, since the Lords could not decide a matter of peerage unless it had been referred to them by the Crown. Knowles had subsequently petitioned for a writ of summons, and his petition had been referred to the Lords. The Committee of Privileges thereupon summoned Holt before them and asked him to give reasons for his judgement. Holt

<sup>1</sup> For these cases see *supra*, pp. 82 and 90.

<sup>2</sup> Namely, those against Russell, Sidney, Cornish, and Alice Lisle.

manfully refused to do so, and categorically stated that he was not to be arraigned for what he had done judicially. After the Committee had reported, the Lords summoned Holt before them, and made the same demand of him. Once again Holt refused to comply.<sup>1</sup> The House dared not commit him to prison, and escaped from an awkward situation by an adjournment. Holt's brave stand proved a warning, and the Houses henceforth respected judicial immunity.

Several statutory treasons were created during this period. In 1692 it was made treason for the duration of the war either to export arms to France or to go thither without a licence.<sup>2</sup> In 1698 persons who had gone to France without a licence since 1688, or had borne arms for James and returned to England without a licence, were declared to have committed treason.<sup>3</sup> In 1702 an Act attainted the Old Pretender and declared guilty of treason all those who corresponded with him or sent him money.<sup>4</sup> An Act of 1703 made it treason to attempt by an overt act to prevent Anne's statutory successor from succeeding to the throne on her death.<sup>5</sup> Another Act, of 1705, made it treason to assist the King of France in certain ways during the war with that country.<sup>6</sup> An Act of 1706 made it treason to affirm in writing that 'Anne was not the lawful Queen or that any person had any right to the Crown, other than a statutory right, or that the succession could not be altered by statute.'<sup>7</sup>

The definition of treason was also somewhat extended by judicial construction. In *Lord Preston's Case* the court held that to attempt to go from England to France for the purpose of giving military information to Louis XIV, with whom England was at war, was to compass the King's death. In general, the courts now took the view that any attempt to capture or depose the King was an overt act of treason, being a compassing of the King's death. Similarly, levying war against the King was taken to include many acts that were

<sup>1</sup> Holt, of course, would have been perfectly ready to state his reasons had the case come before the Lords by a writ of error. What he refused to do was to answer a virtual accusation.

<sup>2</sup> 3 Will. and Mar., c. 13.

<sup>3</sup> 9 Will. III, c. 1.

<sup>6</sup> 1 Anne, Stat. 2, c. 21.

<sup>4</sup> 13 and 14 Will. III, c. 3.

<sup>5</sup> 3 and 4 Anne, c. 13.

<sup>7</sup> 4 and 5 Anne, c. 20. Re-enacted after the Union by 6 Anne, c. 41.

not to the lay mind treasonable. In *Dammaree's Case* a rioter, who had taken part in the destruction of meeting-houses, was held to have committed treason. After the accession of George I, however, this interpretation of the law was seldom invoked. For in 1715 the Riot Act was passed, which proved an adequate weapon for the maintenance of order.<sup>1</sup> This provided that if twelve or more persons, assembled in a riotous manner, refused to disperse within one hour of the reading by a Justice of the Peace of a proclamation contained in the Act, they should be guilty of felony. Moreover, if they resisted arrest or dispersal, those who used violence against them in support of the law were to be indemnified both against the King and against all private persons.

In 1689 the *Habeas Corpus* Act was for the first time partly suspended. There was very naturally much confusion during that year, and many illegalities were committed. William, too, after he had become King had appointed judges and magistrates. These, together with the Houses of Parliament, the Privy Council, and the Secretaries of State, could commit persons to jail. But under the *Habeas Corpus* Act, all persons committed, except for treason or felony plainly expressed in the warrant of commitment, could claim to be released on bail, nor could those committed for treason or felony be indefinitely kept in jail without trial. Moreover, the King's Bench had a right to bail even persons committed for these offences. It was only persons committed by either House who could not be bailed at all while Parliament was in session. At a time when there was a danger of a counter-revolution, perhaps brought about by foreign intervention, it was inevitably felt that the powers of the executive must be strengthened, if the new régime was to survive. But there was also a certain reluctance to tamper with such a bulwark of liberty as the *Habeas Corpus* Act. The problem became acute in March, 1689. On the first day of that month the King sent a message to the Commons informing the House that he had directed the arrest and committal of several persons upon suspicion of treason; <sup>2</sup> there was, however, a danger that they might take

<sup>1</sup> 1 Geo. I, Stat. 2, c. 5.

<sup>2</sup> This the Secretaries of State could do; Justices of the Peace could not do so legally, but some of them had broken the law.

advantage of the *Habeas Corpus* Act to obtain bail. Previously the judges had on occasion frustrated the intent of that Act by requiring excessive bail, but the practice had been condemned in the Declaration of Rights, and William therefore informed the Commons that he did not wish it to be employed again. The Commons forthwith resolved to bring in a bill empowering the King to detain for a limited period such persons as he suspected of conspiring against the Government. Very different was the conduct of the Lords, to whom William had sent a similar message. They drew up an address to the King in which they asked him to detain all suspected persons till April 17. With this address they requested the Commons to concur. Thus the Lords were in favour of asking the King to suspend the *Habeas Corpus* Act, though only at the request of Parliament. But if the King could do this, could he not suspend any Act without such request? Nor, for that matter, could the judges have rightfully refrained from inquiring into the lawfulness of the suspension, if called upon to do so.

The Commons were certainly more mindful of the constitution than the Lords on this occasion. But their action in insisting that the Act, if it was to be suspended, could only be suspended by statute, did not merely safeguard a principle laid down in the Declaration of Rights; it also created an important precedent. The passing of the Act desired by the Commons implied that henceforth extraordinary powers could only be conferred upon the executive by Parliament and for such time and in such manner as Parliament pleased; these powers were to be obtained not by straining the prerogative, but by application to the Houses. Parliament therefore, on the one hand, could prevent undesired extensions of the executive power; but, on the other hand, they claimed to be able to authorize the executive to exercise any powers, whatever the previous state of the law.<sup>1</sup> The Act, however, which now became law, was moderate in its scope. It did not totally repeal the *Habeas Corpus* Act, even temporarily. It merely

<sup>1</sup> It is worth mentioning that the Commons would not accept suggestions that they should themselves commit suspected persons, or that they should impeach them of treason and request the Lords to commit them. They were unwilling, that is, to abuse their privileges or to make a mock of impeachments. I do not say they fully realised the implications of their conduct; but those implications were none the less real and important for all that. A few months later their attitude changed. See *infra*, p. 287.

provided that until April 17 such persons as were committed by warrant of the Privy Council, signed by at least six Councillors, for suspicion of high treason might be kept in custody without bail; until that date no judge or other person was to bail any of them without an order of the Council signed by six councillors; after April 17, however, persons committed were to have the benefit of the *Habeas Corpus* Act; but nothing in the present Act was to diminish the privileges of Parliament or to authorize the imprisonment of any member of either House, until the House had been informed of what he was suspected of, and had given their consent for his committal.<sup>1</sup>

As soon as this Act had expired, applications to be tried or bailed were made by a number of persons in custody. As a result another Act was passed, which authorized the detention in custody until May 25 of all persons who on April 25 or later were in prison by warrant of the Privy Council or of a Secretary of State for suspicion of high treason or treasonable practices. The same provisos were added as had been contained in the previous Act.<sup>2</sup> It will be noted that this Act gave power to a single Secretary as well as to six Privy Councillors, and thereby increased the possibility of unjustifiable commitments, though it also made speedy action more easy. At the end of May yet a third Act renewed the grant of extraordinary powers until October 23, but gave the right of commitment under these conditions to the Privy Council alone.<sup>3</sup> To this renewal there had been a good deal of opposition, and after this Act had expired no attempt at a fourth suspending Act was made. But the Houses did commit a few persons whom they thought it dangerous to leave at large. This somewhat arbitrary use of their powers was probably less unpopular than a further suspension of the ordinary law.

Both before the passing of the Acts and during their operation many things had been done by William's supporters which had no legal justification. There was therefore every prospect that the aggrieved parties—and they must have been many—would seek the remedies to which they were entitled by law. Parliament accordingly passed an Act of Indemnity. The preamble recited that many Lords Lieutenants, Justices of the Peace,

<sup>1</sup> 1 Will. and Mar., Stat. 1, c. 2.

<sup>2</sup> 1 Will. and Mar., Stat. 1, c. 7.

<sup>3</sup> 1 Will. and Mar., Stat. 1, c. 19.

and other officers civil and military had, since William's invasion of England, put into custody several suspected persons, seized arms and horses, entered private houses, and quartered soldiers therein—things which were justified only by the state of public affairs. The enacting part of the statute provided 'that all personal actions, suits, molestations, and prosecutions whatsoever, and judgements had thereupon, if any be for or by reason of the premisses or any matter or thing, advised, commanded, appointed, happened or done in order to the bringing in Their Majesties to this kingdom, or for their service, or for the safety of the government, be and are hereby discharged and made void'.<sup>1</sup> This Act was wide enough in scope to cover most things. It could be justified by very strong political reasons, but it affords a curious commentary upon the Declaration of Rights. Nevertheless a precedent was then set, and partial suspensions of the *Habeas Corpus* Act have usually been followed by Acts of Indemnity. For, as a rule, such suspensions lead to the committing of various illegalities.

The *Habeas Corpus* Act was more than once partly suspended after 1689 in times of crisis. The suspensions were always for a limited period, and the privileges of Parliament were preserved. But power to commit was given to a Secretary of State as well as to the Privy Council.<sup>2</sup>

The numerous impeachments of the period raised several points of legal interest. In 1701 the Commons impeached four peers—Somers, Orford, Portland, and Halifax—of high crimes and misdemeanours. Since, however, they were dilatory in presenting articles against them, the Lords sent a message asking the Lower House to do so speedily. The Commons then presented articles against Orford and—after more delay—against Somers; the articles against Halifax came still later, while those against Portland were never drawn up. Meanwhile a quarrel arose between the Houses about

<sup>1</sup> 1 Will. and Mar., Stat. 2, c. 8.

<sup>2</sup> I do not enumerate these later suspensions, since they did not give rise to any points of great constitutional interest. But the fact that the executive could obtain extraordinary powers from Parliament in a time of crisis is to be remembered. The rebellion of 1715, as might be expected, led to a partial suspension of the Act. This was followed by an Act of Indemnity. See 1 Geo. I, Stat. 2, c. 8, 30, and 39. The suspension seems to have given rise to more controversy than the Act of Indemnity.

other matters. The Lords, alleging there was no precedent for it, refused to require Orford to give security to abide his trial, as the Commons wished. The Commons, on their part, declined to accede to the Lords' request that an early day should be appointed for the trial, and maintained that they alone had a right to decide who should be tried first. A little later they proposed the establishment of a joint committee of both Houses to settle the conduct of the impeachments. The Lords would not hear of this, and further annoyed the Commons by resolving that Lords of Parliament impeached of high crimes and misdemeanours should not upon their trial be without the bar, and that each of the accused peers should have the right to vote at the trial of the others. The Commons angrily renewed their request for a joint committee, and again declined to concur with the Lords' choice of a date for the trials. The Lords none the less proceeded to try Somers and Orford, who were forthwith acquitted, since the Commons did not appear against them. On the last day of the session the Lords further dismissed the impeachments of Halifax and Portland. The Commons, of course, were furious at these proceedings; they had, indeed, resolved after Somers's acquittal that the Lords had 'endeavoured to overturn' their right of impeachment and had invaded the liberties of the subject. But this could not alter the fact that the Lords had established their right to regulate the trials of impeached persons.

This right was again exercised in 1717, when Oxford was tried for treason and high crimes and misdemeanours. After the trial had begun, the Lords decided, upon the motion of a peer, that the charges of treason should be tried first. The Commons refused to agree, and contended that all the charges should be tried together, since they so desired. Conferences were held, but neither House gave way. The Commons finally resolved to take no further part in the impeachment, and so Oxford was duly acquitted.

The Act of Settlement decided an old controversy in the sense desired by the Commons. For it enacted that 'no pardon under the Great Seal . . . be pleadable to an impeachment by the Commons'. But nothing was said about the King's right to pardon an impeached person after he had been sentenced.

It was, however, widely held that the King could not pardon such persons. When, in 1716, the Commons resolved to impeach six Scottish peers who had taken part in the Jacobite rising, they were assured by the Solicitor-General that these peers could not be pardoned if convicted.<sup>1</sup> They were accordingly impeached and found guilty; great efforts were then made by their relations and friends to save their lives. The Commons evaded attempts to influence them by an adjournment. But the Lords took into consideration the case of the unhappy six, and both resolved that the King had a right to reprieve them, and prayed him in an address to reprieve those he found deserving of mercy. As a result three of the six were first reprieved and then pardoned.<sup>2</sup>

The law of procedure in cases of treason was substantially modified during William's reign after a long controversy. There was a widespread feeling that accused persons should be granted increased facilities for defending themselves. The peers, moreover, desired so to reform the composition of the Lord High Steward's court as to prevent the packing of the jury. A bill to carry out these reforms was passed by the Lords in 1689, but was rejected by the Commons, who had no wish to see the privileges of the peers increased. But in 1691 the Commons passed a bill for certain procedural reforms, which did not deal with the Steward's court; the Lords so amended it as to secure the desired change, but the Commons refused to accept the amendments, and the bill was lost. Several further attempts to alter the law were made by the Commons, but the Lords would not accept any bill that did not give them what they wanted. Agreement, however, was reached in 1696. It was then enacted that in the case of the trial of a peer or peeress for treason or misprision, all peers should be summoned and have the right to vote if they appeared; all persons accused of treason, whether peers or commoners, were allowed to have a copy of the indictment

<sup>1</sup> The King could not pardon in an appeal, since an appeal was the suit, not of the King, but of an injured party. It was therefore arguable by parity of reasoning that he could not pardon a person convicted upon an impeachment. For impeachments are the suit of the Commons.

<sup>2</sup> The address of the Lords could not give the King power to reprieve, much less pardon, if he did not already have it. But it was an assurance that his use of the prerogative would not be attacked.



five days before trial, to make their defence by counsel, and to subpoena their witnesses and have them sworn; no person might be condemned save on the evidence of two witnesses to an overt act or acts of treason.<sup>1</sup> This statute did not in any way apply to impeachments.

Subsequently two further changes were made. In 1703 it was enacted that witnesses for persons accused of treason or felony must be sworn in the same manner as witnesses for the Crown.<sup>2</sup> In 1709 it was enacted that after the death of the Pretender persons indicted for high treason should be furnished with a list of the witnesses against them, and of the jurors summoned, and also with a copy of the indictment, ten days before their trial.<sup>3</sup>

Recourse was had to Acts of Attainder more than once during this period. Thus in 1701 the Old Pretender was attainted by statute. Again, in 1715 an Act was passed for the attainder of Bolingbroke, who was impeached of treason, and had fled the country, unless he returned to stand his trial. Acts of these kinds were in accordance with recent precedents.<sup>4</sup> But the attainder of Sir John Fenwick in 1696 comes under another category. Fenwick, a prisoner accused of treason, was able to escape trial because only one witness could be produced against him. But his guilt was certain and the feeling against him was strong. Parliament therefore passed a bill of attainder, and he was executed. This was the last occasion on which such a method of securing a man's death was adopted.

<sup>1</sup> 7 and 8 Will. III, c. 3.

<sup>2</sup> 1 Anne, Stat. 2, c. 9.

<sup>3</sup> 7 Anne, c. 21.

<sup>4</sup> Compare the attainder of Monmouth in 1685—before his capture—and that of Clarendon in 1667. Monmouth was a rebel in arms at the time; the Act against Clarendon was, like that against Bolingbroke, for his attainder unless he returned within a certain time to stand his trial.

## XII

### THE FORCES OF THE CROWN

THE DECLARATION of Rights pronounced the maintenance of a standing Army in time of peace to be illegal without the consent of Parliament. Since William declared war on France soon after he had become King, he was able to keep an Army on foot without statutory authority, but he had, of course, no statutory powers for the maintenance of discipline. Nor was it expedient for him to attempt to exercise the somewhat vague powers of the Crown to enforce martial law in time of war. A small mutiny at the outset of the reign focussed the attention of Parliament upon the problem, and led to the passing of the first Mutiny Act. Parliament were compelled to admit the dangers of the situation. If the Army was not kept under strict discipline, neither the King nor Parliament themselves would be safe. On the other hand, the old dread of a standing Army made them reluctant to give the Crown powers which would make the Army its docile instrument. Parliament therefore decided to give the Crown limited and temporary powers. They thus safeguarded themselves as far as possible against the danger that the King might seek to make himself absolute with the support of the Army.

The preamble to the first Mutiny Act stated that since it was necessary to keep up an Army for the safety of the realm, the defence of the Protestant religion, and the reduction of Ireland, and since no man might suffer loss of life or limb by martial law, in view of the emergency special provision must be made for the maintenance of military discipline.<sup>1</sup> Accordingly the Act provided that all soldiers in receipt of pay who were guilty of mutiny or desertion might be tried

<sup>1</sup> This implies that martial law was at all times illegal whether within or without the realm; that is to say as regards English subjects. Acts committed against aliens on alien soil would not be illegal according to English law. The wording of the preamble was altered in later Acts.

and sentenced to death by a court-martial; for the composition and procedure of such courts-martial certain regulations were made; the Act, however, was not to exempt any soldier from the ordinary processes of law, nor was it to extend to the Militia. Finally, it was only to be in force for six months.<sup>1</sup>

The terms of the Act were thus well calculated to reconcile the existence of a disciplined Army with the maintenance of English liberties. Parliament made it clear that the soldier was to remain a citizen, and that he could not be subjected to severe punishments by sentence of a court-martial save in so far as permitted by statute. Yet the Act was in some respects vague. It made no mention of the King's power, if any, to issue articles of war, although it was necessary that he should do so if discipline was to be maintained. But Parliament had achieved their main purpose. Though the Act was renewed, it was not made permanent. Parliament always limited the duration of Mutiny Acts to a short period, usually one year. Hence the Crown had to have continual recourse to Parliament. Moreover, that assembly had another weapon—the control of the purse. In 1689 began the practice of providing for the Army by annual and appropriated grants. Parliament gave the money for a certain number of men each year, and that number was not to be exceeded.<sup>2</sup>

After the peace of Ryswick it was for a time doubtful whether Parliament would sanction the continuance of even a small standing Army. It was argued by many, and often with sincerity, that the maintenance of an Army in time of peace was inconsistent with the preservation of English liberties. Though there was a danger of a Jacobite rising, and even of a rising supported by foreign professional troops—for another war might break out at short notice—it was contended that the Militia alone could defend the country from foreign and domestic enemies. Nor did the obvious retort that if the Militia were a match for foreign troops, they were also strong enough to prevent a military despotism, convince the opponents

<sup>1</sup> 1 Will. and Mar., Stat. 1, c. 5.

<sup>2</sup> But the Crown was never under any obligation to maintain any number of troops. Parliament fixed a maximum, not a minimum. Nor was the Crown under any obligation to pay the troops or any of them. The money appropriated for that purpose might be withheld, though it could not be spent on anything else.

of a standing Army. So exaggerated were the fears of those men, that it is now hard to believe they can have been genuine; but genuine they were in most cases. However, the dangers of disbanding all the troops were so plain that Parliament reluctantly brought themselves to agree to the maintenance of a small force. At the end of 1697 an Act was passed for the disbanding of the greater part of the Army, but the King was permitted to retain a force no larger than that which had existed in 1680. A year later the Army was still further reduced, this time to 7,000 men. But although the Army was not wholly disbanded, Parliament refused to grant the King statutory powers for the enforcement of discipline. The Mutiny Act of 1697 expired on April 10, 1698, but Parliament would not renew it. Nor was another Mutiny Act passed until February, 1702, when war with France was imminent. During the interval the Army was kept under tolerable discipline, but how it was done is a mystery.<sup>1</sup> Nor did the outbreak of the War of the Spanish Succession more than suspend hostility to a standing Army. After the close of that war the existence of the Army was annually deplored by a fairly large minority in both Houses, and this feeling undoubtedly kept down its numbers; for even the majority regarded the Army as at best a necessary evil.

The later Mutiny Acts substantially re-enacted the provisions of the first Act with certain changes in the preamble and additions to the enacting clauses. Of these some deserve a brief mention here.

The reasons which in the eyes of Parliament made the maintenance of a standing Army necessary were always inserted in the preamble of the Act, although those reasons varied. Thus in time of war reference was usually made to that fact; the last Act of William's reign—that of 1702—spoke of the need for an Army to preserve 'the liberties' of Europe. The first Act to be passed after the peace of Utrecht said the Army was required for 'a guard to Her Majesty's person, . . . the safety of this kingdom, and the preservation of Her

<sup>1</sup> There had been previously, and were to be afterwards, a few brief periods when no Mutiny Act was in force. But except during this period a Mutiny Act was passed every year, even after the peace of Utrecht. The failure to pass a Mutiny Act did not make the maintenance of an Army illegal, since Parliament granted money for that purpose.

Majesty's dominions beyond the seas'. In 1715 reference was made to the rebellion of that year. A change of a very different character was also made in the preamble to the first Act of Anne's reign, which contained the words 'whereas no man may be subjected *in time of peace* to any kind of punishment *within this realm* by martial law'. The words in italics were new, and their insertion implied that the Crown was free to exercise whatever non-statutory powers it might possess of proclaiming and enforcing martial law within the realm in time of war or outside the realm at any time.<sup>1</sup> In the preamble to the Act of 1714 there was for the first time inserted a reference to the numbers of the Army; for it spoke of the need to keep on foot a force of not more than 8,000 men for the defence of Britain, as well as a force of unspecified size for the defence of the Queen's dominions beyond the seas.<sup>2</sup>

In 1690 and later the law against compulsory billeting was so far modified as to permit the quartering of soldiers upon innkeepers by constables; but in 1713 this power was restricted within very narrow limits.<sup>3</sup>

The area over which the Acts were applicable was gradually extended. The first Act only applied to England; before the death of William Ireland and the Channel Islands had been included; Scotland was also included after the Union, as were Gibraltar and Minorca early in the reign of George I. Similarly the categories of persons to whom the Act applied were increased. In 1697 it was extended to the Marines, when on shore, in 1703 to the Artillery, and in 1712 to the invalid companies.

In general, the tendency of Parliament was to increase the powers granted to the Crown for the maintenance of discipline. Thus the first Act of Anne's reign gave the Crown power to subject to trial by court-martial soldiers who committed offences outside England, and also contained a proviso that nothing in the Act was to abridge the Crown's power to make articles of war. The Act of 1715, however, explicitly authorized the Crown to draw up articles of war applicable to the troops in Britain.

<sup>1</sup> The law applied by courts-martial in virtue of the Mutiny Acts was military law, not martial law. The term 'military law', however, was not used until the nineteenth century. See 1 Anne, Stat. 2, c. 20.

<sup>2</sup> 13 Anne, c. 4.

<sup>3</sup> Of course, innkeepers were paid for taking in soldiers.

The articles issued in 1717 gave courts-martial jurisdiction over many civil offences committed by soldiers; since the Act of 1715 had provided that any soldier who had been tried by court-martial could plead the decision of that court in bar to an indictment for the same offence, the result was that the military were to a large extent removed from the jurisdiction of the ordinary courts. Moreover, the Crown had power to make any offence triable by court-martial. Parliament can only have permitted this violation of a fundamental principle in a moment of inadvertence; for this separation of the soldiers from their fellow-citizens fully merits that description. In 1719, however, Parliament provided that soldiers accused of a crime punishable by the ordinary law should be surrendered to the civil magistrate; persons convicted in the civil courts of such a crime were not to be liable to any punishment by a court-martial, save cashiering, for the same crime. In 1722 the clause providing that the judgement of a court-martial could be pleaded in bar to an indictment was deleted.<sup>1</sup>

After the peace of Utrecht Parliament restricted the power of punishment which courts-martial had hitherto enjoyed. The Act of 1713 abolished the death penalty, and only allowed courts-martial to inflict corporal punishment not extending to life or limb; on the other hand, it gave them jurisdiction over 'immoralities, misbehaviour, or neglect of duty'. Their powers remained substantially unaltered until the outbreak of the rebellion of 1715 caused Parliament to restore the death penalty for mutiny and desertion. In 1717 courts-martial were for the first time permitted to inflict the death penalty in time of peace for a specified number of offences; one of these was refusal to obey the 'military orders' of a superior officer. This provision aroused much controversy, since it appeared to make the soldier punishable for disobedience to an unlawful command. In 1718, however, the wording of the clause was altered, and henceforth it was only an offence against military law to 'refuse to obey any lawful command' of a superior officer.<sup>2</sup>

<sup>1</sup> See 1 Geo. I, Stat. 2, c. 9; 5 Geo. I, c. 5; and 8 Geo. I, c. 3. Soldiers enjoyed a limited exemption from arrest for debt; by 4 Geo. I, c. 34 they could not be arrested for a debt of less than £10.

<sup>2</sup> 3 Geo. I, c. 2; and 4 Geo. I, c. 4. The present position seems to be that it is not criminal at Common Law for a soldier to obey an order that

The right to issue articles of war gave the Crown much power over the Army. But that right was limited in two ways. It was held that the articles only had the force of law in so far as they were for the good government of the Army; any articles which infringed the rights of the soldiers as citizens would have been *ultra vires*. Again, the Attorney-General advised the Crown in 1728 that the articles could not direct the infliction of the death penalty for any offence not made capital by the Mutiny Act.

The Act of Settlement provided that no person not being a natural-born subject was to hold any office of trust, either civil or military. This clause prevented the granting of commissions to those of alien birth; but it did not prevent such persons from enlisting as privates.<sup>1</sup>

Conscription was applied to paupers during the reign of Anne by a number of temporary Acts, which directed the Justices of the Peace to levy for military service such able-bodied men as neither followed a lawful calling nor possessed means of support. Other Acts, also temporary, granted a discharge to imprisoned debtors who joined the Army or Navy. Others, again, permitted the Crown to pardon felons convict on condition that they enlisted.<sup>2</sup>

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is not plainly illegal. The authority for this statement is the judgment of the Cape of Good Hope Supreme Court in *Regina v. Smith* (1900). It is probable that British courts would follow this precedent, although it is not binding upon them.

<sup>1</sup> 12 and 13 Will. III, c. 2. Such was the opinion of the lawyers.

<sup>2</sup> The first Act for the conscription of paupers was 2 and 3 Anne, c. 13; the first Act with regard to debtors was 7 and 8 Will. III, c. 12; the first Act with regard to felons was 1 Anne, Stat. 2, c. 20.

## XIII

### THE PRESS

THE LICENSING Act had, in 1685, been renewed for seven years, and thence until the end of the next session of Parliament. Early in 1693, accordingly, the question of its further renewal came up. The Commons decided that it should be renewed for one year, and thence until the end of the next session of Parliament. It would appear that some proposal, of which the nature is unknown, was made for its modification, but rejected by the House. The Lords concurred with the Commons, and the Act was duly renewed; but an amendment was likewise proposed and defeated in the Upper House; this was to the effect that any book bearing the names of its author and printer might be published without a licence. The Commons again considered the renewal of the Act in 1695, and decided that it should not be included in a bill then before them for continuing various Acts which were about to expire. The Lords carried an amendment for its inclusion; the Commons refused to concur, and a conference was held, after which the Lords yielded. The reasons advanced by the Commons for their refusal to concur with the Lords are remarkable for their omissions. They do not contain any argument for the liberty of the press, in which the Commons evidently did not believe. But the Commons pointed out that the provisions of the Act were in many ways absurd and inequitable; they said the right of search conferred by it was a grievance; they objected to the privileges it bestowed upon the Stationers' Company as savouring of monopoly; they complained that the Act deprived the Houses of the power freely to order the printing of documents; finally, they pointed out that quite apart from the Act the writing and printing of seditious or treasonable books were punishable at Common Law.<sup>1</sup>

There is some reason to believe that the Commons were influenced by other considerations than those which they

<sup>1</sup> One cannot infer from this that they desired the press to enjoy any reasonable amount of freedom.



avowed. The truth was that the working of the Licensing Act after the Revolution had been most unsatisfactory. Much depended upon the Licensor whom the Secretaries of State appointed as their deputy, and his task was very difficult to perform. The first Licensor to be appointed after the Revolution was a man named Fraser, who strongly held the view that James had been justly deposed. Accordingly he licensed many works which were distasteful to those who held either that James had abdicated or that William and Mary ruled by right of conquest. This alone might have been tolerated, but when he licensed a work which maintained that the *Icon Basiliæ* has been written, not by Charles I, but by Gauden, a tempest of indignation broke loose, and the unhappy Fraser had to resign. His successor, Edmund Bohun, was a man of very different opinions; he was convinced that all resistance on the part of the subject was unjustifiable, but was prepared to submit to William and Mary on the ground that they had conquered England and were therefore entitled to obedience. He accordingly refused to license many works written in defence of the Revolution. As a result these were often published without a licence, nor was there much danger that their authors and printers would be prosecuted. But though the Government sensibly abstained from proceeding against the champions of the Revolution, the Licensing Act was thereby made to seem absurd. Bohun himself eventually helped yet further to discredit it by licensing a book entitled *King William and Queen Mary Conquerors*. As may be imagined, the bulk of the nation did not believe England had been conquered by a small Dutch Army; the House of Commons took the matter up, summoned Bohun before them, questioned him sharply, resolved that the book should be burned by the common hangman, and requested the King to dismiss Bohun. In view of these facts it is not strange that the Licensing Act was allowed to lapse. In 1696, it is true, its renewal was once more proposed in the Commons, but the House rejected the motion. They now had, we are told by a contemporary, an additional reason for so doing. After the expiration of the Act in 1695 unofficial newspapers had begun to appear once more, and had proved far more to the taste of many M.P.s than the official *Gazette*.<sup>1</sup>

<sup>1</sup> Unofficial newspapers had appeared during the Civil War, and during the Popish Plot period when no Licensing Act was in force.

The Commons, when they declined to vote for the renewal of the Licensing Act, did not intend the press to be free from all regulation. Several bills for the regulation of the press were introduced, the first at the end of the session of 1694-95, and others in the sessions of 1695-96, 1696-97, and 1697-98. All failed to pass the House, nor are their provisions now known. We are, however, better informed about another bill which was passed by the Lords in the session of 1698-99. It provided that owners of presses were to register their names with the Stationers' Company, with which also all books published in London must be registered, unless licensed by royal sign manual, or by the Secretaries of State, or by either House of Parliament; further, books must bear the names of their printers and publishers. This bill, however, did not pass the Commons. It was reintroduced in the Lords in 1702, but this time was defeated there. Another bill for the regulation of the press was before the Commons in the session of 1703-4, but failed to pass. The same fate attended a bill which the Commons considered in 1713.

It is to be noted that the courts did not now maintain, as Chief Justice Scroggs had maintained, that it was illegal to publish any news without permission from the Crown. Whether or no Scroggs was right in point of law, there had been so great a change of opinion that only a statutory censorship would have been tolerated. After the final expiration of the Licensing Act anything might be printed without a licence. Of course, authors, printers, and publishers were liable to prosecutions for criminal libel, and such was the interpretation of the law that most criticism of the Ministers might be libellous. But if the law was severe, writers were bold, and what surprises the modern reader of the then newspapers and pamphlets is not their reticence, but their recklessness and scurrility.

# PART IV

THE AGE OF CONSERVATISM, 1720–1801



# I

## INTRODUCTION

AFTER THE storm and stress of the previous generations this period appears remarkably tranquil. Though many Acts were passed therein which require mention here, few of them were in themselves of very great importance. If statutes alone are taken into account, the constitution was not very different in 1801 from what it had been in 1720. The absence of great statutory changes was due to that profound veneration for the Revolution settlement which obtained almost universally throughout the greater part of the period. Not until the eighteenth century had entered upon its last quarter was the constitution seriously criticized and drastic reform advocated. But even then the tendency to criticism was only to be found among a minority. This aversion to change, strange as it may now seem, is not hard to explain. The Revolution settlement had proved fairly satisfactory to the majority of politically-minded Englishmen. It seemed that liberty and order had been reconciled. In spite of the dismal prophecies of the Jacobites, the country had not fallen into anarchy as a result of the deposition of James. On the contrary, the new régime had triumphantly survived the tests of war and rebellion, and under it Englishmen had enjoyed their legal rights save for slight and temporary diminutions; the pre-eminence of the established Church had been maintained, but enough had been done for the Dissenters to remove the worst of their grievances; such disabilities as were still imposed on them were represented not as persecution, but as necessary safeguards of the Church. Nor was this all. The Revolution settlement appeared to have secured the rights and independence alike of the Crown, the Lords, and the Commons. After 1688 the Crown had not attempted directly to exceed its powers, and the Houses had been able to co-operate fairly effectively with the Crown. Granted that the Commons had enormously

increased their power, yet that increase, not having been violently contested by the Crown, did not attract great notice, or at least did not seem very wrong. The Commons themselves, after manifesting a disposition to arbitrary behaviour, had shown a fair respect for constitutional proprieties.<sup>1</sup> Thus the Revolution settlement came to be regarded as guaranteeing what most men cherished, the rule of law and respect for the rights, conventional as well as legal, of individuals and corporate bodies.

Had this been all, however, the possibility of numerous and important statutory changes in the constitution would not have been excluded. A constitution may be fairly satisfactory, and yet be deemed capable of improvement. Even if changes are not desired at any particular time, it may yet be admitted that they will be desirable in the not-too-distant future. But this will hardly occur unless there is a general belief in the possibility of progress, and that belief was rare throughout the greater part of the eighteenth century. But if men did not generally believe in the possibility of progress, they did believe in the existence, not merely in the possibility, of perfect institutions. To the majority of Englishmen the Church, the constitution, and the legal system all appeared perfect, or nearly so. Since what is perfect can only be altered for the worse, change could not be desirable; the best already existed, and men's duty was to preserve it. Perfect institutions, however, do not create perfect men. Many thought that Englishmen, particularly those concerned with politics, were becoming corrupt; hence the constitution was not being properly applied; the fault was not, of course, with the constitution, but with the men who were not loyal to it; the remedy, in so far as any remedy was possible, lay, not in altering the constitution, but in compelling men to respect it. It is in the light of these beliefs that one must examine the purpose of many proposals which might otherwise seem to indicate a wish for constitutional change; they were, in fact, only designed to enforce by law what should have been enforced by love of the good old constitution.<sup>2</sup>

The general belief that the constitution was perfect was

<sup>1</sup> Cf. their abandonment of tacking. *Supra*, p. 205.

<sup>2</sup> *E.g.* the Place Bills, the Contractors' Bill, and the bill for the disfranchisement of revenue officers. See *infra*, pp. 322, 378-80.

accompanied by a curious failure to understand the nature of constitutions. The eighteenth century saw the development of several very important conventions and also of extra-legal institutions, such as the Cabinet and the premiership.<sup>1</sup> But the men of the time were not properly conscious of the importance of conventions. These were almost ignored by writers of treatises and were seldom sensibly discussed, at least in public, even by those politicians who were continually observing them. In the same way the Cabinet and the premiership were seldom included in formal descriptions of the constitution and were rarely discussed in Parliament.<sup>2</sup> For the majority the constitution was only to be found in the statutes, in law reports, in the writings of certain political theorists such as Locke, and in the *Journals* of the Houses. This blindness undoubtedly made the growth of new conventions and extra-legal institutions a good deal easier than it would otherwise have been. As it was, changes of the most radical character could be made in the constitution almost without opposition. Even the statesmen of the age seem hardly to have realized what was happening or, if they did, they usually abstained from talking about it. It is true that conventions were sometimes mentioned in Parliamentary debates, but they were seldom treated as both new and desirable.

In one sense the substance of the Revolution settlement was preserved almost inviolate. This period is strongly characterized by the importance of legal forms. For them there was a general veneration, and any attempts to disregard them were sure to meet with prompt and strong opposition. Sometimes, indeed, the executive was impelled by what it felt to be urgent reasons of public policy to exceed its legal powers. But the Ministers who advised illegal acts did so with the full knowledge that they were answerable for what they had done; they were prepared to justify themselves to Parliament and to rely on Parliament to condone their offence, if need be by an Act of Indemnity.<sup>3</sup> Parliament alone could decide whether an

<sup>1</sup> But the origins of the Cabinet go back to the seventeenth century. See *supra*, p. 107.

<sup>2</sup> But there was one great exception. Walpole's opponents accused him of occupying an unconstitutional position. See *infra*, p. 363.

<sup>3</sup> For examples see *infra*, p. 339. Note the violent and successful opposition to the claim that the King had a suspending power in 1766.

emergency had justified a breach of the law. Parliament could not merely do this, they could also make anything legal for the future. Parliament, in fact, came to be looked upon as sovereign. But the sovereignty of the King in Parliament did not seem to imply that Englishmen were subject to arbitrary power. For Parliament was in practice very respectful of old customs and usages.<sup>1</sup> Though belief in fundamental law waned rapidly, a fundamental conservatism existed and had much the same practical results. Hence Englishmen felt they had rights, and that those rights were secure. Moreover, what Parliament did was done after discussion. The forms of the Houses allowed ample opportunity for debating the principles and the details of all bills. Minorities had every chance to say their say, and the right of discussion did much to make defeat seem tolerable. Nor should it be forgotten that bills could be amended as well as defeated; many alterations in bills were due to the efforts of those who would have liked to see them wholly rejected. But to have secured an amendment to a bill is, after all, to have become partly responsible for that bill. That minorities felt themselves to be fairly treated is made plain by the absence of systematic obstruction, for which the rules of procedure would have afforded continual opportunities.<sup>2</sup> Again, what happened outside Parliament was almost as important in this connexion as what happened inside. The press was free, and every political topic of interest was the theme of countless articles and pamphlets. Hence there was a fairly general feeling that what the legislature did was substantially just and reasonable. Hence, too, laws were usually respected even by those who had opposed their enactment. Members of the Houses were inevitably influenced by popular trends of opinion, and those who introduced bills were generally

<sup>1</sup> What is said above applies only to the inhabitants of Britain; British subjects overseas looked upon Parliament's claim to sovereignty very differently. See *infra*, p. 397.

<sup>2</sup> There was perhaps some obstruction, though no rowdiness, during the sitting of the Commons which began on March 12, 1771, and continued until 5 a.m. on the following day. The House was then considering complaints concerning certain printers of newspapers in which reports of debates had appeared. The Opposition forced as many divisions as possible; but they were quite within their rights in so doing; however, the Speaker complained that the sitting was being unduly prolonged. I know of no other occasion when a similar complaint was made. For the question of reporting see *infra*, p. 333.



careful to frame them in such a way as to allow for this.<sup>1</sup> It must not be imagined that the Ministers could at any time force the Houses to carry important bills although the majority of members disliked them. Legislation in this period, therefore, was the product of a very substantial measure of agreement.

Thus both the executive and the legislature in general so demeaned themselves as not to appear arbitrary and tyrannical. So much, however, cannot be said of the House of Commons. At certain times that body flagrantly disregarded both the law and that theory of the constitution to which most of its members would have paid lip service. In 1769 they were guilty of gross injustice both towards Wilkes and towards the electors of Middlesex; in 1783–84 they laid claim to a suspending power and overtly endeavoured to upset the balance of power which the constitution was supposed to guarantee. But perhaps the rule of law was even more plainly set at naught during the regency crisis of 1788–89, when the Lords and Commons virtually assumed they had power to legislate jointly without the concurrence of the Crown.<sup>2</sup> Too much importance, however, must not be attached to those events. The Commons themselves officially acknowledged the wrongfulness of their conduct towards Wilkes and the electors of Middlesex; the general election of 1784 gave the electorate a chance to pronounce judgement upon the constitutional questions at issue, and that judgement was unambiguously in favour of the rule of law and the preservation of the old constitutional balance between King, Lords, and Commons; the conduct of the Houses in 1788–89, though imitated in the later regency crisis of 1810–11, did not serve as a precedent for a regular series of attempts to deny that the participation of the Crown was necessary for legislation.

During the last quarter of the eighteenth century the constitution came in for a certain amount of criticism. Though at no time did many desire its total overthrow, a number of people began to think it could be improved. They did not desire—as some had done in earlier years—merely to restore the constitution by statute to its former perfection; they did

<sup>1</sup> However, the poorest sections of the community took little interest in politics. Political opinions were confined to a minority.

<sup>2</sup> For these events see *infra*, pp. 315 *sqq.*

not—as some statesman had half-unconsciously done—work for the adoption of certain conventions as a means of solving the day-to-day problems of carrying on government; they deliberately wished to bring about statutory alterations of the constitution. But this desire was quite compatible with a genuine attachment to that constitution. Of those who had ceased to regard it as perfect, some thought it to be perfectible, and others to be capable of infinite readjustment to new conditions as they arose. Hence they were essentially reformers, and not revolutionaries. Nor was the reform movement merely one for a change in the franchise and the distribution of the seats in the Commons. All who wished to achieve law reform or administrative reform by statute were influenced by the same spirit as those who desired Parliamentary reform.<sup>1</sup> For to hold that the law could be statutorily remodelled or the administrative system statutorily reconstructed implied a change of attitude to the constitution just as much as did the view that the Commons should be made more representative of the people. It is true that those who advocated any one of these types of reform did not necessarily advocate the other two. But this only shows that the spirit of reform was to be found among men who had not much else in common.

In the eighteenth century the reform movement did not achieve very much. The few additions to the statute book which can in any way be attributed to it are significant less in themselves than as signs that the times were changing. It was not to be expected that ideas so new should rapidly win general acceptance. It has often been said that conservative tendencies in England were strengthened by the French Revolution, and so they doubtless were. Though many Englishmen had greeted the early stages of the Revolution with joy, and some had been inspired by it to work for reform in England, yet by the end of 1792 the bulk of English opinion was hostile to the Revolution. Nor did English conservatives fail to point to events in France as awful examples of the consequences of radical and ill-considered change. This much is certain. But those who oppose change are seldom at a loss when they wish to find illustrations of its dangers; nor is aversion to change at

<sup>1</sup> Law reform and administrative reform had not hitherto been generally regarded as within the province of the legislature.

any time so unusual as to require special explanation. Conservatism was immensely strong in England before 1789, and there is no reason to believe that it would have weakened other than very gradually, even had a revolution not occurred in France.

The prevalence of a rooted aversion to deliberate changes in the constitution before and after 1789 did not merely prevent reforms of the kinds mentioned above; it also preserved the constitution from alterations of a very different kind. Many Englishmen after 1792 were afraid lest a revolution break out in their own country, and were prone to describe as "Jacobinical" any opinion with which they did not agree. But in spite of this fear no attempt was made to limit the powers of the House of Commons or the freedom of discussion therein; the rights of the electorate were not curtailed; the press remained free; the courts remained independent. Nor, what was more remarkable, were the powers of the executive very greatly increased by statute. There was, indeed, some legislation restrictive of freedom of speech, freedom of public meeting, and freedom of political association. But most of the new prohibitions were temporary, and when they are carefully examined appear less severe than might have been expected.<sup>1</sup> Moreover, such new powers as these Acts conferred were given not to the Crown and its Ministers, but to the Justices of the Peace. Parliament did not delegate great legislative powers to the King in Council or to any Minister; it did not authorize the creation of administrative courts; it did not give the Crown wide powers of acquiring landed property with or without the owners' consent.<sup>2</sup> Thus, in matters constitutional the years 1793-1801 are a period of conservatism in the true sense of the word; they are not, as has sometimes been said, a period of reaction; for they were not marked by an attempt to repeal any great constitutional statute, nor even to abolish well-established constitutional usages; still less were they a period of totalitarianism.

At the dawn of the nineteenth century the constitution was a strange mixture. Of its elements some had an Anglo-Saxon origin, others a mediaeval, others a modern; it contained

<sup>1</sup> See *infra*, p. 414.

<sup>2</sup> I do not imply that any of these things are necessarily reprehensible.

much that for all practical purposes was obsolete or obsolescent, and much that might appear irrational or even unjust to critical eyes. But with all its defects it retained both vigour and the capacity of growth; it never became fossilized, as did the constitutions of Venice and the United Provinces. The English constitution remained flexible both because new conventions might be evolved and adopted and because what could not be done by conventions could be done by Acts of Parliament. Since the constitution remained thus flexible, it never fell into widespread discredit. Those who wished to correct abuses knew that control of the constitution ultimately resided with the electorate. For the House of Commons was rapidly becoming the master of the executive and the senior partner in the legislature. If the then electorate had not the same view as those of a mass of people who were politically minded, though not electors, the result would be, not an attempt at revolution, but an attempt to secure Parliamentary reform. Only if reform were too long delayed would there be a serious danger of revolution.

From these facts certain consequences naturally flowed. Those who desired Parliamentary reform were usually ready to profess a general attachment to the good old constitution; they had no desire to destroy what could with comparative ease be so improved as to meet their wishes; they were ready to tolerate minor anomalies and the survival of features of merely antiquarian interest, provided they could have their way on certain vital points. By their partial conservatism they did much to diminish the dread which proposals for change would otherwise have aroused. Thus reforms eventually came to appear as fairly compatible with the spirit of the constitution even to many whose inclinations were essentially conservative. Among a great number of the reformers themselves there was great pride in the old constitution, which, with all its defects, was cherished as the best in the world, although still capable of amendment, and this pride was a moderating influence upon their zeal for innovation. It was, indeed, perhaps in this form that their ancestors' belief in fundamental law survived among them. While firm believers in Parliamentary sovereignty, they yet felt that Parliament ought not wholly to destroy that constitution which had been built up by generation after genera-

tion of Englishmen. The opponents of reforms, on their part, came more and more to feel that the actual changes proposed by the majority of reformers, though bad in themselves, were not absolutely intolerable. They were at least prepared to acquiesce when the legislature had effected a change; they did not appeal to arms when the decision of Parliament had gone against them. Yet in that Parliament the will of the Commons was generally dominant, though not always supreme. Virtually therefore the strongest conservatives in the nineteenth century regarded the House of Commons—or the electorate—as the chief power in the country. How things had changed since 1642! Yet a member of the Commons in that year, had he been able to see it at work in the early nineteenth century, would have noticed few changes in its procedure; the content of the speeches therein delivered would, on the other hand, have filled him with amazement.<sup>1</sup> It has been the peculiar characteristic of English constitutional history that fundamental changes have been reflected as little as possible in outward forms.

<sup>1</sup> The chief changes in procedure between 1642 and 1801 were connected with finance. For these see *supra*, pp. 97, 205-6.

## II

### THE KINGSHIP

THE TITLE to the Crown did not alter during this period, but in 1801 the royal style was modified as a consequence of the Union with Ireland. In virtue of powers given him by the Act of Union, George III by proclamation declared that the style was to be as from January 1, 1801, 'by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith'. The designation 'King of France' was thus dropped.

On three occasions Parliament had to face the problem of making provision for a possible regency, in 1751, 1765, and 1788-89.<sup>1</sup>

In 1751 Frederick, Prince of Wales, died suddenly, leaving several children of tender years. George II was then an old man, and his early death appeared not unlikely. A Regency Act was accordingly passed. The procedure employed was as follows. The King sent a message to the Houses of Parliament informing them that with a view to the preservation of the Protestant succession and the maintenance of the laws and liberties of his dominions, it was expedient to make provision for the administration of government, in case his successor should be of tender years; he therefore proposed that, if the Crown should descend to any of the issue of the late Prince of Wales being under the age of eighteen, the Princess Dowager of Wales should be the guardian of the person of such successor and regent until that successor had reached the age of eighteen, 'with such powers and limitations as shall appear necessary and expedient'. To this message the Houses replied by a joint address expressing their thanks and concur-

<sup>1</sup> Until 1937 there was no permanent provision for a regency in the event of the incapacity of the King, who in the absence of special provisions was regarded as capable of personally exercising all the prerogatives from the moment of his accession.

rence with the King's wishes. George II then informed the Lords that he desired his second son, the Duke of Cumberland, the Primate, and the holders of certain great offices to be members of the Council which was to be appointed to assist the regent. A Regency Bill was shortly afterwards introduced in the Lords, and speedily became law.<sup>1</sup> Its terms were that in case the Crown should descend to any of the children of the late Prince of Wales before such successor should have attained the age of eighteen, the Princess Dowager should be regent until the successor had attained that age; she was to have the full exercise of the Kingly power subject to the limitations contained in the Act; a Council of Regency was appointed by the Act to assist her, composed of the Duke of Cumberland, the Primate, the heads of the Treasury and Admiralty, the Lord President, Lord Privy Seal, the Secretaries of State, the Chief Justice of the King's Bench, and not more than four other persons being natural-born subjects who were to be appointed by George II under his royal sign manual; this Council was to meet when so commanded by the regent, and the quorum was to be five; decisions were to be taken by a majority vote; the consent of the Council was to be required for the creation of all peerages, for the granting of pardons to persons convicted of treason, for the filling of all bishoprics, for the filling of the offices of Lord Chancellor, Commissioners of the Treasury and Admiralty, Lord President, Lord Privy Seal, Secretary of State, and for the appointment of all judges; their consent was likewise to be required for the making of treaties, the declaration of war, the dissolution and prorogation of Parliament, and for the giving of the royal assent to any bill which modified or repealed the Act of Settlement, the Act of Uniformity, or the Scottish Act for the security of the Scottish Church; those members of the Council who sat there in virtue of their tenure of Ministerial office were to remain in such office during the regency unless dismissed by the regent with the consent of the Council or upon the address of both Houses of Parliament; other members of the Council might be removed upon the like conditions; vacancies on the Council were to be filled by the regent within two months, but the consent of the Council was required for new appoint-

<sup>1</sup> 24 Geo. II, c. 24.

ments; upon the descent of the Crown to a minor, in case a Parliament should then be in being, that Parliament was to continue for three years, unless the successor attained his majority or the regent dissolved it before that term had expired; if no Parliament was then in being, the previous Parliament was to meet and be subject to the same conditions; if George II's successor was a minor, he was not to marry without the consent of the regent and Council during his minority; any form of marriage which he might go through while a minor was to be null and void; finally, all acts done by the regent, with or without the consent of the Council, in order unlawfully to set aside or vary the provisions of the statute, were to be null and void, and all who advised or promoted such acts were to incur the penalties of *praemunire*.<sup>1</sup>

The provisions relative to the Council were sharply criticized, when the bill was before Parliament, on the ground that it was dangerous and inexpedient to divide the power of the Crown; but apart from that there was little opposition to the bill. Owing, however, to the longevity of George II, the Regency Act of 1751 never came into operation.

The precedent set in 1751 was partly followed in 1765. George II was then afraid that he might die while his successor was still of tender years, and accordingly invited Parliament in a speech to consider the desirability of enabling him to appoint a regent under the sign manual, who was to act if the Crown should descend to any of his children being under the age of eighteen, until such successor should have attained that age; the regent, however, was to be either the Queen or any other person of the royal family usually residing in Great Britain, and was to be subject to the like restrictions as were specified in the Act of 1751. Thus George III asked for a greater power than had been given to George II; for he wished to be able to choose one of a certain number of persons to act as regent. However, a bill to give effect to the King's wishes was introduced in the Lords. In the course of the debates on the bill a doubt was expressed as to the meaning of the expression 'the royal family'; for it was not certain whether or no the King's mother, the Princess Dowager of

<sup>1</sup> The statute also repealed the Acts of 28 Henry VIII, c. 17 and 1 Edward VI, c. 11.



Wales, could be regarded as belonging to it; the question of the Queen's status was also raised, since it was doubted whether a person of alien birth who had been married to the King could be deemed a natural-born subject, and so be capable of holding an office of trust. The judges who were consulted on the latter point were of opinion that she was to be deemed a natural-born subject from the time of her marriage.<sup>1</sup> But the bill was so altered as to restrict the King's choice of the regent to the Queen or one of the descendants of George II usually resident in Great Britain. In the Commons, however, the name of the Princess Dowager was added to the list of persons from whom the regent was to be chosen, and with this amendment the Lords concurred. The Act also provided that the Council of Regency was to consist of the Primate, of the holders of the same offices as had been specified in the Act of 1751, and of the King's brothers and uncle; if one of these last should die or be appointed regent, George III was given power to name a natural-born subject in his place. With these exceptions the provisions of the Act of 1765 were identical with those of the Act of 1751.<sup>2</sup>

Since George III lived on till 1820, the situation contemplated by the Act of 1765 never arose; but towards the end of 1788 the King was afflicted with a sudden attack of insanity, and as a result a constitutional crisis occurred. The proceedings of Parliament upon that occasion furnished a precedent which was followed in 1811, and are therefore doubly interesting.

Parliament was prorogued when the King fell ill, and duly met upon the appointed day; but the Houses forthwith adjourned for a fortnight. During the interval the King's physicians were examined by the Privy Council at a meeting to which all Councillors were summoned, irrespective of their political connexions. The Houses, when they met again, each appointed a select committee to perform the same functions.<sup>3</sup> According to the evidence of the physicians, it

<sup>1</sup> This they said was 'by the operation of the law of the Crown, which is part of the Common Law'.

<sup>2</sup> 5 Geo. III, c. 27.

<sup>3</sup> Thereby the Houses assumed authority to act, although Parliament had not been opened by the Crown. Some, however, argued that each branch of the legislature could act within its own sphere, even when the concurrent action of all three branches was impossible.

appeared that the King was out of his mind, and would continue to be so for some time, but that his ultimate recovery was probable. After their committee's report had been laid before the Commons, Pitt, the Prime Minister, moved the appointment of a committee to search for and report on precedents of proceedings when the personal exercise of the royal authority had been interrupted for any cause. Charles James Fox thereupon rose and maintained that, since the heir apparent, the Prince of Wales, was an adult, he had a clear right to act as regent during the King's sickness with the full exercise of the royal power; it was, however, for Parliament, having first established the fact of the King's insanity, to call upon the Prince so to act; that course, and that alone, was open to them. Pitt replied with vigour that the Prince of Wales had, strictly speaking, no more right to the regency than had any other person; it was in accordance with the spirit of the constitution that the Houses of Parliament should make provision for the exercise of the royal authority by another person or persons, when the King's exercise of it was temporarily interrupted. After a heated debate Pitt's motion was carried without a division. A similar motion was also passed by the Lords.

After these committees had reported, further action was promptly taken by the Houses, although no very pertinent precedents had been discovered; the most relevant were those of 1454 and 1455, when the Duke of York had become Protector at the invitation of the Lords during the temporary insanity of Henry VI. However, Pitt moved three resolutions, which were carried, to the effect that the King was incapable of discharging public business, that it was the duty of the Houses to supply the deficiency of the royal authority, and that they should determine the means whereby the royal assent might be given to the necessary bill. Subsequently he introduced five resolutions of which the purport was that the Prince of Wales should be made regent, but without the power to create peers, to dispose of the King's property, or to grant any pensions or offices save during pleasure, except for those offices which by law had to be granted for life or during good behaviour; further, the control of the King's household and the care of his person were to be entrusted to the Queen

assisted by a council. These resolutions were adopted first by the Commons and then by the Lords, after which addresses were presented to the Prince requesting him to accept the regency upon the above conditions. When he had signified his readiness to do so, the Houses resolved that the Chancellor should affix the Great Seal to letters patent empowering a commission to open Parliament and act therein on the King's behalf. This was accordingly done, and the session was then opened by one of the commissioners in a speech which indicated the need of providing for the care of the King's person and the exercise of his authority during his sickness. The Commons then transacted some ordinary business, and a Regency Bill to give effect to the above-mentioned resolutions was introduced in their House. The Bill passed the Commons, and would also have passed the Lords had not the King's recovery put a stop to its progress.

These proceedings gave rise to much controversy at the time, and very naturally so; for the action of the Houses amounted to a claim to exercise sovereignty alone. Yet it was undoubtedly good law that the Houses could not legislate by themselves. Their authorization of the issue of letters patent empowering a commission to act on the King's behalf was a fiction of the most transparent kind, which furnished an evil precedent. If the Houses could rightly do what they then did, it was difficult to set any limits to their power. According to the best constitutional theory of the time, power was divided between three independent bodies, the Crown, the Lords, and the Commons. But the action of the Houses with regard to the Regency Bill was a virtual denial of the independence of the Crown. There was, therefore, much force in the contention of Fox and his supporters, however intemperately urged, that the conduct of the Houses was arbitrary. Nor was the argument, that the Prince of Wales had a right to be regent without any restrictions on his power, against the spirit of the constitution. As regent he could have no more power than a King would have. But the King was not absolute; he was merely the possessor of certain determinate powers. Why, then, was it unconstitutional for the heir apparent to exercise as regent powers which would be undubitably his the moment the breath was out of his father's

body? And who was the obvious person to be regent? Even Pitt, who denied the Prince's right to the office, admitted that he had an irresistible claim to it.

The real question at issue was not, indeed, who was to be regent, but whether the powers of the regent were to be limited before he had entered upon his office. They could only be so limited if the Houses took it upon them to legislate without the King's participation. This they proposed to do, though the proper course would have been for them to invite the Prince to accept the regency and then to carry a bill for the limitation of his powers, if they so wished. Through their control of the supplies they could have brought such pressure to bear as would have secured his assent to it. Instead, the Houses adopted a course which cannot be justified on constitutional grounds.<sup>1</sup> The Prince, on his part, informed the Lords, through his eldest brother, that he did not claim the regency as of right, whatever his right might be, nor did he refuse to accept the limitations, though he plainly indicated his distaste for them. But his partisans in both Houses argued alike against their expediency and against the method of imposing them. Particular exception was taken to the clause forbidding the creation of peers by the regent. For had it become law it would have removed the only check upon the Lords, and, had they refused to repeal it, they would have had power to veto popular bills. So strong was the case against this clause that an amendment was finally carried in the Commons limiting its operation to a term of three years.<sup>2</sup>

The proceedings of the Irish Parliament upon this occasion contrasted curiously with those of the British Parliament. For the Irish Houses resolved to present an address to the Prince of Wales praying him to assume the regency of Ireland without any restrictions. When the Lord Lieutenant refused to present this address, the Houses transmitted it directly by some of their own members and censured his refusal as unconstitutional. Thus, had not George III recovered his health so speedily, the Prince would have entered upon two very

<sup>1</sup> Of course the political rivalries of the time were of material importance in influencing the Houses, but with these I am not here concerned.

<sup>2</sup> The other clauses of the Regency Bill were not temporary; though it was generally admitted that they would need modification if the King did not recover within a brief time.

different regencies. The King, however, manifested his approval of the action of the British Parliament in the most public manner; for upon his recovery he forthwith issued another commission authorizing the 'commissioners who were appointed by former letters patent to hold' that Parliament 'to open and declare certain further causes for holding the same'. Thereby he formally recognized the validity of what the Houses had done and lent the weight of his authority to the view that the Houses in certain circumstances could legislate alone.<sup>1</sup>

Mention must here be made of the Royal Marriage Act of 1772.<sup>2</sup> Before that date it had been very doubtful whether or no the King had any control over the marriages of members of his family. In 1718 George I had consulted the judges as to the extent of his powers over his grandchildren, and had been advised by ten out of the twelve that he had a prerogative right to direct their education and to dispose of them in marriage, while even the two others had held that his consent was necessary for their marriage. None the less there was no doubt that a marriage of the King's grandchildren or children without his consent was a valid marriage. But the Act of 1772 enormously strengthened the King's power. It provided that none of the descendants of George II, other than the issue of princesses married into foreign families, could contract a valid marriage before they had reached the age of twenty-five without the King's consent signified under the Great Seal and declared in Council; after they had attained that age descendants of George II could marry without the King's consent, provided they gave a year's notice to the Privy Council, unless both Houses of Parliament expressed their disapproval of the proposed marriage during the interval.<sup>3</sup>

<sup>1</sup> George was in this case more influenced by dislike of his son than by respect for the constitution. Given the circumstances, this is easily understandable. But it is strange that the King, knowing he was subject to attacks of insanity, did not take care that permanent provision should be made for a regency in such contingencies. The result was that when George became permanently insane at the end of 1810 the Houses set up a limited regency by their own authority.

<sup>2</sup> 12 Geo. III, c. 11.

<sup>3</sup> The Act had one curious result. When the future George IV, while Prince of Wales, went through a form of marriage with Mrs. Fitzherbert, a Roman Catholic, he did not thereby disqualify himself from succeeding to the Crown, because the ceremony had no validity in law.

These provisions were sharply, though vainly, assailed by a minority in both Houses as being an unwarrantable extension of the King's power and as being of an immoral and unchristian tendency. But it is curious that nobody pointed out a glaring absurdity in the last clause of the Act. That clause rendered liable to the penalties of *praemunire* all who solemnized or were present at a marriage of a member of the royal family not duly authorized. Since, however, no man can be compelled to give evidence incriminating himself, it might well be impossible to prove that such a ceremony had taken place.

### III

#### PARLIAMENT

THE NUMBERS of the Upper House remained about the same during the greater part of this period. In 1719 they were 220; in 1759, 214; and in 1783, 238. There were, indeed, many creations between 1719 and 1783.<sup>1</sup> George II granted sixty-five peerages, and George III, before 1784, granted forty-seven. But these increases were largely counterbalanced by extinctions. On the other hand, the numerous creations during the first Ministry of the younger Pitt—they numbered nearly ninety—made the Upper House a much larger body. But at no one time was a batch of peers created to make a majority, as had been done in 1712. The conduct of the Lords, moreover, was not such as to cause a measure of that kind to be contemplated. The majority of the peerages granted were conferred rather to gratify their recipients than to strengthen the Government in the Upper House.

The Union with Ireland increased the membership of the Upper House by thirty-two; for seats were given to twenty-eight Irish peers and to four Irish Bishops.

The numbers of the Commons remained unaltered until they were increased from 558 to 658 as a consequence of the Union with Ireland.<sup>2</sup>

Several Acts were passed for the regulation of the franchise. In 1729 it was provided that would-be voters should, if required, take before polling an oath that they had not received any bribe; those convicted of giving or taking bribes were to forfeit £500 and be disfranchised.<sup>3</sup> Other Acts aimed at preventing persons who were not duly qualified from voting. But, none the less, many irregularities continued to occur.<sup>4</sup>

<sup>1</sup> I speak here only of peerages granted to commoners, not of promotions.

<sup>2</sup> For the effect of the Union on the composition of Parliament see also *infra*, pp. 391 *sqq.*

<sup>3</sup> 2 Geo. II, c. 24.

<sup>4</sup> I omit the details. The chief relevant statutes are 7 Geo. II, c. 16; 9 Geo. II, c. 38; 13 Geo. II, c. 20; 18 Geo. II, c. 18; 19 Geo. II, c. 28; 3 Geo. III, c. 24; 20 Geo. III, c. 17; 28 Geo. III, c. 36.

Of far greater importance was the disfranchisement of most of the revenue officers in 1782.<sup>1</sup> The aim of these laws was to secure electoral purity and independence; but the disfranchisement of revenue officers is curious. It is true that these were dependent on the Government, and might be punished by dismissal for voting against its wishes. But all voters employed by private persons were in a similar position, yet they were left without protection. But to disfranchise all such voters would have been a practical impossibility. An effective remedy against intimidation would have been the introduction of the ballot; but that was as yet advocated by few. What was really distasteful to Parliament in 1782 was not that voters should be influenced, but that they should be influenced by the Crown. Even so, the Act of that year is remarkable for its omissions. It did not apply to soldiers or sailors, or to many categories of civil servants. An attempt to extend the principle was made in 1786, when a bill was introduced in the Commons for the disfranchisement of certain other classes of civil servants; but it failed to pass the House.<sup>2</sup>

Against even the appearance of an attempt to coerce voters by the military Parliament provided in 1735, when it was enacted that all troops quartered in a place where an election was to be held should be removed thence before the election.<sup>3</sup>

The latter part of this period witnessed a number of attempts to alter the system of representation. As time passed, indeed, its anomalies became more and more glaring; while some large towns returned no members, many decayed boroughs continued to be directly represented; moreover, some parts of the country were greatly over-represented in proportion to their population and wealth, and other parts were equally

<sup>1</sup> The Act (22 Geo. III, c. 41) applied to the Commissioners of the Excise, Customs, Stamp Duties, the Salt Tax, and to their subordinates; also to those employed in managing and collecting the duties on windows and houses, and to the Postmaster, or Postmasters, and his or their, subordinates. Those who violated the Act were to incur a fine of £100 and their votes were to be null and void. The Act did not apply to the Commissioners of the Land Tax or to their subordinates. The Commissioners of the Land Tax were appointed by statute.

<sup>2</sup> The bill applied to certain officers employed in the 'offices of Ordnance, Navy, Navy Pay, Victualling, and Sick and Hurt'.

<sup>3</sup> 8 Geo. II, c. 30. This Act, however, did not prevent individual soldiers who were electors from using their vote.



unrepresented. Many boroughs had only a handful of voters, and a good number were controlled by individuals through bribery or that influence which came from the ownership of land. The variations, too, in the borough franchise were numerous and irrational. This state of things was, however, defended by many; they argued that since members represented, not a particular place, but the commons of England, every district and every person was represented, if not directly, at least virtually; though the grosser forms of corruption could hardly be justified, it was contended that the old system gave property its due weight; in any case, as things were, the best men were returned to Parliament; therefore there was no need to alter in so material a point a constitution which was so nearly perfect; the consequences of such a change were unpredictable, and might well be disastrous. These were the arguments with which the conservatives opposed every suggestion of reform.

In the eighth decade of the century a movement for reform began to develop both in the country and in Parliament. That movement was never very strong, but at times it achieved a certain prominence. The reformers, indeed, were not all at any time agreed in their aims. But they were at least united in the belief that the House of Commons should be made more directly representative of the people. Some, while averse to so drastic a measure as the abolition of the rotten boroughs, thought the number of Knights of the Shire should be increased; for the counties could not be controlled by a patron, as could many of the boroughs. Hence an increase of county representatives might have increased the number of independent members. But it was only natural that the champions of reform should more often desire that representatives should be given to the under-represented and unrepresented towns and be taken away from the rotten boroughs. Such a desire was a symptom of the weakening of that almost idolatrous veneration for the old constitution which had so long obtained. On this occasion the would-be reformers were generally conscious that they were trying to bring about a change; they did not pretend to be conservatives. Nor was it strange that the movement began when it did. Not only was the national outlook on political questions

beginning to change, but the revolt of the American colonists caused some to look with a critical eye at the old system of representation. Would not a reform of that system, they argued, conduce to wiser governmental policy?

The first definite attempt to secure legislation on the matter was made by John Wilkes in 1776. He then moved for leave to introduce a bill 'for a just and equal representation of the people of England in Parliament'. So strong was the adverse feeling of the House that the motion was negatived without a division. Wilkes appears to have desired that the franchise be extended, that the more populous boroughs and counties be given additional members, and that the smaller boroughs be deprived of their members. In 1780, however, the Duke of Richmond presented a bill to the Lords, which provided for manhood suffrage, equal electoral districts, and annual Parliaments; it was rejected without a division, being not unnaturally considered as chimerical. In May, 1782, Pitt moved that the Commons appoint a committee to inquire into the state of the representation of the people. His speech laid great stress upon the existing anomalies and corruptions, but did not prejudice the question by advocating any particular reforms. The motion was rejected by a small majority. A year later Pitt once more raised the question by moving three resolutions; that measures ought to be taken more effectually to prevent bribery at elections, that when the majority of the electors of any borough had been convicted of corruption before a committee of the House appointed to hear election petitions, the borough should be disfranchised, that increased representation should be given to London and to the counties. On this occasion he explicitly disclaimed any desire to see manhood suffrage introduced, and professed the greatest veneration for the old constitution, which he only proposed to modify with the utmost diffidence out of a sincere conviction that change was necessary. But he was again defeated, this time by a large majority. In 1784 a motion was yet again made, but not by Pitt, for a committee to inquire into the state of representation, and was rejected. In 1785 Pitt sought leave to introduce a reform bill, but was defeated by some seventy votes. His plan was to deprive thirty-six boroughs of their representatives and transfer them to the counties and

the metropolis; but no borough was to be disfranchised until two-thirds of its electors had petitioned for disfranchisement, and compensation was to be paid from a special fund;<sup>1</sup> further, copyholders were to be given the county franchise.

The failure of Pitt's proposals put an end to all chances of a reform for many years. Pitt himself made no further attempt to alter the old system, but became one of its supporters. In spite of the efforts of a few men to stir up public opinion, the nation remained apathetic.<sup>2</sup> There were, however, a small group of reformers in the House, who made occasional efforts, all of which were unsuccessful. In 1786 and 1787 motions were made for a committee to inquire into the state of representation. After 1789 opposition to reform inevitably grew stronger; the fear was continually expressed that any change, however small, would be but the prelude to a terrible revolution which would totally destroy the old constitution. On the other hand, events in France stimulated in certain Englishmen a desire for change. Hence the question was at times much discussed in the country, and was more than once brought before Parliament. Thus in 1790 leave was vainly asked to introduce a bill to amend the representation of the people; it provided that a hundred additional members were to be given to the counties, and that the county franchise was to be granted to substantial householders. In 1793 the Commons refused to refer to a committee a petition from the 'Friends of the People', a political society of some note at the time, which prayed for reform. In 1797 they likewise refused leave for the introduction of a reform bill, which proposed that the number of county members be increased, that the county franchise be given to substantial copyholders and leaseholders, that the borough representation be drastically altered, and that the borough franchise be given to substantial householders.<sup>3</sup>

Various statutes rendered further categories of persons in-

<sup>1</sup> Hence the inducement to petition.

<sup>2</sup> The petitions for reform in the years 1783-85 were notable, but they had only expressed the desires of a small minority, as the opponents of reform pointed out with much force.

<sup>3</sup> The reform movement in this period requires only brief mention here; it is only interesting as a sign of things to come; the proposals actually put before Parliament never stood a chance of being adopted. Hence I do not discuss them at length.

capable of sitting in the House of Commons. Judges of the Scottish courts were excluded in 1734.<sup>1</sup> In 1742 the same was done to several classes of placemen.<sup>2</sup> In 1782 there were also excluded all persons who held contracts from the Commissioners of the Treasury, Navy, or Victualling Office, or from the Board of Ordnance, or from 'any other person or persons whatsoever on account of the public service'; any member who accepted such a contract was thereby to vacate his seat.<sup>3</sup> Further alterations in the law were made as a result of the Union with Ireland. In 1801 it was enacted that nobody was to sit for a British constituency in the Parliament of the United Kingdom who was disqualified by an English or British Act, nor was any man to sit for an Irish constituency therein who, before the Union, would have been incapable of sitting in the Irish Parliament; further, after the dissolution of the then Parliament the tenure of certain Irish places was to be a disqualification.<sup>4</sup>

In that same year, 1801, another change of a very different character was made by a statute which provided that no person 'having been ordained to the office of priest or deacon or being a Minister of the Church of Scotland' should be capable of being elected to serve as member of the Commons.<sup>5</sup>

<sup>1</sup> 7 Geo. II, c. 16.

<sup>2</sup> 15 Geo. II, c. 22. Those excluded were, firstly, the Commissioners of the Revenue in Ireland and the Commissioners of the Navy and Victualling Offices; secondly, the deputies and clerks of the said Offices and also those of the following departments: the Treasury, Receipt of the Exchequer, Tellers of the Exchequer, Chancellor of the Exchequer, Admiralty, Paymasters of the Army and Navy, Secretaries of State, Commissioners of the Salt Tax, Commissioners of the Stamp Duties, Commissioners of Appeals, Commissioners of Wine Licences, Commissioners of Hackney Coaches, and of the Commissioners of Hawkers and Pedlars; thirdly, persons having office, civil or military, in Gibraltar or Minorca, other than officers holding commissions in any regiment stationed in those places. The Act was not to come into force until after the dissolution of the then Parliament.

<sup>3</sup> 22 Geo. III, c. 45. But the Act did not extend to any contract made by 'any incorporated trading company in its corporate capacity, nor to any company now existing or established and consisting of more than ten persons, where such contract . . . shall be made . . . for the general benefit of such incorporation or company'. This exception became of increasing importance.

<sup>4</sup> 41 Geo. III (U.K.), c. 52.

<sup>5</sup> 41 Geo. III (U.K.), c. 63. It would appear that the Act only applied to priests and deacons of the Church of England and to Ministers of the Church of Scotland, not to those of other Churches. Prior to the passing of this Act it was doubtful whether the clergy of the Church of England were

The only method by which a member could vacate his seat continued to be indirect, the obtaining of one of those nominal offices of profit the tenure of which was incompatible with that of a seat in the Commons. The granting of such an office, however, was long regarded as a favour, which might properly be denied to those who belonged to the Opposition. The House, in 1775, refused leave for the introduction of a bill to enable members to resign their seats. It was urged in opposition to the measure both that it was an innovation and that great practical inconvenience might be caused if a large number of members were simultaneously to resign, and so to necessitate bye-elections in their constituencies. A few years later it was discovered that a seat could be vacated without the favour of the Government if its holder could obtain a Militia agency.<sup>1</sup> Soon after this the Government began to grant as a matter of course a favour which it had now become pointless to refuse.<sup>2</sup>

Election petitions were heard during this period, according to the decision of the House, either at the bar of the House or before the Committee of Elections and Privileges, which any member might attend. Both methods were dilatory and expensive, while the decisions were often unfair. But in 1770 George Grenville introduced a bill which became law in spite of some opposition and substantially altered the mode of deciding controverted elections. Henceforth cases were referred for final decision to a committee of fifteen M.P.s, which was composed of one person chosen by the sitting member, of one chosen by the petitioner, and of thirteen selected in the following manner: on the day appointed by the House for taking the petition into consideration the names of all members

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eligible. There was good evidence that they had been excluded as long as the clergy had been taxed by Convocation. But after 1664 their position was doubtful. In 1784 a person in deacon's orders was elected for Newport and allowed to take his seat. In 1801 Horne Tooke, who was in Holy Orders, was elected. The House enquired into the eligibility of the clergy and came to the conclusion that he was eligible. Hence the statutory disqualification of the clergy, since it was not considered desirable that they should sit in the Commons.

<sup>1</sup> The point really at issue was whether a member who sat for one constituency could resign in order to contest another. Naturally the Ministers had no wish to enable their opponents to do so.

<sup>2</sup> It has, however, never been the practice for the Government to enable a member to vacate his seat in order to avoid expulsion. No member could ever claim the grant of an office of profit as a right.

were to be written on separate pieces of paper and these pieces placed in six glasses; the Clerk was then to draw names in turn from each glass until forty-nine had been drawn; from this number the petitioner and the sitting member were alternately to strike off names until only thirteen were left. The duration of this Act was originally limited to seven years; but in 1774 it was made perpetual.<sup>1</sup> The merits of the new procedure were, indeed, obvious. None the less some gravely argued against the bill that it was unconstitutional to regulate by statute a matter which had hitherto been left to the decision of the Commons alone; the King and the Lords, they said, should not be allowed to encroach upon the sphere reserved to the Lower House.

The Speakership tended more and more to become a non-partisan office. Arthur Onslow, who filled the Chair from 1727 to 1761, did much to give it this character; he resigned the lucrative position of Treasurer of the Navy after having held it for many years, lest its possession might make him appear biased. This action appeared so proper that no subsequent Speaker ever held a Ministerial office. When Onslow retired, the House voted him their thanks and prayed the King to grant him a mark of the royal favour the expense of which they would defray; Onslow was thereupon given a pension of £3,000.<sup>2</sup> None the less the Speakership was not yet wholly divorced from party politics. Grenville left the Chair in 1790 to become a Secretary of State; Addington left it in 1801 to become Prime Minister. Nay, more, the Speakers themselves continued to take part in the debates from time to time, when the House was in Committee. In 1777, too, Sir Fletcher Norton, when presenting for the royal assent a bill to discharge the Civil List debt delivered a speech which implied that His Majesty had been guilty of extravagance. He received the thanks of the House for this speech, but severe comments were made upon it in debate, and Norton paid the penalty of his temerity, when the next Parliament declined to

<sup>1</sup> 10 Geo. III, c. 16 and 14 Geo. III, c. 15. Minor changes were made by 11 Geo. III, c. 42, and 28 Geo. III, c. 52. See also 25 Geo. III, c. 84, 32 Geo. III, c. 1, 34 Geo. III, c. 83, and 36 Geo. III, c. 59. With regard to election petitions see also 2 Geo. II, c. 24; this last was modified by 28 Geo. III, c. 52.

<sup>2</sup> This precedent was followed in the nineteenth century, whenever a Speaker retired.

re-elect him. The Commons, indeed, wished the Speaker to be both independent and impartial. Pitt, in 1790, refrained from himself proposing Addington as a candidate for the Chair, lest this should make him seem a mere Government nominee. In that year also an Act provided that the Speaker should be paid such a sum by the Treasury as would, together with his fees, bring his total annual emoluments up to £6000; at the same time he was forbidden to hold any office during pleasure.<sup>1</sup>

In January, 1789, while the King was insane, the Speaker died suddenly. The House forthwith elected a successor who began to act from the moment of his election, although he could not receive the royal approval. Nor was that approval given retrospectively after George III had recovered his wits.<sup>2</sup>

The precise limits of Parliamentary privilege still remained unsettled; for the Houses had neither abandoned nor the courts conceded their claim to be the sole judge of those limits. It was plain, however, that certain points had been settled by the disputes during the reign of Anne. For instance, the power of the Commons to commit for an unspecified contempt had been established. In 1751 application was made to the King's Bench on a writ of *Habeas Corpus* for the release of Alexander Murray, who had been so committed. But the court declined to release him, on the ground that 'it could never be the intent of the statute to give a judge in his chambers, or this court, power to judge of the privileges of the House of Commons. The House of Commons is undoubtedly a high court, and it is agreed on all hands that they have power to judge of their own privileges; it need not appear to us what the contempt was for; if it did, we could not judge it'.

In 1763 the Common Pleas stood forth as the champion of what was conceived to be Parliamentary privilege, when Chief Justice Pratt directed the release of Wilkes upon a *Habeas Corpus*. Now John Wilkes, M.P. for Aylesbury, had been committed to jail as the author of a seditious libel. Pratt decided that, since privilege exempted M.P.s from arrest for all offences save treason, felony, and breach of the peace, the commitment

<sup>1</sup> 30 Geo. III, c. 10.

<sup>2</sup> Does this episode prove that the Commons may choose a Speaker and that the Speaker so chosen may act without the King's consent? I am not sure of the answer, but am inclined to think the precedent set in 1789 cannot rightly be followed.

was illegal; for a libel could not be a breach of the peace, though it might tend towards one. These events occurred during a Parliamentary recess; when the Houses met again, a Minister acquainted the Commons by the King's command that Wilkes had been arrested, committed, and discharged, and had subsequently refused to appear and answer an information exhibited against him in the King's Bench which charged him with the authorship of a seditious libel; the King had therefore directed copies of the alleged libel and certain evidence to be laid before the House for their consideration. The Commons then thanked the King for his regard to their privileges and voted the document to be a seditious libel. Wilkes, on his part, complained to the House that his arrest and committal had been a breach of privilege, and argued that he was not compelled to appear before the King's Bench to answer the information. The debate upon his complaint and the further consideration of the King's message were then adjourned; but eventually the House resolved that privilege did not extend to the writing and publishing of seditious libels, and with this resolution the Lords afterwards concurred. There can be little doubt that the conduct of the Commons on this occasion is justly liable to censure. Firstly, if they wished to abandon a privilege, they should have done so by a bill, and not by a resolution. For it might be argued that resolutions could no more diminish than they could extend privilege, which was part of the law of the land. The House, moreover, in 1770 tacitly acknowledged that the proper way to abolish a privilege was by statute, when they passed a bill to permit the prosecution of civil suits against members of both Houses and their servants at any time.<sup>1</sup> Secondly, their resolution was in form, not an abandonment of a privilege, but a declaration that an alleged privilege did not exist. This declaration was therefore opposed to Pratt's judgement in the Common Pleas. Here, then, the Lower House was claiming to be a superior court to the Common Pleas.<sup>2</sup> Nor was the concurrence of the Lords with the Commons material. Not only had the Commons acted first; but it would appear that the resolution of the Lords applied only to their own House.

<sup>1</sup> 10 Geo. III, c. 50. The Act was not declaratory.

<sup>2</sup> It is usually said that the resolution of the Commons was binding upon the courts; but I am unable to agree with this view.



A few years later the Commons behaved in an even more arbitrary manner. At the general election of 1768 Wilkes was returned for Middlesex; in 1769 the Commons expelled him. He stood again and was returned, whereupon the Commons resolved that Wilkes 'having been, in this session of Parliament, expelled this House, was, and is, incapable of being elected a member to serve in this present Parliament,' and that his election was a void election, and that the Speaker should issue his warrant to the Clerk of the Crown to make out a writ for a new election.<sup>1</sup> Wilkes stood again, and was again returned. Once more the Commons resolved that the election was void and that the Speaker should issue his warrant to the clerk of the Crown for a new writ. Wilkes, however, stood again, and was yet again returned. This time, the House, after declaring Wilkes's election to be void, took a new step; they ordered the Sheriffs of Middlesex to come before them and state the figures of the poll. After hearing these they resolved that one Luttrell, a rival candidate who had received fewer votes than Wilkes, 'ought to have been returned', and that the return should be amended by erasing Wilkes's name and substituting that of Luttrell.

That the Commons could and can expel any member for any reason is unquestionable. Most of those who denied the expediency and justice of Wilkes's expulsion did not dispute its legality. But though the Commons could expel Wilkes as often as they pleased, they could not make him incapable of being elected; an incapacity could only be created by an act of the whole legislature, not by any part of it singly. It so happened, indeed, that Wilkes had no means of obtaining redress as long as the Commons were obdurate. For they were the sole judge of elections. But that did not alter the fact that by declaring Luttrell to have been duly elected the Commons were abusing their powers. Strictly speaking, the matter of

<sup>1</sup> There was a partial precedent for the action of the Commons. In 1712 R. Walpole was expelled, stood again, and was returned; upon a petition from some of the electors of the constituency the House then resolved that Walpole 'was and is incapable of being elected . . . to serve in this Parliament'. They rejected, however, a motion to declare a rival candidate, who had received fewer votes than Walpole, duly elected, and instead resolved that Walpole's election was void and that there should be a new election. It will be noted that the House acted as the result of a petition. Walpole did not stand again for election to that Parliament.

the election ought not to have been considered at all by the House, when they directed the substitution of Luttrell's name for that of Wilkes; for there was no petition against Wilkes's return. The Commons, therefore, were virtually electing a member of their own House, not deciding which of two candidates had been elected. Their action in so doing was not merely bitterly criticized at the time, but was also the subject of various subsequent proceedings in both Houses. Early in 1770 several speakers in the Lords, including the Chancellor, denounced its illegality. On the other hand, Lord Mansfield, Chief Justice of the King's Bench, told the Upper House that, while he would not treat the Commons's declaration of Wilkes's incapacity as binding, if the matter came before him in his judicial capacity he would express no opinion of their resolution in his legislative capacity; but he regarded it as improper for the Lords to censure the Lower House, whatever the merits of the decision. In the Commons a motion was made at about the same time, that the House, 'in the exercise of its judicature in matters of election, is bound to judge according to the law of the land and the known and established custom of Parliament which is part thereof'. No attempt was made to oppose this motion; but an amendment was moved and carried for the addition of a statement that the judgement of the House declaring Wilkes's incapacity 'was agreeable to the law of the land and fully authorized by the law and custom of Parliament'. When an identical motion was moved in the Lords, it was rejected outright, on the ground that it was not a fit matter for them to pronounce upon. The Upper House, indeed, resolved that any resolution of their own infringing a judgement of the Commons in a matter in which the jurisdiction of the Lower House was final would be a violation of the constitutional rights of the Commons. Several later attempts in both Houses to condemn the judgement against Wilkes by resolution or to reverse it by bill met with a like unsuccess. Wilkes himself, who was again returned at the election of 1774 and was then allowed to sit, five times failed to carry a motion that the record of the proceedings against him should be expunged from the *Journals* of the House of Commons. In 1782, however, his sixth motion to that effect was carried. Nor was his triumph merely personal, since the motion for expunc-

tion declared the resolutions in question to be subversive of the rights of the whole body of the electors of the kingdom. The Commons thus acknowledged that, when acting judicially, they were bound to respect the rights of individuals, even though they could not be compelled to do so by any other court.

Some ten years before they acknowledged their injustice to Wilkes the Commons had virtually abandoned one of their undoubted privileges. The Houses had long exercised their right of prohibiting any unauthorized publication of reports of their proceedings. In 1641 the Commons resolved that no member should print any of his speeches without the leave of the House. In 1650 they made an order for the exclusion of strangers. After 1689 a similar order was made at the beginning of each session. In 1694 the Commons directed that one Dyer, a writer of news-letters, come before the House to answer a charge of reporting their proceedings. Dyer apologized and was discharged, but repeated his offence on many later occasions, and his example was followed by others. Towards the end of Anne's reign reports of debates began to appear in periodical publications, though not as a rule in newspapers.<sup>1</sup> The Houses officially regarded such publication of their proceedings as a breach of privilege, and occasionally took action against journalists and printers. But these were not greatly discouraged thereby; for the Houses usually discharged those whose arrest they had ordered if they apologized, and in any case the heaviest punishment that could be inflicted was imprisonment for the duration of the session.<sup>2</sup> The offending parties ran no risk of a fine. There was, moreover, before 1738 a common belief that it was not a breach of privilege to publish reports of speeches after the close of the session in which they had been delivered; for to such publication the Houses had hitherto taken little exception. In 1738, however, the Commons resolved that any publication of reports of their proceedings at any time was a breach of privilege. The only result of this resolution was that reports appeared in a slightly disguised form.<sup>3</sup>

<sup>1</sup> By newspaper I mean a publication which appeared once a week or more often.

<sup>2</sup> The Lords could have kept persons in prison for longer, but they never did so.

<sup>3</sup> *E.g.* as 'Debates in the Senate of Lilliputia'.

Early in the reign of George III journalists behaved with greater freedom, and reports of debates began to appear in newspapers. But not until 1771 was the matter taken up by the Commons. Complaint was then made by a member of several inaccurate and libellous reports, and a motion for the arrest of a number of printers was carried. The printers, however, did not surrender; the House therefore addressed the King, asking him to issue a proclamation offering a reward to any person who would apprehend any of the men wanted; two printers were then arrested and brought before Aldermen of the City of London, who, acting in their capacity as magistrates, discharged them forthwith on the ground that such arrests were violations of the City's chartered privileges.<sup>1</sup> Meanwhile the Commons had ordered several other printers to appear at their bar; one of these named Miller had refused to attend, and the House had directed the Serjeant at Arms to take him into custody. He sent a Messenger to do so; but Miller refused to submit, and when the Messenger used force, a Constable appeared on the scene, apprehended the Messenger, and carried him off to answer a charge of assault. The Lord Mayor—Crosby—and Aldermen Wilkes and Oliver heard the parties, ordered Miller to be discharged, and would have committed the Messenger to jail had not bail been given by the Deputy Serjeant at Arms, who attended in order to assert, though vainly, the rights of the Commons. The House was indignant when informed of these happenings and ordered Crosby and Oliver, who were members, to attend in their places, and Wilkes to attend at the bar. Wilkes informed the Speaker by letter that he would attend only if called to his place as member for Middlesex, and the House thereafter thought it prudent to ignore his existence. Crosby and Oliver, however, duly attended and were eventually sent to the Tower, although they had argued that they had only done their duty in upholding the privileges of the City; for the House resolved that to release a person apprehended by virtue of the Speaker's warrant and to apprehend the Messenger of the House for executing his warrant, and to hold the Messenger to bail for such pretended assault, were all breaches of privilege.

<sup>1</sup> These arrests were collusive and had been arranged by Wilkes who was an Alderman and wished to embroil the Commons with the City.

Attempts were made to procure their discharge from prison by writs of *Habeas Corpus*, but the courts declined to interfere. Crosby and Oliver remained in jail until the end of the session, and were popularly regarded as martyrs.

These episodes had not increased the prestige of the Commons. The lesson was too plain to be ignored. Henceforth the Lower House made no attempt to interfere with the publication of debates.<sup>1</sup> The Lords continued for a little longer to assert their claim to prohibit publication. But in 1775, when about to order the arrest of a printer, they found themselves threatened with the resistance of the City magistrates, and prudently decided to let the matter drop. From this time, therefore, reports of debates in both Houses might be published with impunity; for neither House resented mere publication, although a misleading and unfair report might still be the subject of proceedings, if complaint was made by a member. In 1798 several complaints of misrepresentation were made in the Commons, and a motion was made that a publication of which complaint had been made was a breach of the standing order against publication of the proceedings of the House. Several members spoke in the most contemptuous tone of the character of contemporary reporting, but the House had no wish to provoke the press, and the motion was eventually withdrawn.

It cannot be said that at any time the majority in either House thought the publication of debates desirable on constitutional grounds.<sup>2</sup> The House of Lords might indeed hold with some plausibility that their debates were no concern of the public.<sup>3</sup> But the Commons were almost as obscurantist in this matter as the Lords. The view that the people should be informed of the conduct of their representatives could hardly be popular with those who held that the voice of the people was only

<sup>1</sup> They did, however, limit the admission of strangers and even on occasion exclude them altogether.

<sup>2</sup> It must be remembered in this connection that many reports of debates were extremely inaccurate; but this inaccuracy was largely due to the lack of facilities for reporting. Conservatives, however, instead of urging the grant of increased facilities or the publication of an official report, made the badness of the then reports an argument for suppressing all reporting.

<sup>3</sup> In point of fact they even disliked the publication of reports of cases which they had decided. As late as 1762 they put difficulties in the way of such publication. One result of this was that inferior courts paid comparatively little respect to their decisions.

expressed in the House, which should not be influenced by pressure from outside. Even in 1738 freedom to publish reports had found defenders in the Commons; but they were few, nor do the majority seem to have changed their principles with the passing of time.<sup>1</sup> The change in the attitude of the Lower and Upper Houses alike was chiefly due to fear—fear of making themselves both odious and ridiculous.

In 1797 the law relating to the meeting of Parliament upon a demise of the Crown was thus modified. It was then enacted that in case of a demise subsequent to a dissolution, but before the day appointed by the writs of summons for the meeting of a new Parliament, the last Parliament was to meet again forthwith and to continue for six months, unless sooner dissolved or prorogued; if, however, the new King were to die before the day appointed by the writs of summons, the old Parliament was to continue for six months after his death, unless sooner dissolved or prorogued by his successor; finally, in case of a demise on the day appointed by the writs of summons for calling and assembling a new Parliament, or at any time after such day so appointed, and before such new Parliament should have met and sat, the said new Parliament was to meet immediately, and to continue for six months and no longer, unless sooner dissolved or prorogued.<sup>2</sup>

The Septennial Act was for many years unpopular with a number of people. Long Parliaments, they held, gave the Ministers opportunities of acquiring undue influence over the Commons, and prevented that House from faithfully representing the electorate; mediaeval statutes had provided for annual Parliaments, and the Bill of Rights had declared that Parliaments ought to be held frequently. Attempts, therefore, to repeal the Septennial Act were represented as attempts to restore the old constitution.<sup>3</sup> The Ministers, however, always opposed the shortening of Parliaments, and the majority in the Commons always supported them. There were obvious reasons why frequent elections should be unpopular with M.P.s, and, as the years passed, fewer and fewer members were ready to support proposals for altering the law. The Commons

<sup>1</sup> For the attitude of the Commons to the people see also *infra*, p. 381.

<sup>2</sup> 37 Geo. III, c. 127.

<sup>3</sup> The repeal of the Septennial Act would have brought the Triennial Act into force again.

rejected motions for leave to bring in a bill for the repeal of the Septennial Act in 1734 and 1742. In 1745 they refused leave to introduce a bill for annual Parliaments. In 1758 leave was likewise refused to introduce a bill for the shortening of Parliaments. During the reign of George III Alderman Sawbridge tried again and again to introduce a similar bill, but leave was never granted.<sup>1</sup>

<sup>1</sup> In 1771, 1772, 1774, 1775, 1776, 1777, 1779, 1780, 1781, 1782, 1783, 1785, and 1786.

## IV

### LEGISLATION

THE GENERALLY accepted doctrine throughout the period was that the Crown could only legislate in Parliament. But in certain cases of emergency the King still issued proclamations which, though they could not have the force of law in themselves, were intended to be obeyed, and received retrospective statutory sanction. For Parliament expected the King to act in emergencies. Thus in 1740 the Commons, while still debating a bill to prohibit the export of corn and certain other victuals during a temporary scarcity, addressed the King praying him to prohibit their export by proclamation, since delay was dangerous. And it is notable that there was just as much desire for this address among the opponents as among the supporters of the Ministry.<sup>1</sup> In 1766 a shortage of corn developed during a prorogation. His Majesty thereupon issued a proclamation prohibiting its export until three days after the date fixed for the meeting of Parliament; the proclamation explicitly stated that the King acted with the advice of the Privy Council because the situation did not allow him to wait until he could consult Parliament, and this explanation was repeated in the speech from the throne at the beginning of the session. There was a general feeling that the proclamation had been justified, and the Houses would certainly have been very ready to pass a Bill of Indemnity. Indeed, their addresses thanked the King for issuing the proclamation, and amendments in the Commons for the insertion of a reference to the need for an Act of Indemnity were rejected. But it was taken very ill that some of the Ministers maintained the legality as well as the expediency of the embargo. The argument that necessity could make the proclamation legal was

<sup>1</sup> The King complied with the request. The bill to prohibit the export of corn did not receive the royal assent till four months after the issue of the proclamation. See 14 Geo. II, c. 3.



certainly a direct contradiction of what seemed a fundamental point of constitutional law, nor is it strange that strong opposition arose. The Ministers thereupon brought in a Bill of Indemnity, which, however, in its original form applied only to those who had enforced the embargo. With this the Commons refused to be satisfied, and the Bill was so amended as to apply likewise to those who had advised it.<sup>1</sup>

This Act dealt a death-blow to the doctrine, held even by some lawyers, that the King could by proclamation suspend a statute in time of crisis, if Parliament was not sitting.<sup>2</sup> Thus, in 1790 during a similar scarcity the export of corn was once more prohibited by proclamation, since Parliament was not sitting; but when the Houses met, the Prime Minister was careful to assure the Commons that a Bill of Indemnity would forthwith be introduced. The Houses, on their part, conceded that the embargo had been expedient, and the Bill had an easy passage.<sup>3</sup> Since 1767, therefore, the position has been that while the public sometimes expect the law to be broken in time of emergency, yet those who break it do so with the full knowledge that, unless Parliament interposes its protection, they may suffer for their acts.

On one occasion the Commons endeavoured to exercise a kind of suspending power. An Act of 1781 had provided that the East India Company was not, in certain circumstances, to accept bills of exchange drawn by its servants unless the Treasury had permitted their acceptance. In December, 1783, however, the Commons resolved that the Treasury ought not to grant such permission until the House was satisfied that the Company was in a position to meet its obligations.<sup>4</sup> The Lords thereupon intervened with a resolution that for one part of the legislature to attempt 'to suspend the execution of law by separately assuming to itself the direction of a discretionary power which by Act of Parliament is vested in any body of men, to be exercised as they shall judge expedient, is unconstitutional'. Nor can there be much doubt that the Lords

<sup>1</sup> 7 Geo. III, c. 7.

<sup>2</sup> The export of corn was permitted by statute.

<sup>3</sup> 30 Geo. III, c. I. This Act also applied to those who had advised, as well as to those who had enforced, the proclamation.

<sup>4</sup> This resolution was a move in the campaign of the Opposition against Pitt's Ministry.

were right.<sup>1</sup> For the statute gave the Commissioners of the Treasury a discretion, and the Commons alone certainly could not modify a statute.<sup>2</sup>

Mention should also be made here of two statutes which had a general effect on legislation.

In 1747 it was enacted that for the future the term 'England' in any Act should be deemed to include Wales and Berwick-upon-Tweed.<sup>3</sup>

Before 1793 the law was that every Act was assumed to come into force, unless otherwise provided, as from the first day of the session during which it had been passed. Thus most legislation was retrospective. This rule was plainly unjust and also, on occasion, inconvenient; for if two Acts of the same session were repugnant the one to the other, it could not be determined which of them repealed the other. In 1793, however, it was enacted that the Clerk of the Parliaments was to endorse the date of its passing on every Act, which date was to be the date of its coming into force unless otherwise provided therein.<sup>4</sup>

<sup>1</sup> See 21 Geo. III, c. 65. Either House of Parliament was, of course, perfectly entitled to ask the King to exercise the prerogative in a particular way or to censure the Ministers who had advised a particular use of the prerogative. But the prerogative was not here in question. The Commons were attempting to prevent the Lords of the Treasury from discharging a statutory duty. The use of the word 'unconstitutional' by the Lords is interesting. The word had been used by Blackstone in 1765 and by about 1770 was commonly employed.

<sup>2</sup> For the claim of the two Houses to legislate without the real concurrence of the Crown during the regency crisis see *supra*. p. 317.

<sup>3</sup> 20 Geo. II, c. 42.

<sup>4</sup> 33 Geo. III, c. 13.

## V

### REVENUE AND TAXATION

THE POLICY of Parliament towards the civil list varied considerably.

When, in 1721, the King applied to them for assistance on the ground that the civil list was in debt, they contrived to help him without increasing the public burdens; the King was permitted to borrow £500,000 on the security of the hereditary and temporary revenue during his life and, if need be, on that of the hereditary revenue after his death; money for the repayment of the loan was to be raised by a deduction of sixpence in the pound on all pensions charged upon the civil list and upon all salaries payable in respect of offices of profit granted by the Crown—an exception, however, was made in favour of all members of the forces below commissioned rank.<sup>1</sup> Similar steps were again taken to relieve the King's further embarrassments in 1725.<sup>2</sup>

George II was granted on his accession the same sources of revenue that had been granted to his father; but it was provided that if they failed to produce £800,000 a year, the deficiency was to be made good out of the next grant made by Parliament; but if, on the other hand, they produced more than that amount, the King was to enjoy the surplus.<sup>3</sup>

A very different settlement was made on the accession of George III. The King was given a fixed income from 'the aggregate fund' of £723,000, which was to rise to £800,000 as various annuities granted by George II to his second son, to his daughter, Amelia, and to the Princess Dowager of Wales, became extinct.<sup>4</sup> In return George III gave up all the hereditary sources of revenue, except the droits of the Crown and

<sup>1</sup> 7 Geo. I, Stat. 1, c. 27.

<sup>2</sup> 11 Geo. I, c. 17. Modified by 12 Geo. I, c. 2.

<sup>3</sup> 1 Geo. II, Stat. 1, c. 1. See also 30 Geo. II, c. 19

<sup>4</sup> George II had received statutory authority to grant these annuities.

Admiralty, the Scottish hereditary revenue, the four and a half per cent. duties, the Duchies of Cornwall and Lancaster, and a few other minor sources.<sup>1</sup> The produce of these last, however, was in part applied to the public service by the King.

George III made a poor bargain; for George II, during the last years of his reign, had received considerably more than £800,000 per annum from his sources of income. It was not surprising, therefore, that a civil-list debt was soon incurred. As early as 1769 the King had to ask Parliament to pay off a debt of over half a million, which they forthwith did. Motions for an inquiry into civil-list expenditure were rejected in that and the following year on the ground that the King could manage the civil list as he pleased, since it was his own property. Nor would His Majesty's Ministers in the Commons pledge themselves that no more debts would be incurred. Such debts were actually incurred, and in 1777 a further application to Parliament was necessary. On this occasion not only was a grant made to pay off the debt, but an additional £100,000 a year was also given. In order to persuade Parliament, the Ministers presented accounts of civil-list expenditure, thereby acknowledging that an application for money gave the Commons a right to make inquiries. The Opposition contended that the accounts were imperfect; but even if this was true, an important principle had been conceded.<sup>2</sup> Shortly afterwards schemes for the control of the civil list began to be proposed in Parliament. In 1779 the Lords rejected a motion that it should be reduced. In 1780 the Commons resolved that they were competent 'to examine into, and correct abuses in the expenditure of, the civil list revenues, as well as in every other branch of the public revenue'.<sup>3</sup> In 1780 and 1781, moreover, Burke attempted to carry his scheme of economic reform, though in both years he failed to persuade the Commons.<sup>4</sup> In 1782, however, drastic changes were made. Soon after the Rockingham Ministry had been formed, the King sent a message to the Houses informing them that his servants were

<sup>1</sup> There was also the Irish hereditary revenue. See 1 Geo. III, c. 1.

<sup>2</sup> But in 1725 the Commons had asked for and obtained certain figures of civil list income and expenditure, though not a complete statement. The Acts of 1777 are 17 Geo. III, c. 21 and c. 47.

<sup>3</sup> This resolution was moved by Dunning as soon as he had carried his other motion about the influence of the Crown. See *infra*, p. 380.

<sup>4</sup> See *infra*, p. 380.

about to propose reforms with a view to securing greater economy in civil-list expenditure. The bill which was thereupon introduced and carried provided for the abolition of a number of offices; further, the Treasury was given control over expenditure in the King's household, and certain branches of expenditure were statutorily regulated in great detail; no pension of over £300 was to be granted until the total pension list fell to £90,000, after which no pension was to exceed £1,200, unless granted to members of the royal family or at the request of the Houses;<sup>1</sup> the amount of domestic, as opposed to foreign, secret-service money was limited; finally, the Treasury was to lay before the Commons within a year a list of ordinary civil-list expenses arranged in eight classes, which expenses were to be met in the order therein set forth.<sup>2</sup>

Thus Parliament departed from the old conception that the civil list was the King's own in the same sense as a man's private property is his own. Henceforth they assumed that that revenue was a trust to be administered for the public benefit. Most of the money had in practice always been spent on the public service; but the King had none the less been able to dispose of it, at least in theory, much as he pleased. In 1782 Parliament decisively asserted their right to control civil-list expenditure. Granted that a wide discretion was still left to the King, yet that discretion, having been once limited, might easily be restricted yet further. Moreover, the belief more and widely obtained that that discretion should be exercised in accordance with the advice of responsible Ministers.<sup>3</sup>

No serious quarrel over money bills arose between the two Houses during this period. The Lords, while still maintaining in theory their claim to amend them, never insisted upon it in practice; they never, that is, attempted to make any save verbal amendments in bills which imposed taxes. Such amendments the Commons sometimes accepted, though they were always careful to enter them in their *Journals* so that

<sup>1</sup> This rule did not apply to pensions given to diplomats. Nor, of course, did the Act in any way affect the disposal of the Irish hereditary revenue; it is, however, strange that it did not touch the disposal of the Scottish hereditary revenues or the 4½ per cent duties.

<sup>2</sup> 22 Geo. III, c. 82. The savings effected by the Act were to be applied, in the first place, to the discharge of the civil list debt.

<sup>3</sup> Subsequent Parliamentary proceedings with regard to the civil list are not of great constitutional interest.

their true nature might appear. It was, moreover, generally accepted that the Lords could not vary a pecuniary penalty in a bill, though they might strike it out altogether. This rule, however, was occasionally broken. With regard to such bills as Turnpike or Paving Bills, which imposed tolls or rates, the practice was that the Lords could amend them, provided they did not alter the tolls or rates.

The Commons adhered strictly to the standing orders regulating their procedure in granting supply. Thus in 1760 the Speaker ruled that a bill to enable the Counties in which the Militia was embodied to draw on the Exchequer for certain sums was a money bill, and so could not be introduced without the recommendation of the Crown.

The practice of appropriation was continued. But, particularly in war-time, the sums assigned to the forces were often exceeded. Subsequently, however, application was made to Parliament to pay off the debt incurred, and Parliament regularly did so. On one important occasion money was spent without any such excuse as that of a war. Early in 1784—just after Pitt had become Prime Minister—the Commons resolved any person paying public money to the support of any services voted in that session of Parliament, before an appropriation Act had been passed, would be guilty of a high crime and misdemeanour.<sup>1</sup> The object of this resolution was to prevent a dissolution. Nevertheless Parliament was dissolved and the resolution disregarded. Nor did the new Parliament take any notice of what had been done. But the election had resulted in the return of a House of Commons favourable to the Ministry. During the wars with France the Government often spent money on purposes to which it had not been appropriated. The Commons, however, refused to condemn their action when the Opposition raised the question; the plea of necessity was regarded as affording ample justification. In 1796 a large subsidy was given to the Emperor without any specific Parliamentary authority, although a vote of credit had been passed for general war expenditure. Subsequently the Commons approved of the subsidy.

<sup>1</sup> Most of the supplies granted each year were appropriated by one separate Act. Money was sometimes spent before that Act had actually been passed.

Throughout the period Parliament gave votes of credit to the Crown, when application was made for them in time of crisis. They were, however, usually defined in their amount and object. But on two occasions, in 1727 and 1734, no limit was prescribed. Such votes naturally met with opposition; but the majority held that the responsibility of certain Ministers for the expenditure was a sufficient guarantee that the powers given would not be abused.<sup>1</sup>

Though the Commons made these concessions in times of war or threatened war, they never allowed it to be forgotten that they controlled the purse.<sup>2</sup> They knew that large sums had to be spent, and many irregularities condoned, when their country was in danger, but they never abandoned any of their rights. When the Ministers asked for money they had to defend their conduct. There was usually a vocal Opposition, even when the majority acceded to the wishes of the Ministers. Nor were the Commons without information on financial matters; besides that furnished by Ministerial speeches, they were often provided with statements of accounts either at their own request or on the initiative of the Crown. In a sense, therefore, the generosity of the Commons proves not their weakness, but their strength. They gave freely because they were convinced that the national interest required a large expenditure.

Commissions of Accounts of the old type were not revived during this period. But in 1780 Shelburne moved in the Lords 'that a committee be appointed, consisting of members of both Houses possessing neither employment nor pension, to examine without delay into the public expenditure and the mode of accounting for the same, more particularly into the manner of making all contracts, and at the same time to take into consideration what saving can be made, consistent with the public dignity, justice, and gratitude, by an abolition of old and new created offices, the duties of which shall have either ceased, or shall on enquiry prove inadequate to the fees or other emoluments arising therefrom; or by the reduction of such salaries or other allowances and profits as may appear to be unreasonable'. Shelburne's speech made it plain that

<sup>1</sup> For the unlimited votes of credit see 13 Geo. I, c.7 and 7 Geo. II, c.12.

<sup>2</sup> See also *infra*, p. 422.

he desired not merely to secure increased economy, but also to diminish the influence of the Crown in Parliament by reducing its patronage. The motion was defeated, as was only to be expected. For, apart from other reasons, the arguments against it were strong. Its opponents did not fail to point out that, if carried, it would purport to bind the other House, which was absurd; again, it was an invasion of what the Commons had long regarded as their own province; further, the statutory Commissions of Accounts during the reigns of William and Anne had been productive of little good; finally, the need for such an inquiry was contested. There was, however, a desire in the Commons for the appointment of a statutory commission or of a committee of the House to inquire into expenditure. Accordingly, Lord North, the Prime Minister, introduced a bill, which became law, for a commission of a new kind. Seven persons, who were not M.P.s, were appointed to examine the accounts of all persons entrusted with public money, save in so far as these accounts had been passed before the Auditor of the Imprest, and also of all in a like position, whether or no their accounts had been passed, who had disbursed public money for services performed since the beginning of the year 1776; they were also to examine the collection and expenditure of all moneys which should be granted before the expiration of their commission on July 5, 1781; they were empowered to examine persons on oath and also to require the production of their papers; they were to report to the King and to both Houses of Parliament, and could embody in their reports observations on the fees and gratuities paid to those charged with the collection and issuing of public moneys, on the method of contracting for public services, and on the system of accounting.<sup>1</sup> The bill was sharply criticized on the ground that the commissioners were not M.P.s. The Commons, it was said, ought not to delegate functions that properly belonged to them to persons who did not sit in the House. This feature of the bill, however, nowadays seems to be a merit. The commission, being non-political, was able to discharge its duties efficiently and fairly. The utility of its labours soon became obvious, and it was continued for some time by annual Acts. Moreover, its

<sup>1</sup> 20 Geo. III, c. 54.



reports eventually led to a number of reforms. The constitutional implications of North's proposal are interesting. There can be little doubt that the Opposition desired the appointment of a statutory commission in order to weaken the influence of the Crown and to damage the then Ministers. The agitation for its appointment was a move in the political game. But the commission that was actually appointed strove to secure increased administrative efficiency, and an increase in this really involved an increase in the power of the executive. In the event, that proved to be an increase in the power of the Ministers rather than that of the Crown. Such a development was scarcely foreseen at the time. On the contrary, the constitution of such a statutory commission implied that Parliament had a right to concern themselves with the normal course of administration, which had hitherto long been supposed to be under the sole direction of the Crown.<sup>1</sup> But it was none the less significant that on this occasion the interposition of Parliament was invoked by the Prime Minister for the benefit of the executive power.<sup>2</sup>

During the premiership of the younger Pitt a number of select committees of the Commons were appointed to report on financial matters. In 1786 a committee of nine was set up to examine the accounts of income and expenditure presented to Parliament during that session, and to report on the probable income and expenditure in the future. In 1790 a similar committee was again created, though it was also charged with the duty of reporting on the change in the amount of the debt since the beginning of 1786. In 1797 and 1798 small committees were appointed to report on the increase of the national debt since the beginning of 1793 and also on the product of certain taxes. All these committees were given definite and limited tasks. They were all appointed at the wish of the Prime Minister, who saw that such committees could be of help to him in persuading the House to approve of his financial policy. Their reports undoubtedly gave the Commons useful information, but it was information which

<sup>1</sup> Parliament, of course, had long exercised the right to discuss cases of alleged Ministerial misconduct or incompetence; but that is another matter.

<sup>2</sup> I do not imply that North realized the implications of his conduct. He may well have thought that he was making a concession in order to avoid the constitution of a Parliamentary commission.

Pitt wished them to have.<sup>1</sup> Therefore the appointment of these committees was not a sign that the House wished to annoy the executive, but a proof that they and the executive were collaborating in the pursuit of a common task.

In 1785, partly as a result of the recommendations of the statutory commission, the old system of auditing was altered. An Act of that year abolished the Auditors of the Imprest and authorized the King to appoint five commissioners to audit the public accounts. These commissioners were to hold office during good behaviour, were to have a large salary, and were not to sit in the Commons; they were to present statements of accounts to the Treasury.<sup>2</sup> The letters patent for their appointment directed them to audit accounts 'by and with the advice and authority' of the Lords of the Treasury and the Chancellor of the Exchequer. Hence the Treasury was able to direct the allowance of expenditure which the commissioners had disallowed. The statute did not require the commissioners to report to Parliament; but an Act of 1787 ordered the Treasury to present to Parliament at the beginning of each session a detailed account of the produce of the Customs, Excise, and stamp duties, and an account of all additions to the annual charge of the national debt by interest on new loans.<sup>3</sup>

<sup>1</sup> The committees contained a majority of Pitt's supporters.

<sup>2</sup> 25 Geo. III, c. 52.

<sup>3</sup> 27 Geo. III, c. 13.

## VI

### PRIVY COUNCIL AND CABINET

THE FUNCTIONS and importance of the Privy Council remained pretty much what they had been at the end of the previous period.<sup>1</sup>

The Cabinet now definitely became, what it has since remained, an informal meeting of Privy Councillors who assembled to draw up an advice which was to be given to the King. After 1717 the King scarcely ever attended their meetings, and their advice was usually tendered to him in the form of a minute of their proceedings composed as a rule by a Secretary of State.<sup>2</sup>

The numbers of the Cabinet varied from time to time. In 1729 it had fifteen members; in 1737 sixteen or seventeen; in 1757 sixteen; in 1761 twenty-one. It always included the heads of the great offices of business and—prior to 1770 at least—a number of other persons, such as the Lord Steward, Lord Chamberlain, and Master of the Horse, whose offices certainly did not make their presence necessary; further, the Archbishop of Canterbury was until 1761 always a member; so, too, at certain times was the Chief Justice of the King's Bench.<sup>3</sup>

It is natural to enquire whether all the members of the Cabinet regularly attended its meetings. This question can be answered with some degree of certainty. The First Lord of the Treasury and the Secretaries of State were almost always present; the Lord Chancellor attended only less frequently than they, the Lord President, Lord Privy Seal,

<sup>1</sup> See *supra*, pp. 211–12.

<sup>2</sup> See *supra*, p. 215.

<sup>3</sup> *E.g.* Mansfield during the Seven Years War. On the other hand, the Secretary at War was not a regular member until 1794, save for a brief period in 1754–55. The Commander-in-Chief was often a member in time of war. The Lord Lieutenant of Ireland often attended Cabinet meetings when he was in England.

and the First Lord of the Admiralty came less often than the Chancellor, but still very often; the other members were absent from a large number of meetings; the Primate, indeed, was seldom there. But it should be added that even a member who attended comparatively seldom might come to small meetings as well as to large ones.<sup>1</sup> No doubt members sometimes failed to attend merely because they were out of Town. But there was another reason for most absences. It would appear that certain members were usually more trusted than others; important affairs were often referred to them, and to them alone. After all, nobody had a right to be summoned to meetings. It was for the King to decide whose advice he would request. It was, of course, practically impossible to exclude certain Ministers, and as time passed the King's control over the choice of those whom he consulted grew weaker. The numbers of those consulted to the exclusion of their fellows varied from time to time. The head of the Treasury, however, and the Secretaries of State were almost always among those so consulted. It would, indeed, be difficult to imagine how any important decision could be taken without them. The questions reserved for the consideration of a portion of the Cabinet were usually questions of foreign policy or—in war time—of strategy.<sup>2</sup> Thus, in 1725 the King asked the First Lord of the Treasury, Secretaries, Chancellor, President, and Privy Seal to consider a proposed treaty between him and the Duke of Wölffenbittel. This was simply the reference of a specific matter to a part of the Cabinet. But at other times all important questions of policy were so referred.

On occasion a topic might first be considered by a small meeting and then referred by them to a fuller one. It is also very probable that three or four Ministers sometimes met together before a Cabinet to decide on the line which they would take there. But such meetings, which did not result

<sup>1</sup> I have examined the minutes of 234 meetings held in the years 1717-56. The First Lord of the Treasury and the Secretaries were almost always present, the Chancellor attended 183 meetings; the President 151; the First Lord of the Admiralty 150; the Privy Seal 103; the Chamberlain 95; the Master of the Horse 80; the Groom of the Stole 65; the Lord Steward 63; the Primate 47.

<sup>2</sup> The same practice has sometimes been followed as regards questions of foreign policy in the nineteenth and twentieth centuries.

in the tendering of advice to the King, were not Cabinet meetings.

It is not surprising that contemporaries were more or less aware that all the members of the Cabinet were not equally trusted. Mention of this fact was occasionally made by speakers in Parliament. Other references indicate that the more trusted members of the Cabinet were sometimes colloquially known by a special name. They were called at different periods the 'Conciliabulum', the 'Junto', the 'effective Cabinet', and the 'confidential Cabinet'.<sup>1</sup> The names varied, but their meaning was the same.

After the accession of George III the King and his chief Ministers appear gradually to have altered their attitude to the Cabinet. There were obviously strong reasons for making it a small body with none but active members, and this it became, though only gradually. During the earlier part of the reign we hear of 'nominal Cabinet Councillors', members who never or scarcely ever attended meetings, and did not expect to be summoned. These 'nominal' Councillors were in a different position from those earlier members of the Cabinet who attended, not regularly, but from time to time; the attendance of the latter at meetings, irregular though it was, might have some significance. The 'nominal' Councillors were not a part of the Cabinet in any material sense. Thus for all practical purposes the Cabinet came to consist of a small number of persons, most of them holding great offices.<sup>2</sup> By the time of the younger Pitt's first Ministry this seems to have been accepted in theory as well as established in practice. Henceforth there is no mention—or scarcely any—of 'nominal' Cabinet Councillors. As Cabinets became smaller their members attended meetings pretty regularly. To say this, however, is not to imply that on occasion only a part of the Cabinet might not be consulted. But there is reason to believe that this was done comparatively seldom.<sup>3</sup>

Strictly speaking, the Cabinet, throughout this period, was

<sup>1</sup> The term 'Conciliabulum' was used during the Seven Years War. The others are later.

<sup>2</sup> About nine during North's Ministry; ten during Rockingham's second Ministry; eleven during Shelburne's Ministry; seven at the outset of Pitt's—an eighth was soon added.

<sup>3</sup> For the question of collective responsibility see *infra*, pp. 359-61.

only supposed to discuss such matters as had been referred to it by the King. But it is very probable that this rule was never strictly kept for any long period. After 1781, indeed, breaches seem to have been fairly frequent.

Concerning the attitude of Parliament and of the general public to the Cabinet there is little to say. From time to time a speaker in the legislature or a pamphleteer referred to it as an illegal or an unconstitutional body. But in neither House was a motion condemning it ever made. Nor is there any evidence that public opinion was really hostile to the existence of a Cabinet.

## VII

### KING, PARLIAMENT AND MINISTERS

IF BY some unhappy chance we had to depend upon formal treatises for our knowledge of the constitution during this period, our conception of it would be not merely inadequate, but profoundly erroneous. But these works were highly esteemed by contemporaries, and Blackstone's *Commentaries on the Laws of England*, in particular, was regarded from the first as an authoritative exposition of the law of the constitution.<sup>1</sup> Yet what Blackstone has to say on this topic is highly misleading. It is not easy to understand how Blackstone and his fellow-writers could ignore the glaring contrast between their constitutional theories and the constitutional practice of the age. That there should have been a certain confusion in constitutional thought during the years 1689–1719 is not strange; for those years had been full of changes and developments. But the absence of statutory changes for a long time afterwards, together with the comparative tranquillity of the political atmosphere, afforded an opportunity to take stock of the position and ascertain the real nature of the working constitution. That opportunity was not taken; the eighteenth century produced neither a Bagehot nor a Dicey, but a prolific school of constitutional mythologists. Their writings, however, are not for this reason unworthy of notice. For what they wrote was read and, in a sense, believed. Englishmen had long shown an extraordinary capacity for holding contradictory views, and this characteristic was at no time more prominent than in the eighteenth century. Therein lies the explanation of much that would otherwise be obscure in the constitutional history of the period.

What these writers of formal expositions of the constitution have to say about the relations of the executive and the legislature

<sup>1</sup> The first edition of the *Commentaries* appeared in 1765.

is especially curious. The following quotation from Blackstone is a typical specimen: 'herein', he writes, 'indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature, the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has resolved, while the King is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two Houses, through the privilege they have of enquiring into, impeaching and punishing the conduct (not indeed of the King, which would destroy his constitutional independence; but, which is more beneficial to the public) of his evil and pernicious counsellors. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest; for the two Houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from separation, and artificially connected together by the mixed nature of the Crown, which is part of the legislative and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each and formed out of all; a direction which constitutes the true line of the liberty and the happiness of the community.'<sup>1</sup> The constitution, thus interpreted, provides for an elaborate balance of power. The King, the Lords, and the Commons each have their own proper sphere of activity, and each is perpetually on the watch lest either of the other two should attempt to pass beyond its due bounds; if any of the three attempts to do so, the other two should combine to check it. Such a condition of things would seem to be better adopted to the prevention than to the promotion of activity, since it makes no adequate provision for co-operation between the executive and the legislature. The King can, it is true, veto bills; but the Houses can retaliate by refusing supplies, and so

<sup>1</sup> This passage may be found in Book I, Chapter 11 of the *Commentaries*.



paralyse the executive. On the other hand, the Houses have no direct control over the King, who is the executive. His Ministers, indeed, can do wrong, though he cannot, and they can be punished for it. But that only means they are civilly and criminally liable for breaches of the law. There is no need for Ministers to have the confidence of both Houses or of either House. They are the servants of the King, and it is for him to appoint and dismiss his servants.

The theory outlined above never was, and never could be, carried out in practice for any length of time. Blackstone, unlike some other writers, was learned in statute law and case law; he was also, like all other writers on the constitution, familiar with the writings of Locke and his school. But he was no more conscious of the nature and importance of constitutional conventions than were the great majority of his contemporaries.<sup>1</sup> It was, indeed, largely because of this general unawareness that new conventions were able to develop under the pressure of circumstances with comparatively little opposition.

What, then, was the real state of affairs?

The power of the Lords was far less great than that of either the King or the Commons. For the Upper House did not, in fact, habitually hold the balance between the other two. As a rule it acted in accordance with the wishes of the King's Ministers—that is to say, usually, though not always, in accordance with those of the King. Nor, with one great exception in 1783–84, were there any very serious conflicts between the Lords and the Commons. It sometimes happened that the Upper House threw out bills which had passed the Lower. Generally these were bills which the Ministers had either opposed in the Commons or had allowed to pass that House without opposition in the sure and certain hope that they would be defeated in another place. In such cases there was little likelihood that a crisis would develop. It is true that the Lords occasionally rejected bills to which the Ministers were not unfavourable, but if the Commons passed similar bills in subsequent sessions, the Upper House usually accepted them. Moreover, many sons of peers and

<sup>1</sup> The contrast between Dicey's treatment of the constitution and that of Blackstone is illuminating.

many persons otherwise related to peers sat in the Commons, and this conduced towards the co-operation of the two Houses.

That the Commons were far more powerful than the Lords is obvious. But the position of the Commons was very different from what it was to become in the nineteenth century. This was largely because political parties as we know them were only beginning to come into existence by the end of the period, and did not exist for its greater portion. The names 'Whig' and 'Tory' were certainly in common use at the beginning of the period, as they had been before, and they continued to be used after its close. But the principles and conduct of those who were called 'Whigs' and 'Tories' cannot always be deduced from the names.<sup>1</sup> It must be remembered in this connexion that party organization of the modern type did not come into existence until the nineteenth century. We find throughout the period groups of men who commonly act together in matters political, but these groups cannot always be called parties without a misuse of that term. The trend of opinion, too, long continued to be unfavourable to parties, which were still often regarded as at the best necessary—and temporary—evils, and at the worst as factions dangerous to the body politic. But as the years passed a change took place. Burke was the first great thinker to defend and justify parties as healthy elements in the state, and his views became increasingly popular. It was symptomatic of the new state of things that although the members of that body of Opposition 'Whigs' which was headed by the Duke of Portland differed widely in their attitude to the French Revolution and its repercussions on English politics, Portland himself did all he could to prevent those differences, and they soon became of the first importance, from completely breaking up the party; for he believed in parties, and thought the splitting of his own would be a misfortune for his country. The split eventually came, but no long time before Portland could write thus to a friend in affirmation of his creed: 'I am also decidedly of opinion that the existence of a Whig party is essential to the well being of this country, as well as to the preservation of its constitution'.<sup>2</sup>

<sup>1</sup> As far as possible I avoid speaking of 'Whigs' and 'Tories' in this section.

<sup>2</sup> See *The Windham Papers*, vol. 1, p. 201.

These words were written in 1794 by a man who, though in high political position, was of very moderate capacity.<sup>1</sup> That such a man, whose inclinations, moreover, were naturally conservative, should uphold parties on principle was highly significant.<sup>2</sup>

Closely connected with men's attitude to parties was their attitude to the propriety of regularly opposing Ministerial measures in Parliament. During the earlier part of this period it was usually held to be the duty of members of both Houses in normal circumstances to give a general, though not an unvarying, support to the King's Ministers; they should, indeed, vote according to their conscience on particular questions, but a steady opposition was to be condemned; it was only justifiable on the ground that the constitution was in danger. There was, of course, always an Opposition in being, though it ordinarily consisted of several groups with divergent political aims.<sup>3</sup> But its members long tended to regard its existence as a regrettable necessity, due to the unconstitutional conduct of some or one of the chief Ministers for the time being.<sup>4</sup> Not until parties become respectable did the regular existence of an Opposition come to be looked upon as a symptom of health, and not of disease, in the body politic.

<sup>1</sup> For Portland see also *infra*, p. 371.

<sup>2</sup> Portland had doubtless been greatly influenced by Burke and Fox; but it was a sign of the times that such a man was so influenced by them. It may be added that Portland professed to believe the principles of his party were 'the principles upon which the Revolution of 1688 was founded and perfected'. The correctness of this belief is doubtful, but its existence is none the less important.

<sup>3</sup> The *Oxford Dictionary* gives examples of the use of the term 'Opposition' in this sense from the years 1704 and 1744; but it was sometimes so used during the intervening years; afterwards this use became common. It is convenient to use it throughout this section to designate those members of either House who were steadily opposed to the chief Minister or Ministers.

<sup>4</sup> During the reigns of George I and George II certain sections of the Opposition sought to escape the reproach of faction by attaching themselves to the heir apparent. George II, while Prince of Wales, and his eldest son Frederick, until his death in 1751, both set themselves up to some extent as political leaders. Those who looked up to them as such could not be confounded with the Jacobites and could represent themselves with some plausibility as being outside party. For the heir to the throne did not regard himself as a party man. George III, during the years immediately preceding his accession, had a certain political following, though he did not attempt to overthrow his grandfather's Ministers. George IV also dabbled in politics, while Prince of Wales, but by that time the support of the heir apparent was scarcely needed to justify opposition to the Government of the day.

Charles James Fox in the latter part of his life stoutly maintained this view, and many agreed with him.<sup>1</sup> But even at the end of the century there were men in Parliament who professed adherence to the older belief. When Charles Abbot first entered the Commons in 1795 he informed a friend that he intended 'upon all general occasions to vote in support of the Minister of the day, be he Pitt or Fox; for to me they are as indifferent as Pompey or Caesar, and I hate, because I disapprove, a teasing, barking, cavilling, unprincipled opposition'. Yet Abbot reserved to himself the liberty to vote as he pleased upon 'particular and important questions'.

Since there were no real parties at the beginning of this period, the King then still retained much freedom in his choice of Ministers. He was also able to continue through their agency the process begun earlier of using the enormous patronage of the Crown as a cement to hold together a majority in the Houses. The King, in the language of the day, thus gained influence over the Houses. But then, as before, that influence was reciprocal. For the Houses, and especially the Commons, gained influence over the Crown. The King had to select some of his Ministers with a view to their capacity for managing the Commons. Nor was this the only practical restriction upon his freedom of choice. Whatever his own preferences might be, the King could not safely fill all the great offices of business with utterly incompetent men. For the heads of the big departments were always exposed to attack by the Houses. Further, it was more and more necessary that there should be a fair amount of collaboration, Parliamentary as well as administrative, among the chief Ministers. It was not yet, however, an established practice that all Ministers should profess the same views in public. The holders of the great offices still spoke and voted against each other on occasion. Thus Sir P. Yorke, while Attorney General during the years 1723-36, several times divided against the majority of his colleagues in the Commons, Henry Fox, when Secretary at War, fiercely opposed Hardwicke's Marriage Bill, the elder Pitt, when Paymaster, supported in 1751 a motion that supplies for 10,000 seamen should be granted, though the Prime

<sup>1</sup> But at times during the war with revolutionary France there was a strong feeling that regular opposition was to be deplored. Such feelings are still common when the national security appears to be in danger.

Minister only desired a supply for 8,000, Mr. Secretary Conway often voted with the Opposition during the years 1766–68, and Lord Chancellor Thurlow during the years 1784–92 often opposed in the Lords bills which the younger Pitt had supported in the Commons.

Such conduct was possible because a public difference of opinion between the leading Ministers did not for the greater part of the century necessarily have any very serious consequences. If the King chose to retain in his service Ministers who occasionally divided against each other, he was perfectly within his rights in so doing. Nor did either House during this period ever regard a defeat upon a single question, however important, as necessarily entailing the resignation of the Ministers who had found themselves in a minority.<sup>1</sup> Hence public differences of opinion among the Ministers were sometimes tolerated. More serious, however, than differences concerning a particular bill, were those concerning foreign policy, whether or no they were expressed in Parliament. Such differences, if radical, might lead to changes in the Ministry. For one or more powerful Ministers sometimes forced the King to get rid of a recalcitrant colleague by a threat of their own resignation.<sup>2</sup> These cases were proofs that the successful parties to the dispute had extraordinary—some contemporaries would have said inordinate—influence over the King.

The minor placemen, among whom are to be included those officers with seats in Parliament, enjoyed a somewhat greater degree of freedom than the holders of the great offices. For some time many of them regarded it as proper to vote with the Opposition on occasion if they felt so inclined. That dismissal should be the consequence of so doing was long considered a grievance in many quarters. Walpole was denounced

<sup>1</sup> *E.g.* Walpole was compelled to let the Excise Bill drop in 1733; in 1744 and 1767 the Ministers failed to carry important financial proposals in the Commons; in 1786 a proposal for the fortification of Portsmouth and Plymouth was defeated in the Commons by the casting vote of the Speaker; in 1796 Pitt was compelled to drop a proposed duty on legacies of real property in order to avert its rejection by the Commons.

<sup>2</sup> *E.g.* Walpole and Townshend procured the dismissal of Secretary Carteret in 1724; Walpole forced Townshend to resign the Secretarial seals in 1730; the Pelhams obtained the dismissal of Granville, then a Secretary of State, in 1744.

for unconstitutional conduct in procuring the dismissal of placemen for voting with the Opposition. Again, in the early years of George III an outcry was raised when General Conway was deprived of the command of a regiment because of a vote he had given on the question of general warrants.

Opinion long distinguished with regard to the holders of both major and minor offices between occasionally voting with the Opposition and regularly supporting it. The former was looked upon by many as compatible with the tenure of a place; the latter as not. But in the course of the reign of George III the view began to prevail that Ministers should always be outwardly unanimous. The transition may be illustrated from the conduct of North during the period of his premiership from 1770 to 1782. He denied to the Commons that the dismissal of Lord Chancellor Camden in 1770 had been caused by his having voted with the Opposition; in 1779 he told the House that he could not prevent his colleagues in the Lords from expressing different opinions about a Militia Bill; yet at other times North definitely asserted that the Ministers were collectively responsible. After North's fall that view made rapid progress. Charles James Fox, who had condemned the continuance in office of North's Ministry in spite of their divisions, was himself prepared to resign office rather than remain in the Rockingham Cabinet with whose policy he could not concur.<sup>1</sup> When Pitt in 1792 procured the dismissal of Thurlow, who had frequently opposed his measures in the Lords, most men thought he had done wisely.

In the circumstances the change was very natural. For some time the Houses had in practice been much concerned with matters of policy; the addresses of thanks for the King's speech at the beginning of each session had by the end of the previous period become statements of the views of the Houses on the policies outlined therein. Again, any branch of governmental activity might give rise to debates and resolutions in either House. The Ministers might try to conceal the facts, but they could scarcely prevent the Houses from going their

<sup>1</sup> This was in 1782; Fox would have resigned the Foreign Office, because he could not have had his way on an important matter, even had Rockingham lived. As it was, Rockingham's death caused Fox to resign for another ostensible reason, namely that Rockingham's successor was not chosen by the Cabinet. See *infra* p. 371.

own way.<sup>1</sup> Even questions of foreign policy were continually discussed in Parliament; papers relating to negotiations were frequently laid before the Houses either at their request or of the King's own motion; nor was any request for papers ever refused, though the Ministers were at times able to secure the defeat of a motion to address for papers on the ground that their production would not be in the national interest. The King, indeed, retained the right to declare war and make peace at his discretion. But it was plain that no war could be declared and no treaty of peace made unless the approval of Parliament was almost certain.<sup>2</sup> It was plainly desirable that the Ministers should work together in order to manage the Houses, and thus by the end of the century the convention of outward unanimity had become pretty well established.<sup>3</sup>

These, then, were the considerations which generally influenced the King in his choice of Ministers. But it must be remembered that he could not compel any man to accept office, nor could he in practice refuse to allow any Minister who so wished to resign. Frequently the King had to make concessions of one kind or another in order to secure or to retain the services of particular men. The King, in fact, in order to get the man he wanted for one place, had often to consider his wishes in the filling of others, or even to allow him to alter the trend of policy. When it was necessary to obtain the support of various Parliamentary groups, a prolonged process of bargaining might ensue. The Minister who was to lead the Commons was inevitably of peculiar importance. Though there was always a disposition among many members to give a general support to the King's Ministers for the time being, provided their policy was not exceptionally unpopular, and though that tendency could easily be strengthened by the

<sup>1</sup> Note that North was unable to prevent the Commons from dealing with the Civil List in spite of his efforts. See *supra*, p. 342.

<sup>2</sup> Bute in 1762-63 found the responsibility of concluding the peace which terminated the Seven Years War almost too great to bear. Bute was a nervous man and feared the Commons would turn against him. Shelburne was forced to resign in 1783 because the Commons condemned the preliminaries of a definitive treaty of peace. But the Commons then really objected not so much to the terms of the settlement as to Shelburne himself. They would have censured any settlement at the time in order to drive Shelburne out of office. So this episode does not invalidate what has been said above. For Shelburne's resignation see also *infra*, p. 371.

<sup>3</sup> But even then Ministers might agree to differ on particular points.

proper use of the royal patronage, yet the leader of the Commons never had an easy task, nor were there ever at any one time many persons fit to undertake it. But the King had to find a suitable person for the task, and had to make whatever concessions might be necessary to secure his services.<sup>1</sup>

The rise of the premiership was largely due to the necessity of managing the Houses. Robert Walpole is usually and rightly called the first Prime Minister. But it is impossible to give a very precise meaning to the term as applied to Walpole and to the other Prime Ministers of the eighteenth century. It was one of French origin, and was originally employed by Walpole's enemies more or less as a term of abuse.<sup>2</sup> There was not then any office of Prime Minister. According to the formal constitutional theory of the time, Walpole should have concerned himself solely with financial business, save in so far as he was called upon to give his advice on other matters in his capacity as a Privy Councillor. That one Minister should engross the major part of the King's confidence, and that his advice on all matters should have a preponderant influence over his master, was in the eyes of many thoroughly unconstitutional. In France such Ministers had long been known; in England they were generally thought to be incompatible with freedom. Walpole himself, of course, repudiated the title of Prime Minister, and repeatedly declared in the Commons that he was but one among several of the King's servants. He even on occasion repudiated all responsibility for foreign policy.<sup>3</sup> This, however, was sometimes a mere tactical expedient. In any case, Walpole's position was very different from that of a modern Prime Minister. He had not been called upon to form a Ministry; indeed, a complete change of Ministers on the advice of one man was scarcely conceivable at the time.

<sup>1</sup> The arrangements made at any one time naturally depended largely upon the personalities of those concerned. A strong leader could demand and get much more than a weak one. Hence generalization is impossible as to the amount of power each particular leader possessed.

<sup>2</sup> This was done during Walpole's second tenure of the First Lordship of the Treasury, 1721-42. It is to be noted that Walpole's position was very different from that of a Mazarin or Fleury. Walpole owed his influence with the King largely to his skill as a Parliamentarian. Hence the term 'Prime Minister' when used by Englishmen speedily acquired a peculiar meaning.

<sup>3</sup> It must be remembered that Walpole did not reach the summit of his power until after the fall of Townshend in 1730.



Nor was Walpole the leader of the strongest party in the Commons. His position was simply that of a man of great abilities who had been given an office of the first importance and had subsequently gained enormous influence over his master. The extent of that influence depended largely on their personalities; it was neither uniform nor regulated by custom. Had either George I or George II dismissed Walpole at any time, their action in so doing would have been perfectly correct. It was, in fact, generally expected that upon his accession to the throne George II would dismiss Walpole, and he actually all but did dismiss him. In retaining Walpole the King was simply influenced by considerations of his own convenience; Walpole knew how to commend himself when in office, and had given proof of his ability to annoy the Government when in opposition. Again, in 1730 Walpole quarrelled with Secretary Townshend over foreign policy, and the King, being forced to choose between them, kept Walpole and allowed Townshend to resign. But he might just as properly have done the reverse. Walpole depended completely on the Crown. Since he enjoyed the royal confidence and the control of most of the royal patronage, he was long able to keep together a majority in the Commons. Without this support he could not have done so. But to say this is not to imply that anybody else in Walpole's position would have been equally successful. It was chiefly because Walpole was a great Parliamentary that he secured and kept the royal favour.

Walpole was fiercely attacked by the Opposition. They accused him of being a Prime Minister, of having committed numerous—though unproven—illegal acts, and of having advocated bad policies. Great apparent stress was laid on the first two charges, because it was not yet generally understood that the Houses might properly agitate for the removal of a Minister merely because they disliked his policy. Hence Walpole and his friends could reply by denying either that he was a Prime Minister or that he had broken the law and arguing that, this being so, attacks on him were unjustified. None the less, the tendency was for these debates to become in fact, if not in name, debates on the policy of the Ministry. For it was necessary that that policy should be approved by the Parlia-

ment. The Opposition, however, though they were bent on the overthrow of Walpole, scarcely contemplated a complete change of Ministry. In 1741 they went so far as to move in both Houses for addresses to the King praying him to dismiss Walpole from his presence and counsels for ever. These motions were defeated after heated debates, in the course of which Walpole, while formally denying that he was Prime Minister, had virtually admitted the truth of the charge and boldly assumed responsibility for all Ministerial measures. No long time after this triumph there was a general election, and Walpole, finding the new House of Commons resolutely hostile to him, resigned office early in 1742.<sup>1</sup> His resignation was a tacit admission that no Minister could remain in office without the support of the House, and it was only fitting that this tribute to its power should come from the greatest Parliamentarian of his age.

There was at first a fairly strong desire in the Commons for the impeachment of the ex-Minister. No real evidence that he had broken the law was available, but the House seemed for a time to feel that their conduct in bringing about Walpole's fall could only be justified if he had been guilty of criminal conduct. Accordingly a motion was made for a secret committee to inquire into Walpole's conduct during the previous twenty years. This was defeated by two votes; but another motion for a committee to inquire into his conduct during the previous ten years was carried by a small majority. The committee found that its task was impeded by the refusal of several witnesses to answer questions, on the ground that they might thereby incriminate themselves. The Commons thereupon passed a bill to exempt all persons giving evidence from the penalties for any crimes they might admit. This bill the Lords rejected as being contrary to justice; for had it become law it would have encouraged ill-grounded accusations. The committee continued its task as best it could, and eventually produced a report which was not very damaging to Walpole. By that time, too, the Commons were very ready to let the matter drop. Henceforth overt attacks on a Minister's policy and efforts to obtain his removal needed less and less

<sup>1</sup> No motion directly aimed at Walpole had been carried when he resigned. The divisions which made plain to him the feelings and intentions of the House were on election petitions.

to be justified by allegations that he had broken the law, nor did the Commons ever again take such steps against an ex-Minister.

The fall of Walpole was not followed by anything like a complete change in Ministry. All that happened was a certain amount of reshuffling and the conciliation of certain sections of the Opposition by the grant of office to their leaders.<sup>1</sup> The position of Prime Minister could not be abolished, since it had no formal existence; but it was, so to speak, allowed to fall into abeyance for a brief space. It was, however, inevitable that it should be revived in some form. For experience had shown that government could not easily be carried on unless one Minister had a certain superiority over his colleagues. That the Prime Minister should hold any particular office was less necessary, but that he should have one of the great offices of business was very desirable. Now, it so happened that the patronage attached to the Treasury gave its First Lord certain advantages in competition with the other chief Ministers. For the importance of patronage in the politics of the century can hardly be over-stressed. But another consideration had also to be taken into account. Some Minister must act as leader of the Commons. Since the use of the royal patronage played a great part in the management of the House, and since only a man of first-rate abilities could manage the House, it was not very surprising that the positions of First Lord and leader of the House should sometimes be united. He who held both was naturally Prime Minister, and tended to remain so for many years.<sup>2</sup> Though several peers became First Lords of the Treasury and Prime Ministers, their tenure of power was a good deal shorter.<sup>3</sup> It can, then, be said that for the greater part of the remainder of the century there was a Prime

<sup>1</sup> William Pulteney, one of those leaders, refused to take office; but accepted an Earldom and a seat in the Cabinet. This was doubly a blunder. Pulteney, who had been a great figure in the Commons, counted for little in the Lords, and membership of the Cabinet without office brought him no real power. Pulteney himself appears to have realised his error almost as soon as it had been committed.

<sup>2</sup> Cf. Walpole 1721-42, Pelham 1744-54, North 1770-82, Pitt 1783-1801. I date Pelham's premiership from the dismissal of Carteret in 1744.

<sup>3</sup> When a commoner was First Lord, he was also Chancellor of the Exchequer and controlled finance; when a peer was First Lord, the Chancellorship was held by a member of the Lower House, and the First Lord had a rival in his own department.

Minister who was nearly always the First Lord of the Treasury. By Prime Minister is meant a Minister who counted for more than any of his colleagues in the formation of policy and had a certain voice in the selection of some of those colleagues. No more precise description can be given. For not only did the power of the different Prime Ministers vary, but the same Prime Minister was not at all times equally powerful.<sup>1</sup> None the less, the existence of a premiership came to be generally recognized and accepted. This happened gradually and quietly. Since no legislation was required, the Houses were not called upon to express their approval, nor did they go out of their way to check the new development. Occasionally a speaker in one or the other House or a writer in a pamphlet protested that a premiership had no place in the British constitution properly interpreted. But both the Houses and the nation remained unexcited. Moreover, the development of collective responsibility prevented the Prime Minister from reducing all his colleagues to mere ciphers, as some had once feared he would do.

The first three monarchs of the House of Hanover certainly failed to grasp the full significance of these happenings. They respected the constitution; but that constitution, as they and the writers of treatises interpreted it, placed the executive power in the hands of the King. George I and his two immediate successors wished their Ministers to be their servants in fact as well as in name; that this should not always be so was to be deplored. But since government had to be carried on, they often conceded in practice what they never would have admitted as a theoretical proposition; they sometimes allowed a Minister or a number of Ministers to impose a distasteful

<sup>1</sup> The following persons may perhaps be considered as having been Prime Ministers while they were First Lords of the Treasury: H. Pelham (1744-54), Duke of Newcastle (1754-56), Earl of Bute (1762-63), G. Grenville (1763-65), Marquis of Rockingham (1765-66), Lord North (1770-82), Marquis of Rockingham (March-June, 1782), Earl of Shelburne (July, 1782 to February, 1783), Duke of Portland (April-December, 1783), W. Pitt (December, 1783 to March, 1801). For the position in 1756-61 see *infra*, p. 369. In July, 1766, Chatham became Lord Privy Seal in a Ministry of which he was by far the most important member; but early in the following year he became too ill to transact business; when he recovered his health in 1768 he resigned. Between the time when he fell sick and January 1770 the Duke of Grafton, the First Lord of the Treasury, was the first man in the Ministry, but he was not a strong character.

policy upon them; they sometimes gave office to persons they disliked. When they conveniently could, they exercised what they deemed to be their proper powers. Particularly in the sphere of foreign affairs they sometimes endeavoured, with the aid of one or two Ministers, to carry out a policy of which the other Ministers disapproved; they were sometimes able to give high office to persons with no obvious qualification except their favour; they sometimes intrigued with persons who were not Ministers, in order to be able to turn out their actual Ministers and replace them by others; they sometimes dismissed Ministers simply because they disliked them. Nor did any of these actions violate any established constitutional convention. The King in matters constitutional was almost always a conservative.<sup>1</sup> When he openly resisted innovations, his resistance could be defended as an attempt to preserve the much-vaunted balance of King, Lords, and Commons.

In this respect George III does not differ from George I and George II. There is no proper foundation for the belief, once prevalent, that he attempted to subvert the constitution; the year 1760 is not a date of any importance in constitutional history. It is indeed true that George III gave office to many Tories, whereas George I and George II had given office almost exclusively to Whigs.<sup>2</sup> But one cannot deduce from this that the first two Georges believed in party government; they did not even know what it was. Their choice was originally due to their belief that the Whigs were the loyal supporters of the House of Hanover, while they doubted the loyalty of the Tories; with George II the exclusion of the Tories from high office doubtless became in part a matter of habit. They assumed, however, that it was the duty of the Houses to support the Ministers they had appointed, not because the Ministers were Whigs, but because they were the King's Ministers. That George III should make the same assumption when some of

<sup>1</sup> The development of the premiership was partly due to the King; but there was no deliberate attempt on his part at innovation. He simply made a number of arrangements that were convenient at the time.

<sup>2</sup> The terms 'Whig' and 'Tory' had very little meaning by 1760. There were always some Whigs in the Opposition. It is, I think, in general better to talk of the supporters of the Government and of the Opposition than to try to divide the Houses on the basis of a Whig-Tory classification of members.

his Ministers were men who had once been Tories was equally natural and equally proper.

Roughly speaking, these were the factors which principally determined the relations of King, Parliament, and Ministers during the greater part of the period. A narrative of all the Ministerial changes therein belongs rather to political than to constitutional history; but a brief treatment of certain crises must be attempted.

In 1746 the First Lord of the Treasury, Henry Pelham, backed by the other leading Ministers, wished the King to confer office upon the elder Pitt. When George II refused to do so, most of them resigned. The King thereupon tried to constitute a new Ministry, but his failure became apparent when it was found that it would not command a majority in the Commons. The King then called back his late Ministers and submitted to their terms. This episode cannot be taken to prove that the will of the majority of the Commons was the decisive factor in the choice of a Ministry; such was not generally the case in practice any more than in theory. But it then happened that the only prominent men upon whom the King could rely were peers. A majority could not be kept together in the Lower House without a capable leader, and no such leader was to be found among Pelham's opponents. Pelham and his friends therefore took advantage of this opportunity to exert a pressure on the King which many thought wrong. Even Hardwicke, then Lord Chancellor and one of Pelham's stoutest backers, subsequently came to the conclusion that their treatment of the King had not been very proper. None the less, their success showed the weakness of the Crown.

The Duke of Newcastle, who succeeded Pelham upon the latter's death in 1754, found the problem of managing the Commons very troublesome. He discovered that things would not go well there without an efficient leader, and that an efficient leader was a potential rival for the chief place in the Ministry. The outbreak of the Seven Years War only increased his difficulties. Though the Government did not actually lose its majority, the criticisms of the Opposition grew violent, and after the loss of Minorca the temper of the House became such that he dared not remain in office. Newcastle was a timid man, and his fears of impeachment were ridiculous; but there

is some reason to believe that the House would not have allowed the Ministry to continue totally unchanged. As it was, Newcastle's resignation led to a partial reconstruction; the insignificant Duke of Devonshire was made First Lord of the Treasury, and Pitt became a Secretary of State and the first man in the Ministry.<sup>1</sup> But the King did not like Pitt and dismissed him in April, 1757. A prolonged crisis then ensued; for Pitt was popular both in the Commons and in the country. Yet the King's right to dismiss Ministers was scarcely questioned, though its recent exercise was widely deplored. George II made desperate efforts to construct a Ministry without Pitt, but had no success, since he could not find men with both the power and the courage to accept and carry on the government. Eventually Pitt and Newcastle, who retained a large Parliamentary following, joined forces, and the King reappointed them to their former offices. Pitt allowed Newcastle to control the distribution of most of the patronage, while he himself had the chief say in the formation of war policy; for the Cabinet usually followed his lead. Thus Newcastle's control over patronage did not make him the dominant figure in the Ministry. His presence there, indeed, was largely due to the King's wishes. Nor would Pitt have been able to play so great a part had he not speedily won the confidence of his royal master.<sup>2</sup>

During the first decade of George III's reign there were many Ministerial changes, nor was it until 1770 that the King was able to secure a Ministry that was both stable and to his liking. From 1770 till 1782 Lord North remained Prime Minister and First Lord of the Treasury. Early in the latter year occurred the first of a series of crises. Recent British disasters in the war with the rebellious Americans and their European allies caused the Commons to turn against the Ministers. A motion was carried condemning the further prosecution of hostilities

<sup>1</sup> I omit to specify the other changes.

<sup>2</sup> The accession of George III in 1760 weakened Pitt's position fairly quickly. In March, 1761, the Earl of Bute, the King's favourite, was made Pitt's colleague in the Secretaryship. In October, 1761, Pitt resigned because he did not agree either with the King or with the majority of his Cabinet colleagues on foreign policy. A few months later Bute succeeded Newcastle as First Lord of the Treasury. Bute's rise was entirely due to the King's favour; his resignation in 1765 was caused by his weariness of office; the strain was too great for him to bear.

against the rebels, and another motion, declaring that the House no longer had any confidence in the Ministers, only just failed to pass. North, who had both stated in the House and informed the King that Ministers must have the confidence of Parliament, shortly afterwards resigned, together with most of his colleagues. The actions alike of the House and of these Ministers were entirely unprecedented. Never before had the House of Commons forced the principal Ministers almost all to resign, nor was it less remarkable that the Prime Minister should acknowledge their right to do so.<sup>1</sup> It is true that several speakers in the House asserted that the King had entire freedom to choose such new Ministers as he pleased. But it was a very strong thing for the House virtually to determine that certain men should not be Ministers merely because their policy was disliked.

The King did what was clearly expected of him, and gave the principal vacant offices to the leaders of the Opposition. But he succeeded in retaining one of the members of the old Cabinet, the Lord Chancellor. He also had his way on another point; for he refused to grant an audience to Rockingham, the new First Lord of the Treasury, before the Ministry had been formed. Negotiations with Rockingham were conducted through Lord Shelburne, leader of another of the Opposition groups, who became a Secretary of State. The vacant offices, however, were filled in accordance with Rockingham's advice. But Rockingham had previously come to an understanding on the matter with Shelburne. Moreover, Rockingham, before taking office, secured the King's consent to the adoption by the new Ministry of a detailed programme of foreign and domestic policy. These were great concessions on the King's part. Never before since 1714 had there been a change of Ministers so nearly complete; never at all before had the King had so little real share in the making of Ministerial appointments.<sup>2</sup> Never at all before had he been forced to approve in advance of so detailed a programme of policy.

Three months later Rockingham died, and the King appointed Shelburne to succeed him. Thereupon several members of

<sup>1</sup> The circumstances of Walpole's fall were very different. See *supra*, p. 364.

<sup>2</sup> Rockingham had refused to take office, when asked in 1767, unless the then Ministry were to be considered 'at an end'.



the Cabinet resigned, not merely because they disagreed with Shelburne's policy, but also on the ground that Rockingham's successor should have been chosen by the Cabinet. This claim was, of course, perfectly unwarranted by precedent and could not have been accepted by the King.<sup>1</sup> The vacant offices were filled, and the Shelburne administration remained in office until early in 1783. Then, however, when the preliminaries of peace between Britain and her late enemies were submitted to Parliament, resolutions condemning their terms were passed by the House of Commons. After this Shelburne resigned, although his colleagues remained in office for a little longer. The leaders of the majority in the Commons were determined that the Duke of Portland should be the new head of the Treasury, and that practically all Ministerial posts should be filled in accordance with his recommendations.<sup>2</sup> The King made the greatest efforts to avoid a complete surrender, but in vain. Portland was eventually given the Treasury, and the other posts were assigned to those whom he recommended. The King was not allowed to retain a single one of his old Ministers in the new Cabinet. This was another triumph for the House of Commons, who had been active during the interval of several weeks between Shelburne's resignation and Portland's appointment; <sup>3</sup> they had gone so far as to present an address to the King praying him to appoint an administration which deserved the confidence of the people, not, be it noted, of the House of Commons. To this address His Majesty had returned a polite reply, but he had not forthwith yielded; there had therefore been talk of a second and stronger

<sup>1</sup> It is true that after Pelham's death in 1754 the King had asked the opinion of the Cabinet as to 'the most proper and advisable methods of filling up the vacancies' caused by Pelham's death. But it will be noted that the initiative was the King's. Moreover, the Lord Chancellor, by the King's command, had communicated to the Cabinet the King's suggestions of which the Cabinet had unanimously approved. As far as I know the Cabinet were never again consulted on such a matter.

<sup>2</sup> The Duke of Portland was a mediocrity. But North and Fox, who had just joined forces, wished to make him the nominal head of the new Ministry. This coalition between former opponents was a sign of the times; although many regarded it as unprincipled, they did so rather because North and Fox had long been opponents than because it was an attempt to coerce the King.

<sup>3</sup> During this interval Shelburne's former colleagues remained in office to carry on necessary business. The House looked on them as caretakers, so to speak.

address, which would doubtless have been voted had not the King eventually given way.

The King accepted the new Ministry only because he could do no other, and he was fully determined to get rid of them as soon as he could see his way to replacing them. Meanwhile he refused to grant any peerages at their request, much to their annoyance.<sup>1</sup> At the end of the year a peculiar combination of circumstances brought about their downfall. Fox's celebrated India Bill was then introduced in the Commons and passed by that House, but was thrown out by the Lords. Now, the Bill contained a constitutional innovation of the gravest import. It provided that the government of the territories of the East India Company, with the patronage annexed thereto, was to be controlled by a board of seven commissioners, whose names were inserted in the bill—the Commons put them in while the House was in committee. These commissioners were to hold office for four years unless either House should sooner request the King to dismiss them. The Bill, therefore, was directly contrary to the established principle that the executive power resided in the Crown. It was, in the language of the age, an attempt to alter the balance of the constitution, an attempt unsupported by any good precedent.<sup>2</sup> Thus the measure—whatever its other merits or demerits—might well be opposed on constitutional grounds. The King, before it came to the Upper House, consulted Lord Temple who was not then a Minister, and authorized him to inform members of his House that His Majesty would consider any man who voted for it as an enemy. Nor is there any doubt that Temple's publication of this message contributed largely to the defeat of the Bill. After its rejection by the Lords the King promptly dismissed his Ministers and appointed a new administration of which the younger Pitt was the head.

These events raise several interesting problems. Firstly, was it proper for the King to consult with Temple as he did?

<sup>1</sup> Ministers could not then have resigned for this reason and obtained the support of the Commons for their action in so doing.

<sup>2</sup> The various statutory commissions of accounts are not really comparable; they had neither great administrative powers nor enormous patronage. The only near precedent is that of the Commissioners for Wool in William's reign; but they never were an important body. See *supra*, p. 242.

Technically every peer had a right of access to his sovereign in order to tender advice, though that right had for some time been obsolescent, save in the case of Ministers. Secondly, was the King justified in sending, or Temple in conveying, the message described above? Here again the constitutional theory of the time may be invoked in their defence; when either the King, or the Lords, or the Commons attempted to go beyond due bounds, it was for the others to combine in resistance. But how could there be effective combination without communication? The King's action was unprecedented, but so were the circumstances. That his message was couched in intemperate language must be admitted; but that is another matter. Thirdly, was the King entitled to dismiss his Ministers as he did? There can be no doubt that he was so entitled; his right to appoint and dismiss his servants had not yet been limited by convention. There was, indeed, a recent precedent for his action. In 1765 he had dismissed all his leading Ministers except the Chancellor, nor had either House protested. Thus according to the old interpretation of the constitution George's conduct was in every way unexceptionable, or nearly so. But it is significant that to some extent he took account of recent tendencies. He had been advised by Temple that it would be imprudent both to veto the India Bill, if it passed the Lords, and also to get rid of Ministers who had the support of the Commons until the Bill had been rejected by the Lords. That advice the King took. Hence the strong language of his message to the Lords; for he wished to make sure the Bill would be thrown out. But by taking Temple's advice George virtually admitted that the royal veto was obsolete and that he could not change his Ministers without the prospect of support from at least one House of Parliament.

The House of Commons showed resentment at these proceedings. In consequence of a report that Temple was telling members of the Upper House that the King was opposed to the India Bill, they carried a resolution, on the very day the Lords threw the Bill out, that 'it is now necessary to declare that to report any opinion or pretended opinion of His Majesty upon any bill or other proceeding depending in either House of Parliament with a view to influence the votes of members is a high crime and misdemeanour, derogatory to the honour of the

House, a breach of the fundamental privileges of Parliament, and subversive of the constitution of the country'. Supporters of this resolution argued that Lords of Parliament could only advise the King collectively, not individually, and contended that Temple's conduct was incompatible with responsible government; even if Temple was entitled to advise the King, some added, he should immediately take office, and so assume responsibility for his advice. The opponents of the resolution denied the first proposition and added that the allegations concerning Temple were unproven; since, however, they accepted the doctrine of Ministerial responsibility, they were somewhat embarrassed. In truth, the speakers on both sides were confused; the majority of the Commons wished to treat as well, established a convention that was only incipient, and so to gain the credit of resisting a breach of the constitution; they even went so far in their political zeal as to invent a new crime; Temple's conduct, whatever else it may have been, was certainly not illegal; but the House now reverted to the old practice of treating anything it disliked as criminal. On the other hand, the opponents of the motion did not wish Temple's action to be treated as a precedent; they were well aware that it was not in harmony with the trend of constitutional development, though it was not wholly at variance with the old constitutional theory, and could further be justified to some extent by the special circumstances of the moment.

The Commons were, of course, hostile to the new Ministry, which was often beaten on important divisions. The King's conduct in changing his Ministers was several times attacked. His formal right to appoint and dismiss was not denied in so many words; but it was maintained that he should have regard to the wishes of the Commons in its exercise; nor, it was said, was he entitled to retain the services of a Ministry which did not possess the confidence of that House. The Commons committed themselves to this view by passing a resolution which declared the continuance of the new Ministers in office was 'contrary to constitutional principles and injurious to the interests of His Majesty and his people'. Subsequently other resolutions censuring the Ministry and asserting the need for a firm and efficient administration 'entitled to the confidence of the people' were passed and laid before the King. George,

however, retained his Ministers. The Commons thereupon voted an address in which they said they expected him to give effect to their wishes; the King's reply to this stated that no good purpose would be served by the dismissal of Ministers against none of whom the Commons had made any formal charge; the Commons then voted a further address, in which they claimed the right to advise His Majesty on the use of his prerogative and renewed their demand that he dismiss his Ministers. The King's reply was very similar to that given before, but acknowledged the right of the Commons to tender their advice 'on every proper occasion touching the exercise of any branch of my prerogative', which advice would always receive 'attentive consideration'. The Commons retorted by voting a lengthy 'representation' to the King in which, while admitting his right to appoint to all executive offices, they argued that no administration, 'however legally appointed,' could efficiently serve the King unless possessed of the confidence of the House; that House, moreover, was perfectly entitled to ask for the removal of Ministers, even though they had committed no crime; were their wishes not complied with, refusal of supplies would be justifiable. The King's answer to the representation took the form of a dissolution. The ensuing election resulted in the return of a House of Commons favourable to the new Ministry.

Even before the election the change of Ministers was defended by a majority of the Lords and by a strong minority of the Commons. Pitt and his friends in the Lower House maintained that the King had an absolute right to appoint and dismiss Ministers at his pleasure. While admitting that a Ministry should as a rule enjoy the confidence of the Commons, they argued that in certain circumstances a Ministry was justified in retaining office without it; at all events, they were entitled to a fair trial; the House should not agitate for their removal until they had shown themselves guilty of misconduct or incapacity.<sup>1</sup> The Lords, on their part, intervened in support of the King and Ministry with an address in which they assured His Majesty they would support him in the 'just exercise' of his prerogatives, and made special reference to the 'happy constitution' which placed in his hands the 'undoubted

<sup>1</sup> Peel used somewhat the same arguments in 1835.

authority of appointing to all the great offices of executive government.'

Pitt remained Prime Minister until 1801, when he resigned in the following circumstances. He had designed after the Union with Ireland to carry a measure permitting Roman Catholics to sit in Parliament and relieving them of various other disabilities. But when he was on the verge of introducing his bill, he found that the King was inexorably opposed to it; for George III not merely disliked it, but was convinced that his assent to it would be a violation of his coronation oath.<sup>1</sup> Thereupon Pitt, who had not, it would seem, the support of all his Cabinet, determined to resign. But far from going into opposition, he promised to give a general support to Addington, whom the King had picked upon as his successor; he even pledged himself not to make any attempt to carry Catholic emancipation during the King's life. Undoubtedly the substitution of Addington for Pitt was a triumph for the King; but that triumph was due rather to Pitt's forbearance than to the King's actual power. Had Pitt so chosen, he could probably have driven Addington out of office pretty quickly.<sup>2</sup> Pitt himself owed his long tenure of office just as much to his own consummate talents, particularly his Parliamentary skill, as to the King's favour. If Pitt had been a mediocrity like Addington, he would soon have fallen. In 1801, however, Pitt did all he could, and more than he ought to have done, to further his master's wishes. For he was certainly wrong in pledging himself for an indefinite period not to bring forward a proposal which he thought desirable.<sup>3</sup>

By the end of the eighteenth century both the Cabinet and the premiership were definitely established and extremely strong. The members of the Cabinet had learnt to act together and to impose their will upon the King. In 1761 the veteran statesman, Granville, had said 'the King might take a

<sup>1</sup> See *supra*, p. 267.

<sup>2</sup> Whether Pitt could have compelled the King to call him back to power is another question. George III, had he wished, could have asked Fox to take office, and Fox might have been able to maintain himself there. But no Ministry could then have withstood the joint opposition of Pitt and Fox.

<sup>3</sup> There was always a danger that George III would go permanently mad if subjected to too great a mental strain. Pitt was certainly influenced by a desire to spare the King's nerves when he made this promise. Nevertheless it could not be reconciled with his duty as a legislator.

foreign measure alone with a Secretary of State.' A generation later no man who was conversant with political usages would have accepted this statement. During the wars with revolutionary America and revolutionary France most of the critical decisions were taken by the Cabinet, which rapidly came to regard itself, and to be regarded by others, as responsible for them. With responsibility naturally went power. In 1800, when the King demurred to certain proposals submitted by the Cabinet for the conduct of the war, he was told by one of the Secretaries of State 'that the appropriation of the national force must . . . be subject to the advice and responsibility of Your Majesty's confidential servants'. After this the King could only give way. That Ministers should use such language as a matter of course was a sign of the times.

What the premiership had become we know from a description which Pitt practically dictated to his friend Melville in 1803. Pitt, writes Melville, 'stated his sentiments with regard to the absolute necessity there is in the conduct of the affairs of this country that there should be an avowed and real Minister, possessing the chief weight in council and the principal place in the confidence of the King. In that respect there can be no rivalry or division of power. That power must rest in the person generally called First Minister; and that Minister ought . . . to be the person at the head of the finances. He [*sc.* Pitt] knows to his own comfortable experience that, notwithstanding the abstract truth of that general proposition, it is in no ways incompatible with the most cordial concert and mutual exchange of advice and intercourse amongst the different branches of executive departments; but still, if it should come unfortunately to such a radical difference of opinion that no spirit of conciliation or concession can reconcile, the sentiments of the Minister must be allowed and understood to prevail, leaving the other members of the administration to act as they may conceive themselves conscientiously called upon to act under such circumstances.'<sup>1</sup> One cannot imagine Walpole thus describing the premiership, and it is a little suprising that even Pitt should have been so outspoken. He claims for the Prime Minister powers far in excess of those which were to be claimed by most of his successors, including so strong a man

<sup>1</sup> H. Pellew, *Life of Viscount Sidmouth*, vol. 11, p. 116.

as Gladstone. The Prime Minister, according to Pitt, is not *primus inter pares* in the Cabinet, but something not too far removed from a dictator. No doubt Pitt's practice was more accommodating than his theory, or he would not have been in power for over sixteen years. It was, however, fully in keeping with his exalted conception of the premiership that Pitt should decline to tender advice to the King after his resignation, although George was not indisposed to consult him.<sup>1</sup>

This increase in the power of the principal Ministers and decrease in that of the King was largely due to the success of the policy employed in the management of the Commons. Since, too, it was generally accepted by the end of the century that no Ministry could long endure without the confidence of the House, that policy ultimately proved advantageous to the Commons and also—as was curiously shown in 1784—to the electorate. But this was not generally realized for some time. The methods by which the Crown sought to manage the Commons long appeared dangerous and unconstitutional to many, and two great series of attempts were made to reduce the royal influence on the Lower House. The first series began during the period of Walpole's premiership. It is easy to understand that those who accused Walpole of subverting the constitution should endeavour to restrict the distribution of the royal patronage which he controlled to so great an extent. To re-enact the clause in the Act of Settlement which excluded all placemen from the Commons was no longer considered practical politics; but proposals were made for the exclusion of further classes of placemen. While Walpole remained in power none of these had any success. The Commons rejected Place Bills in 1734, 1735, 1736, and 1740; in 1741 a fifth bill was introduced and passed by the Lower House—it was a popular measure and an election was imminent—but it was rejected by the Lords. Another measure advocated by the Opposition was a bill to enforce the existing laws which excluded pensioners during pleasure or for a term of years from the Commons; it was proposed that newly elected members should swear they had not broken these laws. Several Pen-

<sup>1</sup> The King intimated to Pitt, when he gave him a final audience before his resignation, that he hoped to keep him as his friend; Pitt replied that intercourse between the King and himself might be injurious to the new Ministry and that therefore they should not meet often.



sion Bills were introduced and passed by the Commons, but all were thrown out by the Lords.<sup>1</sup> Both the Place Bills and the Pension Bills had several precedents, but in 1734 the House was asked to grant leave for the introduction of a bill of a very different kind. Several Army officers with seats in the House had recently been dismissed for voting with the Opposition. This had aroused a good deal of indignation, though it should have been obvious that an M.P. with a commission in the forces was in the same position as any other placeman. The measure advocated by the Opposition was a bill to prevent any Army officer not above the rank of Colonel from being dismissed unless as the result of the sentence of a court-martial or an address from either House. Such a bill would have been contradictory to the established principle that the King was the head of the forces, and Walpole had little difficulty in defeating the motion for its introduction.

After Walpole's fall in 1742 many of his former opponents thought they had a fine opportunity to secure some of the reforms they had long been advocating. A Pension Bill and a fairly drastic Place Bill—for the exclusion of many classes of office-holders and of Army officers under the rank of General—were introduced; both passed the Commons and were thrown out by the Lords. A more moderate Place Bill was then brought in, and this became law.<sup>2</sup> Early in the following session—in December, 1742—the Commons were asked to grant leave for the introduction of a further Place Bill, but leave was refused.

These Place Bills were naturally distasteful to both the King and his Ministers. But the latter could hardly declare the reasons for their dislike in public. There were, indeed, a few people who argued that the Crown ought to have more influence over the Commons, but such opinions were more often put forward in pamphlets than in Parliamentary speeches. Those who opposed the Place Bills in the Houses usually asserted that places were not instruments of corruption; some of them even said that placemen were not expected to vote in any

<sup>1</sup> In 1730, 1731, 1732, and 1740. Walpole made no attempt to oppose them in the Commons, but relied on the Lords to reject them. Some speakers in the Upper House said the bills were futile, since those who had taken a pension would not stick at perjury.

<sup>2</sup> See *supra*, p. 326.

particular way. More common was the argument that Place Bills were attacks on the prerogative; the King should be allowed to choose whomsoever he would to serve him; nor were legislative and executive functions incompatible, though they were distinct.

Attempts to curtail the influence of the Crown by statute were not resumed for over a generation. But in the last years of the American war there developed a great movement for what was known as 'economic reform'. Its supporters professed to desire, not merely to reduce the royal influence, but also to secure increased administrative economy and efficiency. With most of them, however, the first object was the main one. George III, like Walpole, had been accused of entertaining unconstitutional designs, and these charges were fairly widely believed.<sup>1</sup> This movement became of importance in 1779, when a bill was introduced in the Commons to exclude from that House all who held Government contracts. An M.P. who held such a contract was obviously liable to be influenced in a manner peculiarly damaging to the public interest; for contracts were far more lucrative than most places. But the bill was rejected as being an unwarrantable restriction of the rights of electors. It was brought in again in 1780 and 1781 with no better success. In 1782, however, the support of the Rockingham Ministry secured its passage.<sup>2</sup> Efforts were also made to effect other reforms. In 1779 the Lords rejected a motion for an address to the King urging the need for economy. Early in 1780 Burke brought before the Commons a comprehensive plan of 'economic reform', which included the abolition of several offices, sweeping changes in the management of several offices, and a detailed regulation of the civil list. Though none of these proposals became law, the Commons were so far swayed by the spirit of hostility to royal influence that in the same year they carried Dunning's famous resolution that the influence of the Crown had increased, was increasing, and ought to be diminished.<sup>3</sup> But in 1781 they rejected on the second reading a bill introduced by Burke for the regulation of

<sup>1</sup> There is much similarity between the language used of Walpole by his opponents and that used of George III by many who were hostile to the North Ministry. George was personally exposed to criticism because he was felt to be a bigger man than any of his then Ministers.

<sup>2</sup> See *supra*, p. 326.

<sup>3</sup> See also *supra*, p. 342 and *infra*, p. 383.

the civil list, the limitation of pensions, and the suppression of a number of offices. Not until after the fall of North did the reformers achieve a partial success. Before he had consented to take office, Rockingham had stipulated that the King should approve of certain reforms. As a result, the King sent a message to the Commons desiring them to take into consideration a plan of civil-list reform which would shortly be laid before them. What was actually proposed was very much less drastic than Burke's original plan, and this proved acceptable to the Houses.<sup>1</sup>

The reforms of the year 1782 may have done something to diminish the influence of the Crown.<sup>2</sup> But they did not effect great economies nor—with a few exceptions—did they increase administrative efficiency. They did, however, something far more important: they established the right of the legislature to regulate all branches of the administration. Pitt, when Prime Minister, saw that the legislature might be used to strengthen the executive, and secured the passage of certain bills which directly and greatly increased administrative efficiency; he did with the aid of statutes what could not have been done by the mere use of the prerogative.<sup>3</sup> The executive, however, which Pitt was thus strengthening was coming to be more and more under the control of the House of Commons.<sup>4</sup>

These developments were not properly understood at the time, and therefore they aroused comparatively little controversy. There was, however, much difference of opinion as to the proper relation between the Commons and the people. According to the prevalent theory, the members of the Lower House were the representatives of all the commons of Britain, not merely of their respective constituencies; still less were they

<sup>1</sup> The passage of the Contractors Bill was also due to Rockingham. For the civil list reform see *supra*, p. 343.

<sup>2</sup> Some thought that more peers were made when there were fewer places to give.

<sup>3</sup> Compare the use made by North and by Pitt himself of the statutory commissions of accounts. See *supra*, p. 346.

<sup>4</sup> In this connexion it is significant that before the end of the century Ministers were sometimes asked questions in the Houses by individual members. The subject is still obscure, but apparently Pitt fairly often answered questions in the Commons. In the early nineteenth century the number of questions asked increased with amazing rapidity. Ministers, of course, could not be compelled to answer questions, still less to answer them truthfully. But in practice the asking of questions soon proved a fruitful method of obtaining information, relevant and irrelevant.

delegates. Many would have added that while a Parliament was in being, the wishes of the people were only to be ascertained from the Commons; manifestations of opinion outside the House were not worthy of consideration. But other views were held with equal fervour. From time to time M.P.s were given 'instructions' by their constituents.<sup>1</sup> As might be expected, many strongly disapproved of them; but others held them to be morally binding—they obviously had no legal force; others, again, thought they should not be disregarded without grave cause. But if members were to be bound or even influenced by 'instructions', they would soon become delegates rather than representatives, and in that case the House of Commons could no longer be said to speak for the people, but merely for the small number of electors. It is easily understandable, therefore, that opponents of Parliamentary reform, such as Burke, laid great stress on the contention that M.P.s were representatives. If the Commons did not in some sense represent the whole nation, the system by which they were returned was hardly defensible. But, granted that the Commons were representatives of the people, there was still room for dispute as to the constitutional status of the people.

The Opposition, as one might expect, tended to magnify the claims of the people. Walpole's opponents sometimes argued that the King should dismiss him because he was generally hated, although a majority of the Commons supported him. Burke during the earlier part of his career sometimes spoke as though George III ought to appoint popular Ministers. It is difficult to see on what principle these contentions can be justified, for those who advanced them were for the most part quite satisfied with the electoral system. Why, then, were the wishes of the people not supposed to be reflected by the divisions in the Commons? What, in any case, was the proof that any Minister was unpopular? Attacks in the press? Riots? None the less, it was not without significance that members of the Opposition should sometimes argue thus. By so doing they helped to weaken the belief that the Lower House should ignore popular manifestations of opinion. One of the functions of that House was to consider petitions. These were usually upon matters affecting individuals or particular localities.

<sup>1</sup> See also *supra*, p. 245.

But in the last part of the century a number of petitions upon matters of national political interest were presented. Owing to the activities of certain organizations, the Commons received in 1780 a number of petitions praying for economic reform, and the House was told by several speakers that a movement of this kind was not to be disregarded, though others deprecated what they considered an attempt to coerce the House.<sup>1</sup> It was while the Commons were considering these petitions that Dunning's resolution about the influence of the Crown was carried, and this was accompanied by two others, one of which was that it was the duty of the House to provide an effectual remedy for the abuses complained of in the petitions. These resolutions were an acknowledgement that the House might properly be influenced by means of a series of petitions on a great constitutional point. Hence their importance in this connexion.

In all these discussions the Ministers and their supporters had tended to argue that the House should not allow its independence to be restricted by outside pressure. But in 1784 there was a curious change of sides. The Pitt Ministry was then violently attacked by the majority of the Commons, but was popular with at least certain sections of the public. Its supporters accordingly argued that this popularity should weigh with the House. Eventually the King dissolved Parliament. His motive in so doing was candidly revealed by his speech delivered at the close of the session. 'I feel it a duty,' he told the Houses, 'which I owe to the constitution and to the country, to recur as speedily as possible to the sense of my people by calling a new Parliament.' For George III a general election was the only means of discovering the popular will in a time of crisis. This speech implies that the Commons really should represent the whole people; but if it is suspected that they do not do so at any particular time, the King may dissolve Parliament. George's action was unprecedented, but not unjustifiable.<sup>2</sup> A deadlock had resulted from the dispute of

<sup>1</sup> It should be added that the signatories of these petitions were for the most part men of some substance.

<sup>2</sup> Parliament had previously been dissolved—*e.g.* in 1701 and 1710 in the hope that an election would lead to substantial change in the composition of the Lower House. But no dissolution had as yet occurred in the middle of a session in order to enable the King to retain a particular set of Ministers.

the King and the Lords with the Commons. For the King to have yielded to the then House of Commons would have seemed to him an abandonment of a constitutional principle. Accordingly the electorate were called upon to arbitrate between the parties to the dispute. The appeal was novel. But what other solution was there? The Opposition, fearing this dissolution, had denounced it as unconstitutional.<sup>1</sup> In so doing they were really contending that a House of Commons should be uncontrollable for seven years or so; however much their actions displeased the electorate, there was no justification for an appeal to the country. The King naturally disregarded these attempts to question his right of dissolution, and the election of 1784 realized his expectations. But he perhaps did not comprehend that he had established a new constitutional principle. Never before had the electorate been directly called upon to determine a question of this nature. Even had their verdict been contrary to his wishes, the King had virtually pledged himself to accept it. In 1784 the electorate were asked to decide whether or no the King was to be allowed to retain a certain Prime Minister. The immediate result of that election was a triumph for George III, who was able to keep the Minister of his choice; but he could only keep him because he was also in a sense the choice of the electorate. The election of 1784 was the first stage in that lengthy process whereby elections were to become not merely elections of M.P.s, but also elections of Prime Ministers.<sup>2</sup>

<sup>1</sup> The dissolutions of 1747, 1774, and 1780 had excited some unfavourable comment because in each case the Parliament dissolved might have sat for another session. Shortly before the dissolution of 1780 a motion had been made in the Commons for an address praying the King not to dissolve or prorogue until proper measures had been adopted for diminishing the influence of the Crown. But it had been defeated. Its opponents had argued that such an address would be an attack on the prerogative.

<sup>2</sup> The process was not completed until late in the nineteenth century. But the election of 1874 was really an appeal to the electorate to decide whether Gladstone or Disraeli was to be Prime Minister, and the precedent then set was often followed.

## VIII

### THE UNION WITH IRELAND

IT IS convenient before discussing the Union to give a brief description of the composition and status of the Irish Parliament during the eighteenth century.

That Parliament was a bicameral assembly. The Upper House in 1800 contained twenty-two Lords Spiritual and two hundred and seven Lords Temporal; the Commons numbered three hundred, of whom sixty-four sat for the thirty-two counties, two hundred and thirty-four for the one hundred and seventeen boroughs, and two for Trinity College.<sup>1</sup>) The county franchise had been confined to the forty-shilling freeholders by an Irish Act of 1542. The boroughs were of four types: freeman boroughs, corporation boroughs, potwalloper boroughs, and manor boroughs. In most of the freeman boroughs, however, the franchise had practically become restricted to the members of the small corporations.

(Ever since 1691 Roman Catholics had been excluded from sitting in either House by an English Act which required members to take the oaths of allegiance and supremacy.<sup>2</sup> An Irish Act of 1727 had further deprived them of the right to vote in Parliamentary elections. They were also subject to numerous other disabilities.)

Before 1782 the Irish Parliament possessed only very limited powers. An Irish Act of 1495—the celebrated Poyning's Act—had provided that no Parliament should be holden thereafter in Ireland, 'but at such season as the King's Lieutenant and Council there first certify the King, under the Great Seal of that land, the causes and considerations, and all such Acts as them seemeth should pass in the same Parliament, and such causes, considerations and Acts affirmed by the King and his Council to be good and expedient for the land, and his licence

<sup>1</sup> All constituencies returned two members.      <sup>2</sup> 3 Will. and Mar., c. 2.

thereupon, as well in affirmation of the said causes and Acts, as to summon the said Parliament under his Great Seal of England had and obtained'. In 1556 this statute was re-enacted with the modification that the Lord Lieutenant might send over further measures to be certified while Parliament was sitting.<sup>1</sup> Another Irish Act, of 1542, had provided that the King of England was always to be King of Ireland.<sup>2</sup>

Thus the Irish Parliament had deprived itself of the initiative, of the right to amend bills, and of all voice in matters affecting the succession to the Crown. (Moreover, the English Parliament had from very early times claimed and exercised the right to legislate for Ireland. Laws might therefore be made for Ireland, however recalcitrant its own Parliament.) In 1690, when Ireland was still adhering to James II, the English Parliament passed an Act declaring that the then Irish Parliament was an illegal body and that its proceedings were void; the preamble to this act spoke of Ireland as 'annexed and united' to the imperial Crown of England.<sup>3</sup> In 1692, after the crushing of the Jacobites, an Irish Parliament loyal to William and Mary passed a bill for their recognition, the preamble to which also acknowledged the dependence of Ireland upon the English Crown. Again, in 1720 the British Parliament was once more moved to assert its supremacy by the following circumstances: the Irish House of Lords had claimed to be a final court of appeal for Irish cases, while the British House of Lords had denied their right to hear appeals at all.<sup>4</sup> Accordingly an English Act was passed declaring that the Irish House of Lords had no appellate jurisdiction and that the 'kingdom of Ireland hath been, is, and of right ought to be, subordinate unto and dependent upon the imperial Crown of Great Britain, as being inseparably united and annexed thereto; and that the King's Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons of Great Britain in Parliament assembled, had, hath,

<sup>1</sup> 10 Henry VII, c. 4 and 3 and 4 Philip and Mary, c. 4.

<sup>2</sup> 33 Henry VIII, c. 1.

<sup>3</sup> 1 Will. and Mar., Stat. 2, c. 9.

<sup>4</sup> Previous to this claim on the part of the Irish House of Lords appeals from the King's Bench in Ireland had gone sometimes to the King's Bench in England and sometimes to the Irish House of Lords; in both cases, however, there had been a further right of appeal to the British House of Lords.



and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the kingdom and people of Ireland'.<sup>1</sup>

From time to time the Irish Parliament showed dislike of these restrictions. An indirect method of evading Poyning's law was devised early in the reign of William III. The Houses then began to present to the Lord Lieutenant 'heads of bills' for him to transmit to England. They had no means of compelling him to do so, but in practice he usually complied with their wishes. However, both the Lord Lieutenant in Council and the British Privy Council could and did alter 'heads of bills'. Thus the Irish Parliament might find a measure returned to them in a form totally distasteful. (As the eighteenth century advanced Irish discontent increased, until in its eighth decade a great movement developed to secure the independence of the Irish Parliament and the abandonment of the British claim to legislate for Ireland. In 1782-83 that movement achieved what seemed to most of its supporters a triumphant success.) The settlement of those years was effected by two British Acts and one Irish Act. The first British Act simply repealed the Declaratory Act of 1720; but since the repeal did not alter the law as it had stood before that date, it was still possible for appeals to go from the Irish to the English King's Bench. The Irish desired that such appeals should cease, and their wishes were met by the passing of a British Act which declared and enacted that the people of Ireland were bound only by Irish statutes, and that no appeals were to go from Irish to English or British courts.<sup>2</sup> So much the British Parliament could do; but Poyning's Act could only be modified by an Irish statute. The Irish Act of 1782 regulated the manner of passing bills in Ireland.<sup>3</sup> For the future the Lord Lieutenant was to certify to the King only such bills as both Houses of the Irish Parliament should judge expedient to be enacted in that kingdom; such bills, if transmitted to the King, were to be transmitted without alteration; if returned to Ireland, they were to be returned under the British Great Seal, likewise without alteration; no bills were to be certified into Great Britain as a cause for holding a Parliament in Ireland;

<sup>1</sup> 6 Geo. I, c. 5.

<sup>2</sup> 22 Geo. III, c. 53, and 23 Geo. III, c. 28.

<sup>3</sup> 21 and 22 Geo. III, c. 47.

but no Parliament was to be held there without a licence from the King under the British Great Seal.

The constitution created by this settlement was peculiar. The Irish Parliament had, indeed, acquired the right to initiate and amend bills; but by a statute of its own making the responsibility for advising the King to hold or not to hold a session of the Irish Parliament, or to return or refuse to return an Irish bill, rested with a British Minister, the Lord Chancellor.<sup>1</sup> That Minister, if he was responsible at all for his use of the Great Seal in Irish matters, was responsible to the British Parliament, which had renounced the right to legislate for Ireland. Moreover, the King appointed and dismissed his Irish Ministers upon the advice of the Lord Lieutenant, himself a member of the British Cabinet, or of certain British Ministers.<sup>2</sup> Responsible government, as we know it, was not then desired, or even properly understood, by the Irish Parliament.

This curious situation did not, however, lead to as many complications as might have been expected. For the Lord Lieutenant after 1782, with the aid of the Irish Ministers, was usually able to secure the defeat of such bills as were distasteful to the chief British Ministers, by whom he was in practice generally directed.<sup>3</sup> None the less, there was always a risk that a crisis might occur. The temporary insanity of George III in 1788-89 might well have caused a conflict between the British and the Irish Parliaments. The Irish Houses then voted addresses to the Prince of Wales calling upon him to assume the regency of Ireland with all the powers of a king. The Lord Lieutenant refused to transmit these addresses, on the ground that he was not entitled to do so, since the Prince had no right by law to take upon himself the government of the realm. He took, in fact, the same view as was taken by the majority in the English Parliament. The Irish Houses thereupon transmitted their addresses by deputations of their own

<sup>1</sup> By an Irish Act of 1768 no Irish Parliament was to last longer than eight years; but there was no statutory provision for periodical sessions.

<sup>2</sup> I doubt whether it would have been proper for either House of the British Parliament to concern itself with the conduct of a British Minister in merely advising the King on Irish affairs; on the other hand, they perhaps would have had a right to examine and condemn any use which the Lord Chancellor might make of the British Great Seal in Irish matters. I am not, however, aware that they ever did so.

<sup>3</sup> All bills which passed the Irish Parliament were allowed to become law.

members. The Prince thanked them, but informed them that his father's recovery was imminent. Now, since the Irish Acts of 1542 and 1692 had not been repealed, the Crowns of Great Britain and Ireland were statutorily inseparable, and it was contended that by parity of reasoning the same person must be regent of both kingdoms with the same powers. The Irish Parliament, however, took the view that these Acts did not apply to a regency. None the less, difficult legal problems might have arisen had the Prince become regent. There was also a possibility at one time that Britain and Ireland might have different regents. Had that actually happened, it is hard to see how war between Britain and Ireland could have been averted. The King's recovery was truly a blessing for his dominions.<sup>1</sup>

This crisis was not immediately followed by an attempt to bring about a union. In Ireland there was little desire for a change; the Irish Parliament was proud of its newly acquired independence, nor were its measures unpopular; in 1793 the franchise was granted to Roman Catholics, together with certain other concessions. There was, moreover, a possibility, though no more than a possibility, that Romanists would once more be allowed to sit in the Irish Parliament. Hence Irish opinion was attached to the then constitution. The British Ministers, on their part, were not eager to court a rebuff by raising the question of a union. This state of things was altered by the unrest which rapidly developed during the last years of the century in Ireland. The rebellion of 1798 was repressed, but the Protestant minority who controlled Parliament remained a prey to fear. Among the British Ministers there was a very natural alarm. The British Parliament could not make laws for Ireland; the Irish Parliament, which could, was making itself hateful to the majority of Irishmen; only by allowing Romanists to sit could the Irish Parliament regain the confidence of the Irish people; yet, if this were done, measures most injurious to British interests might be passed therein. In these circumstances it was very natural that the

<sup>1</sup> The possibility mentioned above was a very real one. Since the British Parliament denied the Prince's right to be regent, they might have given the regency to another person—say to the Queen. Had they known as a fact that the Prince had gone through a form of marriage with a Papist, they would not improbably have done so.

thoughts of Pitt and his Cabinet colleagues should turn towards a union between Britain and Ireland. The Union, it must be emphasized, was primarily due to the British Cabinet.<sup>1</sup> But the procedure adopted to bring it about showed the most scrupulous respect for the rights of the Irish Parliament. The methods followed were very different from those employed in the making of the Union between England and Scotland. No commissioners were appointed to draw up Articles of Union in the form of a treaty.<sup>2</sup> What was done was this. When the Irish Parliament assembled for the session of 1799, the Lord Lieutenant stated in his speech that he was commanded by the King to express His Majesty's hope that the British and Irish Parliaments would devise some means of maintaining and improving the connexion between the two countries. Everybody knew that a legislative union was thereby meant, and the debate on the addresses in both Houses turned upon that question; the Lords showed themselves favourable to a union; but the address of the Commons was so worded as to imply their opposition. No formal proposals for a union were made during the remainder of the session.

The British Parliament was also invited to consider the question at the same time. On January 22, 1799, a royal message was sent to the Houses inviting them to consider ways of bringing about a 'final adjustment' of the relations between Britain and Ireland. The Houses thereupon expressed their thanks to the King and intimated their readiness to do so. The Commons referred the royal message to a committee of the whole House, and after debate they came to a number of resolutions concerning the conditions of the proposed union. The concurrence of the Lords with these resolutions was then obtained, and at the end of April they were presented to the King, together with a joint address in which the Houses asked His Majesty to lay the resolutions before the Irish Parliament. These proceedings were, of course, in accordance with the

<sup>1</sup> In 1703 the Irish House of Lords and in 1707 the Irish House of Commons had made representations to Anne expressing their desire for a union. But no action was taken in England; since a union would have involved the concession of commercial equality to the Irish. The English had no desire to make such a concession to a subordinate kingdom.

<sup>2</sup> It is doubtful whether authority for the appointment of Irish commissioners by the King could have been obtained from the Irish Parliament.

wishes of the Cabinet. Pitt had told the Commons on January 31 that, while there was no chance of effecting a union as long as the Irish Parliament was averse to it, he yet thought it was desirable for the British House of Commons to pass the resolutions. One of those resolutions explicitly said that the union must be brought about by the action of both Parliaments. So the British Parliament avoided even the appearance of an attempt to legislate for Ireland. Moreover, another of their resolutions stated that the number of the Irish representatives in the Parliament of the United Kingdom was to be settled by both Parliaments, but that the method of their choice was to be determined by the Irish Parliament.

Shortly after the beginning of the next session of the Irish Parliament in January, 1800, the resolutions of the British Parliament were laid before them, together with a message from the King. After various debates the two Irish Houses agreed upon certain resolutions concerning the proposed union, which were presented to the King with a joint address. These resolutions and this address were communicated by him to the British Houses. The latter then proceeded to consider the Irish resolutions, which were substantially in agreement with those they themselves had passed; both Houses made some amendments of comparatively minor importance, and each House accepted the amendments of the other. The resolutions thus amended were then presented to the King with a joint address. His Majesty communicated them to the Irish Houses, which subsequently informed him in an address that they had accepted the resolutions, but had also passed certain further resolutions. These were laid before the British Houses, which did not adopt them as they stood, but only in a modified form. The new British resolutions were presented to the King with a joint address; the King laid them before the Irish Houses, which adopted them, and informed His Majesty that they had done so by a joint address.

After these preliminaries Acts to bring about the Union were passed by both Parliaments.<sup>1</sup> But the method of selecting the Irish representatives in the Parliament of the United

<sup>1</sup> The British Act of Union—39 and 40 Geo. III, c. 67—was passed on July 2, 1800; the Irish Act on August 1, 1800. The British Act contained a proviso that it was not to come into force unless an Irish Act of Union had been passed before January 1, 1801.

Kingdom was determined by a separate Irish Act, which was incorporated in the British Act of Union.

The terms of the Union were these.

On January 1, 1801, Great Britain and Ireland were to be united into one kingdom, known as the United Kingdom of Great Britain and Ireland. The succession to the Crown of the United Kingdom was to be in the same manner as the succession to the Crown of the kingdoms of Great Britain and Ireland had stood settled before the Union. There was to be one Parliament for the United Kingdom. In the Upper House of this Parliament the episcopate of the established Church of Ireland was to be represented by one Archbishop and three Bishops, sitting by rotation of sessions, and the Irish peers by twenty-eight of their number, elected for life by their fellow-peers. It was still to be lawful for the King to create peers of Ireland to the extent of one creation for every three extinctions, unless the number of Irish peers fell below one hundred, in which case he might create Irish peers without restriction until that number had again been reached. In the House of Commons Ireland was to have a hundred representatives—two for each county, two for Dublin, two for Cork, one for Trinity College, and one for each of thirty-one boroughs. It was further provided that no more than twenty holders of Irish offices of profit were to sit in the Commons until the Parliament of the United Kingdom had legislated on the matter.<sup>1</sup>

The Churches of England and Ireland were to be united into one, to be called 'the United Church of England and Ireland'. The doctrine, worship, discipline, and government of this were to be in full force for ever as these were then by law established for the Church of England, and the continuance and preservation of the united Church were to be 'deemed and taken to be an essential and fundamental part of the Union'.

The King's subjects in Britain and Ireland were to be granted equal commercial privileges, and free trade was to be established between the two countries with a few exceptions. The charges arising from the national debts of Britain and Ireland were to be kept separate. For twenty years after the Union the annual expenditure of the United Kingdom was to be defrayed in the proportion of fifteen parts by Britain and two

<sup>1</sup> See *supra*, p. 326.

parts by Ireland. After that date a new arrangement was to be made.

All laws in force in Britain and Ireland at the time of the Union were to remain in force, and all courts civil and ecclesiastical were to continue, though the Parliament of the United Kingdom was to have power to make such changes as seemed expedient.

All these provisions were to be in force for ever.

Thus the Union between Great Britain and Ireland was brought about by a kind of treaty made between two independent legislatures and statutorily ratified by each of them. The procedure employed appears clumsy, but it certainly implied that the British and the Irish Parliaments stood on an equal footing. The Irish Parliament was in no way coerced. The conditions of the Union were conditions which they freely accepted.<sup>1</sup> Why, then, it may be asked, was the Union a failure? A complete answer to this question would involve the consideration of many matters irrelevant to this study. But it may here be said that the Irish Parliament did not represent the Irish people. This was not due merely to the absence of a democratic franchise. The franchise in England was far from democratic, yet the English House of Commons was in a very real sense a representative body; with all its defects, it was never long out of sympathy with those sections of the community which were politically conscious. But the Irish Parliament, even after 1793, was always dominated by the desire to maintain the ascendancy of the Protestant minority. As long as the apparent interests of Protestants and Catholics did not conflict, its measures might be popular; when, however, they seemed to conflict, Parliament acted in a manner unacceptable to the majority of Irishmen. Hence the Union came to appear a betrayal of Irish interests by the Protestants. Indeed, the Irish Parliament had taken care in making the Union to secure, as they thought for ever, the position of the Irish Church, to which most Irishmen did not belong. Pitt wished the Union to be followed by Catholic emancipation, and had Romanists been allowed to sit from the first in the Parliament of the United Kingdom, Ireland might perhaps

<sup>1</sup> I am not here concerned with the question whether the Union was carried by bribery in the Irish Parliament.

have acquiesced in the Union. Many Irish Roman Catholics were ready to accept it in 1800, because they believed it to be a prelude to emancipation.<sup>1</sup> But emancipation was delayed until the Irish had come to dislike and distrust the Parliament at Westminster. Ireland, it soon seemed, had given up her Parliament and gained nothing in return; yet that Parliament had had a vigorous life during its last years, and even those who were excluded from it had been in a manner proud of the body to which they hoped some day to gain admission. To these circumstances the eventual unpopularity of the Union in Ireland may be in part attributed.

<sup>1</sup> Roman Catholics in Ireland retained the right to vote, if otherwise qualified, after the Union in virtue of the Irish Act of 1793. Would-be voters in England might still be called upon to take the oath of supremacy, though this was not always done. See *supra*, p. 186.



## IX

### THE PROBLEM OF SOVEREIGNTY

BY THE middle of the eighteenth century it was a very common opinion in Britain that the power of the King in Parliament was unbounded. The dogma of Parliamentary sovereignty was proclaimed in a manner scarcely conceivable two generations earlier. This change, indeed, was one of theory rather than of practice. For the legislature could hardly act more drastically than it has already acted. What happened was that men came more and more to realize and admit the implications of earlier legislation. Englishmen, too, were accustomed to submit to the authority of the legislature not merely on great questions of public policy, but also on innumerable matters affecting private rights and particular localities. Many who troubled themselves little about the Bill of Rights or the Septennial Act had been made conscious of what the King in Parliament could do by an Act for enclosing land or for making a river navigable. Legislation, moreover, was substantially in accord with national feeling. Hence it was all the more easy to acknowledge the sovereignty of the King in Parliament because the conduct of the legislature in general seemed neither oppressive nor arbitrary; for the legislature was usually guided by good sense and moderation. Further, legislation required the active concurrence of the King and the two Houses, each of which was supposed to be quite independent;<sup>1</sup> the Lower House, also, was supposed to represent, directly or virtually, all the commons; the constitution of the legislature, therefore, seemed to exclude the possibility of arbitrary power. It is, then, easy to account for the change in men's ideas. That change was not, of course, instantaneous or complete. Vague references to a funda-

<sup>1</sup> Writers of treatises spoke as though the royal veto might be easily exercised, and stressed the division of power between King, Lords and Commons.

mental divine or natural law continued to be made in many treatises, though they can sometimes hardly have been very serious. For instance, Blackstone both alludes to a supreme law of nature and virtually admits that all Acts of Parliament are law. Of more significance was the persistence of a belief in some sort of a fundamental law among a few members of both Houses; but their views were ill-defined, and their number rapidly decreased. On the other hand, statesmen and judges alike tended more and more to declare in the most emphatic terms that the legislature was sovereign. When the Upper House in 1747 was debating the bill for abolishing heritable jurisdictions in the Highlands, Lord Chancellor Hardwicke contemptuously brushed aside the argument that the legislature was not competent to enact it because it infringed the terms of the Union. 'In all countries', he said, 'the legislative power must, to a general intent, be absolute, and therefore upon treaties of this nature strict and rigid constructions ought not to be made, and may prove dangerous'. The great Mansfield, while Chief Justice of the King's Bench, never hesitated to maintain that the King in Parliament was sovereign. In *Somerset's Case* he declared slavery was so odious that it could only be established in England by positive law; but that positive law could establish it there he explicitly stated.<sup>1</sup>

The problem of sovereignty, however, did not disappear from British politics; for, while the King's subjects in Britain had come to view the Parliament at Westminster as omniscient, his subjects in Ireland and in the thirteen American Colonies set themselves against its authority during the early part of the reign of George III. The imperial Parliament had long legislated both for Ireland and for the Colonies without arousing much opposition. But its right to do so was now challenged. The attitude of the Irish can largely be explained by nationalism; they strove rather to secure the independence of Ireland from the authority of the imperial Parliament than to defend fundamental law. After 1783, indeed, the Irish

<sup>1</sup> Mansfield's *dicta* in *Raynard v. Chase* (1756) do not contradict what is said above. He then observed that the Statute of Artificers should be strictly construed because it was a penal statute, was contrary to natural law and to the Common Law, and was inexpedient. But he did not refuse to apply it. For *Somerset's Case* see also *infra*, p. 419.

legislature was in theory a sovereign legislature. But among the American Colonists attachment to fundamental law and hatred of all absolutism were still prevalent, as they had been among the Englishmen of the seventeenth century. Of the strength of these feelings the constitution of the United States was to be a striking proof. The dispute between Britain and the American Colonists was thus, from one point of view, a dispute between adherents of different political theories. Compromise between the two was not then within the range of possibility. But this was not generally plain for some time. The Colonists had long accepted without much challenge the authority of the imperial legislature, because its Acts were either to their liking or were capable of sufficient evasion to rob them of their sting. The imperial Parliament had, moreover, legislated comparatively seldom for the Colonies. Hence when the question of its powers became an urgent one for the Colonists, they had at first much difficulty in stating their views clearly; but that there were limits to those powers they nearly all believed. When compelled to justify that belief, they appealed, now to the Common Law, now to their charters, and now to natural law and natural rights. But to the belief they held fast, upon whatever grounds it might be alleged to rest. They never properly appreciated the evolution of British constitutional theory and practice since 1688. The American colonists, moreover, were endeavouring to extend the powers of their own legislatures, for which they sometimes claimed an authority not very compatible with their nevertheless quite sincere dislike of sovereignty. English colonists, after all, had always enjoyed numerous rights and had possessed considerable powers of self-government. That they should eventually claim unprecedented powers for themselves was but a sign that they were reaching political maturity. Like the Englishmen of the seventeenth century, however, they were loath to admit that they wished to alter the law; instead they represented themselves for some time as conservatives, and their conservatism took the form of an appeal to fundamental law in one form or another.

It is not surprising that this political philosophy failed to commend itself to the British legislature; for there were few in Britain who could understand it, and fewer still who were

in sympathy with it. On the other hand, men there were increasingly conscious of imperial problems which seemed to require the action of the imperial legislature for their solution. They were problems that could not be solved by the King alone nor, because they concerned more than one Colony, by a Colonial legislature.<sup>1</sup> What, then, was more natural or reasonable than that the imperial legislature, with its plenitude of power, should do what seemed necessary? Since, too, that power did not seem an arbitrary one to most of the inhabitants of Great Britain, they could not realize that the Americans did in fact so look upon it. To the objection that the American Colonists were not directly represented in the House of Commons, it could be replied, with a greater or lesser degree of conviction, that they were virtually represented there just as Manchester was virtually represented. What, however, was important was the belief in Britain that there must be one sovereign legislature for the Empire; if so, that legislature could only be the legislature at Westminster. Any objections to its competence were regarded as a danger to the security of the Empire, and so met with strong opposition. Thus a crisis was inevitably caused. For the imperial legislature felt impelled to assert its authority in a way that could not but provoke resistance in the American Colonies. In the continued exercise of the royal authority alone the Americans might have acquiesced, especially if that exercise had been governed by new conventions. But it was not to be expected that they would submit to the plenary authority of a legislature in which they felt they had no real part when that legislature was intervening in Colonial affairs to a hitherto unprecedented extent. In these circumstances every new Act of the imperial Parliament which applied to America appeared to the Colonists as a dangerous precedent designed perhaps to prepare the way for yet further and more extensive inroads upon what they conceived to be their rights.

The conflict between the British and the Colonial points of view was first made plain over the question of taxation. After the Seven Years War the British Government, having to provide for the defence of the thirteen American Colonies, naturally

<sup>1</sup> The concurrent action of the Colonial legislatures appeared a practical impossibility at the time.

desired that these should contribute towards the cost. Since it was virtually impossible to secure the necessary grants from the several Colonial legislatures, they very naturally had recourse to the imperial Parliament for authority to tax the Colonists. There were, indeed, precedents for the raising of revenue from the Colonies by Acts of that Parliament, since some of the duties imposed by various Acts for the regulation of trade had been productive of small sums. Accordingly an Act was passed in 1764, which imposed certain duties on imports into the American Colonies, in order that a revenue might be raised, as stated in the preamble to the Act, 'for defraying the expenses of defending, protecting, and securing, the same'.<sup>1</sup> In 1765 the celebrated Stamp Act was passed with the same intent;<sup>2</sup> this imposed duties on various classes of documents in the Colonies. It there met with prompt and violent opposition, and a 'Congress' of Colonial representatives—a body without any legal status—denounced it on the ground—among others—that the King's subjects could not be taxed without their consent; since the Colonists were not represented in Parliament, the Act was therefore illegal. The 'Congress,' however, did not wholly repudiate the right of Parliament to legislate for the Colonies. Scarcely any of the Colonists would as yet have gone so far. For it was generally admitted that the imperial legislature might provide for the regulation of trade, and even impose duties for that purpose; some, however, contended that such duties must not be productive of revenue. Others distinguished between external and internal taxes; the former, they said, might be imposed, the latter not.

The opposition to the Stamp Act met with a partial success. For in 1766 the Rockingham Ministry procured its repeal; but that repeal was followed by the passing of a Declaratory Act which stated that the American Colonies were, and ought to be, subordinate unto and dependent upon the Imperial Crown and Parliament of Great Britain, and that the imperial legislature had, and ought to have, full power and authority to make laws binding upon the Colonists.<sup>3</sup> Thus Parliament made it plain that they regarded the Stamp Act merely as

<sup>1</sup> 4 Geo. III, c. 15.

<sup>2</sup> 5 Geo. III, c. 12.

<sup>3</sup> 6 Geo. III, c. 12.

impolitic, not as in any way unlawful. The Declaratory Act was a natural response to the American challenge; but it revealed the unbridgeable gulf between the British and the American points of view.<sup>1</sup> In the then circumstances it was not to be expected that the imperial legislature would suffer its sovereignty to be impugned. Yet as long as it claimed sovereignty there was a danger of a conflict with the American Colonies. Only an abandonment of that claim and a delimitation of the powers of the legislature could then have averted a further crisis. But these things were impossible. In the days when the legislature had not claimed to be sovereign, the belief that there was a limit to its powers had not involved any serious attempt to define those powers. Now, even had the legislature been ready to give up its claim, it would still have been necessary to delimit its powers if the Colonists were to remain content. But the difficulties in the way of such a course were enormous. There were a number of members of both Houses who argued that in some respects the powers of the imperial legislature over the Colonies were not plenary. But their contentions were neither very consistent nor very clear. For instance, the elder Pitt maintained, like many of the Colonists, that the legislature's powers were very wide, but did not extend to the imposition of taxes for revenue, as opposed to those for the regulation of trade. But what justification was there for saying this? The Colonists, Pitt argued, could not be so taxed by Parliament because they were not represented therein; for he brushed aside as a sophism the theory of virtual representation. But his acknowledgement that it was both right and expedient for the legislature to do almost anything short of this was fatal to his theory. Might not the Colonists object on the same ground and with equal justification to any legislation which they disliked? In strict logic the position of those who said the legislature was sovereign and should proclaim itself to be so seemed far stronger. Nevertheless, the passing of the Declaratory Act was a political blunder, though one that was almost inevitable.

That the passing of the Declaratory Act was not a mere

<sup>1</sup> Compare the Declaratory Act of 1720 which made an identical statement as to the power of the Imperial legislature to make laws for Ireland. This Act was a model for that of 1766.

expression of a constitutional theory was shown in 1767, when an Act of Parliament imposed revenue duties upon certain imports into the American Colonies; the produce of these duties was to be expended by the King at his discretion upon the administration of justice and the support of the civil government in the Colonies; if there was a surplus, it was to be disposed of by Parliament for the defence of the Colonies.<sup>1</sup> Moreover, both this statute and another statute of the same year made provision for the more effective enforcement of the Acts of Trade.<sup>2</sup> Opinion in the Colonies was strongly hostile to the duties, and Colonial controversialists did not fail to repeat the contention that taxation without representation was unlawful. They were, however, for the most part careful to add that Colonial representation at Westminster was impossible, for they did not really desire it. Practically speaking, the Colonists would not have felt their interests adequately secured had they been given the right to elect a few members of the Commons; nor would this concession have converted them to belief in the sovereignty of the imperial legislature. Their arguments made little impression in Britain, but there was none the less a genuine desire there to allay the Colonists' discontent, and in 1770 all the duties were repealed save that on tea, which was retained to assert the power of the legislature.

American opposition continued, and many disorders occurred. As a result, in 1774 Acts were passed for the alteration of the constitution of Massachusetts and the better protection of officials engaged in enforcing the law. In America, on the other hand, a 'Congress' of representatives assembled to take measures for the defence of the Colonial cause. They drew up a Declaration in which they claimed that the Colonists had certain rights 'by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts'; laws, therefore, which affected their lives, liberties, or property, could only be made with their own consent; they were possessed of all the rights of Englishmen, being of English descent; hence only their own Assemblies could tax them or pass bills regulating their internal affairs;

<sup>1</sup> 7 Geo. III, c. 46. Great difficulty had been experienced in obtaining adequate supplies for the two former purposes from several of the Colonial Assemblies.

<sup>2</sup> These had never been properly observed by the Colonists.

they did not repudiate the royal authority or the right of the imperial legislature to regulate overseas trade; the Declaration also enumerated certain Acts which its authors deemed to be illegal, inasmuch as they encroached upon the fundamental liberties of the Colonists.

Such contentions could not be acceptable in Britain. The utmost concession the British Ministry would offer was that if any Colony would give an adequate supply towards its defence and the maintenance of the civil government, the imperial legislature would not impose revenue duties upon it. The Congress, very naturally, would have none of this, and American opinion rapidly began to move towards a complete denial of imperial authority. Colonial controversialists had recently found it increasingly difficult to lay down clear limits of the authority of the imperial legislature. Nor was it satisfactory to argue, as some did, that the Colonists were subject to the authority of the King, but not to that of the King in Parliament. This movement of opinion in favour of independence was accompanied by acts of resistance, which soon developed into acknowledged rebellion. In July, 1776, the Declaration of Independence was issued.

The failure of her attempts to subdue the Colonists led Britain to offer certain concessions. An Act of 1778 declared that henceforth the imperial legislature would not impose any taxes, save for the purpose of regulating trade, upon the North American and West Indian Colonies; further, any revenue that might be produced by such taxes was 'to be paid and applied to and for the use of' the Colonies.<sup>1</sup> At the same time the Government were ready to promise other concessions if the Colonists would submit; namely, that the imperial legislature would abstain from altering the constitution of any Colony save at its own wish, that no standing force would be maintained in a Colony during peace without its consent, that Colonies would be allowed to elect their own Governors, and that a federal assembly might be set up for the thirteen Colonies; certain changes in the regulation of trade were also suggested. But it was too late for such a settlement to be accepted on the other side of the Atlantic. Even had they been made earlier, it is not certain that the

<sup>1</sup> 18 Geo. III, c. 12.



Colonists would have welcomed these offers. They would have feared that what had been granted by one statute might be taken away by another.

The American revolution did not make Parliament change its attitude. In 1782 and 1783 the British legislature abandoned its claim to make laws for Ireland.<sup>1</sup> This abandonment, however, was merely designed to avert a rebellion; it did not imply that the British legislature thought its competence was in any way restricted as regards the rest of the Empire. It continued to make laws for the remaining Colonies, though not without a certain prudence. Nor did the new arrangement with regard to Ireland last for many years. The Union of 1801 was a striking proof of its unsatisfactoriness. After that Union all the King's subjects were regarded as being under the authority of one sovereign legislature.<sup>2</sup> Nor can much importance be attached to the fact that the British Act of Union provided that the conditions of the Union should be in force for ever. Its supporters would scarcely have denied that they could be modified by an Act of the Parliament of the United Kingdom, just as the terms of the Union between England and Scotland had been modified by Acts of the Parliament of Great Britain. Thus at the beginning of the nineteenth century the powers of the imperial legislature was generally held to be unbounded.<sup>3</sup>

<sup>1</sup> See *supra*, p. 387.

<sup>2</sup> During the debates on the Bill of Union a few voices were raised in the British Commons to contend that the Irish Parliament had no power to abolish itself. But it was scarcely denied that the people of Ireland, as opposed to its Parliament, could, if they so wished, commit their country to the Union; that the Irish Parliament should do so alone was represented as beyond its powers; in other words, not the Irish legislature, but the Irish nation, was sovereign.

<sup>3</sup> Not until the present century have they been limited by anything like a fundamental law. For the Statute of Westminster, 1931, is, to all practical intents and purposes, such a law. Theoretically it could be repealed by the body which made it at any moment and in any circumstances. But its repeal without their consent would be regarded by the Dominions as an act of revolutionary violence and would certainly lead to the disruption of the Empire.

## X

### CHURCH AND STATE

THE LEGAL relations of Church and state did not alter throughout this period save in so far as they were modified by Hardwicke's Marriage Act.<sup>1</sup> Nor is there any doubt that the law was in harmony with the general trend of opinion. The Church of England was held to be the best in the world. The privileged position given to its members appeared perfectly natural. Though the temper of the age was increasingly averse to persecution, the treatment of the Dissenters was not regarded as persecution, but as a necessary safeguard of the established Church; it was expedient, men argued, that there should be an established Church in every state and that members of this Church should have certain privileges. Hence the Dissenters had no just cause for complaint. Even the severe laws against Roman Catholics were justified on the ground that Romanism was incompatible with loyalty to the King and the constitution. Very few, moreover, were in favour of any indulgence to unbelievers.<sup>2</sup> For without religion it was believed that the state could not endure. This belief in the need for religion also caused men to support the established Church. For a multitude of sects seemed incapable of giving that support to the body politic which the establishment supplied. But the Church was not thought to exist merely for the sake of the state; rather Church and state were usually looked upon as co-ordinate institutions. Some regarded them as two aspects of the same thing, but these were in a minority.

No change was made in the Act of Uniformity, though in 1772 there was an attempt to free the clergy and those holding degrees in Civil Law and medicine from the necessity of subscribing the Articles. But the House of Commons, after an

<sup>1</sup> See *infra*, p. 408.

<sup>2</sup> The courts held Christianity was part of the law of England; hence an overt denial of any fundamental doctrine was punishable. But they did not concern themselves with subtle theological controversies.

animated debate, refused to receive a petition, signed by 250 persons, praying for relief. The argument which prevailed was that the clergy should be compelled to accept certain tenets, not merely—as the petitioners wanted—to profess belief in Holy Scripture; if so, no better formulae than the Articles could be devised. A small section of the majority held that, if the Houses passed a bill granting the petitioners' request, the King could not give his assent to it consistently with the coronation oath. But the House as a whole did not incline to this view.<sup>1</sup>

The Dissenters endeavoured in vain to secure a measure of relief from their statutory disabilities. Motions for leave to bring in a bill for the abolition of the sacramental test imposed by the Act of 1673 were rejected by the Commons in 1736 and 1739. There is, however, some reason to believe that the House might have accepted a proposal for the repeal of the Corporation Act. After the lapse of over a generation the Dissenters renewed their efforts to obtain relief. In 1787 a motion was made in the Commons that the House go into committee to consider so much of the Corporation Act and of the first Test Act as required persons before they were admitted to any office in municipal corporations or had accepted any office civil or military under the Crown to receive the sacrament according to the rites of the Church of England. The motion was defeated, and again met with the same fate when it was renewed in 1789 and 1790.<sup>2</sup> The House was quite convinced that any relaxation of the law would be a danger to the Church, and so to the state.

The provisions concerning the sacramental test pressed hardly not only upon the Dissenters, but also upon the members of the established Church of Scotland. Accordingly in 1791 a motion was made in the Commons that the House go into committee to consider how far the sacramental test ought to extend to persons born in Scotland. But the House rejected it, although it was difficult to deny that the Scots had a good claim to relief.

One concession, however, the legislature did make to the Dissenters. In 1772 the Commons passed a bill to exempt

<sup>1</sup> See *supra*, p. 267.

<sup>2</sup> It is to be noted that none of these proposals, if adopted, would have given any relief to Roman Catholics.

Dissenting ministers from the necessity of subscribing any of the Articles in order to obtain the benefit of the Toleration Act. The bill was thrown out by the Lords, passed again by the Commons in 1773, and once more rejected by the Upper House. In 1779 it was reintroduced with a few changes, and on this occasion passed both Houses. Henceforth Dissenting ministers and teachers were merely required to take the oaths of allegiance and supremacy and to subscribe a declaration that they were Protestant Christians and accepted Holy Scripture as the rule of their doctrine and practice. Those who complied with these conditions were not merely granted the benefit of the Toleration Act, but were also explicitly allowed to act as schoolmasters.<sup>1</sup>

Certain bills were also introduced in favour of the Quakers, though only one became law.

In 1739 they were permitted, if otherwise qualified, to become Attorneys on making an affirmation instead of taking an oath.<sup>2</sup> On the other hand, the Lords in 1736 rejected a bill, which had passed the Commons, to compel, not merely to permit, suits against Quakers for non-payment of tithe, whatever its amount, to be brought before the Justices of the Peace.<sup>3</sup> This bill was regarded by the Bishops as a menace to the rights of the tithe-owner, because they held he would have had increased difficulty in obtaining his due had it become law. Nor did they refrain from arguing that the Justices of the Peace could not be expected to be impartial in determining such cases.<sup>4</sup> The Lords were moved to throw out the bill by this appeal to their respect for property. In 1796 a further attempt was made to help the Quakers. The Commons then passed a bill to relieve Quakers from imprison-

<sup>1</sup> 19 Geo. III, c. 44.

<sup>2</sup> 12 Geo. II, c. 13.

<sup>3</sup> Under the Act of 1696 suits for the non-payment of tithe, if its value did not exceed £10, could be brought before two J.P.s, or before the Courts Christian, or before the courts in Westminster Hall. See *supra*, p. 277. The bill of 1736 compelled them to be brought before two J.P.s whose decision was to be final, unless the Quaker should litigate payment. This bill, had it become law, would have given sensible relief to the Quakers; since proceedings before the Courts Christian or before the courts in Westminster Hall were dilatory and costly. The principles of the Quakers did not permit them to pay tithe voluntarily.

<sup>4</sup> There was perhaps more force in these objections than is generally realised. The provisions of the bill were somewhat unfair to the clergy. But perhaps relief could have been given to the Quakers without injury to the Church. No proposals of that kind were made by the opponents of the bill.

ment for the non-payment of tithe and to permit them to give evidence on affirmation in criminal cases. The Lords threw the bill out, and when it was reintroduced in the following year, it failed to pass the Commons. These bills, like that of 1736, were defeated because they were looked upon as injurious to the security of property.

By the end of the century the Unitarians had become a fairly numerous sect, and in 1792 they petitioned the Commons for relief from the statutes in force against them.<sup>1</sup> Fox moved that the House go into committee to consider these laws, but the House rejected the motion. The majority on this occasion seem to have been influenced by the belief that many Unitarians held political opinions of a radical, not to say a subversive, character.

From one great grievance all the Dissenters were freed by a judicial decision. The City of London in the middle of the century elected a number of Dissenters into the office of Sheriff, although under the Corporation Act no strict Dissenter could hold it. The City, however, did this in order to get money, since a heavy fine was imposed upon those who declined to serve. At length certain persons refused both to serve and to pay the fine. Legal proceedings were taken against them, and the case ultimately came before the House of Lords, where judgement was given against the City in 1767. The Lords were largely influenced in their decision by the views of Mansfield, who held that bare dissent was only a statutory, not a Common Law, crime; now those Dissenters who had qualified themselves to obtain the benefits of the Toleration Act were exempt from the statutory penalties for nonconformity; on the other hand, the Corporation Act made Dissenters incapable of holding municipal office unless they were occasional conformists; those who were not occasional conformists could not be finable for not accepting such offices, since a mere omission to qualify themselves by taking the sacramental test was not illegal.<sup>2</sup>

<sup>1</sup> See *supra*, p. 278, for the Act of 1698. That Act had not been enforced, but its existence was a threat to the Unitarians.

<sup>2</sup> This case was *City of London v. Evans*. The City had originally taken proceedings against two other Dissenters, Streatfield and Sheafe; but the case against Streatfield had collapsed because he was not within the jurisdiction of the Sheriff's Court—before which it originally came—and Sheafe had died before his case could reach the House of Lords.

In the reign of George III the severity of the laws against Roman Catholics began to be somewhat relaxed. The enforcement of those laws had never been continuous or systematic, and when Jacobitism had become virtually extinct many Protestants began to think some of them no longer necessary for the security of their religion. In 1778 one of the most oppressive of those laws, the Act of 1700, was so far modified that Romanists who took an oath of allegiance to the King, of abjuration of the Pretender, and of repudiation of the doctrine that the Pope had any temporal authority in England, were exempted from its penal clauses.<sup>1</sup> Further relief soon followed. An Act of 1791 gave all Roman Catholics who took an oath of a similar tenor freedom to worship according to their rites, and to hold lands and to maintain schools under the same conditions as other subjects.<sup>2</sup> These Acts only applied to England, but similar concessions were made to Scottish Roman Catholics in 1793.<sup>3</sup>

In 1753 Hardwicke's Marriage Act was passed; this not merely remedied certain abuses, but also marked a permanent change in the attitude of the state towards the Church on one important point. Hitherto, with certain exceptions, the law regulating marriage had been the Canon Law, save during a portion of the Interregnum; for an Act of 1653 had not only provided for the due publication of banns, but had also required a civil ceremony before a Justice of the Peace.<sup>4</sup> After the Restoration the old law once more obtained. Now, though the Canons of 1604 had laid down various rules as to the publication of banns and the celebration of marriages, breach of those rules did not involve the invalidity of a marriage.<sup>5</sup> There was therefore every facility for the clan-

<sup>1</sup> 18 Geo. III, c. 60. For the Act of 1700 see *supra*, p. 278.

<sup>2</sup> 31 Geo. III, c. 32. This Act also allowed Romanists to follow all the legal professions and permitted Roman Catholic peers to have intercourse with the King.

<sup>3</sup> Of course no English Act applied to Scotland, but the Scottish Acts against Roman Catholics were very severe. For the question of Catholic emancipation in 1800-1 see *supra*, p. 376.

<sup>4</sup> Marriages in accordance with the provision of this Act were legalized by 12 Car. II, c. 33. It should be noted that these marriages would in any case have been valid by Canon Law if consummated, since they contained the essential element of consent. The Courts Christian, however, might have sought to compel the parties to be married *in facie ecclesiae* but for this statute.

<sup>5</sup> By 7 and 8 Will. III, c. 35 penalties were imposed on those who disregarded the Canons. But the Act did not declare any class of marriage to be void.

destine marriage of minors and for the solemnization of hasty marriages between adults. Further, the Courts Christian continued to enforce the Canon Law concerning marriage contracts *per verba de praesenti* and *per verba de futuro*. Until 1753 the state made no general attempt to modify the law of marriage, although a number of marriages were dissolved by private Acts.<sup>1</sup> The reform of 1753 was of a sweeping character and was designed both to prevent clandestine marriages and to do away with the jurisdiction of the Courts Christian in cases of verbal contracts of marriage. It elaborately regulated the publication of banns, and provided that no clergyman was to be punishable by ecclesiastical censures for solemnizing, after banns published, the marriages of minors without the consent of their fathers or guardians, unless notice of their dissent had been given; on the other hand, notice of such dissent was to render the publication of banns void; marriages of minors solemnized by licence without the consent of the fathers or guardians were to be void; all marriages were to be solemnized in the parish church of one of the parties, unless they were by special licence from the Archbishop of Canterbury; the presence of two witnesses besides the officiating clergyman was required at every marriage ceremony, and a detailed entry of the particulars was ordered to be made in the parish register; no suit was to be had in any ecclesiastical court to compel the solemnization of any marriage *in facie ecclesiae* by reason of any contract of matrimony whatsoever; all marriages solemnized in contravention of the provision of the Act were to be void, not merely voidable;<sup>2</sup> but the Act did not apply to the marriages of Jews, Quakers, or members of the royal family.<sup>3</sup> This Act remedied great abuses and

<sup>1</sup> Such Acts were passed at the request of the innocent party, when the adultery of the other party had been proved and a separation had been obtained by the award of the Courts Christian. It does not appear that the clergy as a body regarded such Acts with hostility.

<sup>2</sup> It still remained true that marriages of parties within the prohibited degrees were voidable by the Courts Christian; but until a decree of nullity had been obtained they were valid for all civil purposes; nor would the civil courts permit a marriage to be annulled on such grounds after the death of one of the parties.

<sup>3</sup> 26 Geo. II, c. 33. This Act did not apply to Scotland. It will be noted that the term 'royal family' was not defined. The Act was drawn up and championed by Lord Chancellor Hardwicke, from whom it took its name.

proved generally acceptable. It was not denounced by the Church as an infringement of its rights; nor did the Dissenters seem to regard it as oppressive, though they might well have objected to the requirement that their marriages should be solemnized in a parish church.<sup>1</sup> Such opposition as the bill encountered in the Houses came from those who denounced it, not as unjust to any Christian community, but as an arbitrary interference with liberty and as tending to encourage immorality.

Lord Hardwicke was also responsible for an important judicial decision as to the validity of post-Reformation Canons. In 1736, when Chief Justice of the King's Bench, he held that the Canons of 1604 did not bind the laity *proprio vigore*; post-Reformation Canons were only binding on the laity in so far as they had been confirmed by statute.<sup>2</sup>

<sup>1</sup> The Roman Catholics, on the other hand, strongly objected to the law; but not much sympathy was felt for them.

<sup>2</sup> The case was that of *Middleton v. Croft*. By 25 Henry VIII, c. 19, 'such canons, constitutions, ordinances, and synods provincial being already made' were to remain in force, except in so far as 'repugnant to the laws, statutes, and customs of this realm' or 'to the damage or hurt of the King's prerogative royal', until a royal commission, for which provision was made in the Act, should have revised the Canon Law; this commission never met. The pre-Reformation Canons therefore remained law except in so far as they were repugnant to this or subsequent Acts.



## XI

### JUSTICE

THE INDEPENDENCE of the judges was completely secured soon after the accession of George III. Acting on a suggestion made by the King in a speech from the throne, the Houses in 1760 passed a bill which provided that judges' commissions were not to be determined by a demise of the Crown and that their salaries should be duly paid.<sup>1</sup> Since, however, there was no compulsory retiring age, the change made it possible for judges to remain on the bench after the decay of their faculties.

Throughout the period the character of the judges was of the highest. Yet during the earlier part of George III's reign some of them, and in particular Mansfield, Chief Justice of the King's Bench, came in for much criticism.<sup>2</sup> Mansfield was accused of leanings towards arbitrary government and of misapplying the law in consequence. Both charges were ludicrous. It is true that Mansfield virtually created a great deal of England's commercial law. But legal historians have praised this as a glorious achievement, not made it a matter of reproach. Many of Mansfield's contemporaries were blind to the fact that he was performing a great task thereby, and so falsely charged him with attempting to corrupt the law. He was more specifically accused of attempting to blend large portions of the Civil Law with the Common Law; Civil Law, said his critics, was not fit to be adopted by a free people. Mansfield's view of the function of juries in cases of criminal libel was even more bitterly denounced.<sup>3</sup> On this point the

<sup>1</sup> Geo. III, c. 23. George III, be it said, had not removed any of the judges on his accession.

<sup>2</sup> William Murray, 1705-93; Solicitor-General, 1742-54; Attorney General, 1754-56; Chief Justice, 1756-88; created Baron Mansfield of Mansfield in 1756; created Earl of Mansfield in 1776.

<sup>3</sup> See *infra*, p. 429.

Chief Justice was assailed not merely in the press, but also in Parliament. In December, 1770, a motion was made in the Commons for the appointment of a committee to inquire into the administration of criminal justice and the proceedings of the judges in Westminster Hall, particularly in cases relating to the liberty of the press and the constitutional powers of juries. The House very properly rejected the motion, on the ground that they could only inquire into the conduct of judges when a specific charge had been made against them, whereas the supporters of the motion had confined themselves to vague general statements. The conduct of Mansfield and his brethren was also the subject of certain proceedings in the Lords at this time. After Chatham in the course of a speech upon a totally different subject had sharply reflected upon Mansfield's view of the function of juries in libel trials, the Chief Justice defended his opinion as being in accordance with precedents. Shortly afterwards Camden, an ex-Lord Chancellor, called upon Mansfield to answer certain queries concerning the law of libel; Mansfield refused to do so forthwith, but pledged himself to deal with them on some future, though unnamed, day. This promise, however, was not kept, nor did Camden take the matter up again. But no credit for this is to be given to Mansfield, whose behaviour had been lacking in courage and frankness. Had he done his duty, he would have refused, as Holt had done on a not dissimilar occasion, to defend his conduct as a judge before the Lords, unless the House was hearing an appeal from one of his decisions.<sup>1</sup>

The law relating to the constitution of juries was modified in 1730 by an Act which authorized the Courts of Common Law to order special juries to be struck at the request of the prosecutor or defendant in a trial for misdemeanour or at that of either party in a civil action.<sup>2</sup> Lord Mansfield took advantage of this Act to procure a panel of specially qualified jurymen for the trial of commercial cases; he held private meetings with these men in order to instruct them, and they assisted him in developing commercial law.<sup>3</sup> At a later date the Act

<sup>1</sup> For Holt see *supra*, p. 283.

<sup>2</sup> 3 Geo. II, c. 25. The duration of this Act was limited to three years, but it was made perpetual by 6 Geo. II, c. 37.

<sup>3</sup> I do not mean that Mansfield ever privately discussed with these men cases that were *sub judice*.

was also alleged to have had other results of a less desirable character. For some said that it enabled the Government to secure the appointment of juries favourable to the prosecution in libel trials.<sup>1</sup>

The judges continued to develop the law of treason on the lines previously laid down. In the *Case of Lord George Gordon* (1781) it was held that it was treason for a mob to assemble with intent to secure the repeal of a statute by the intimidation of the legislature. Again, in 1794 it was held at the trial of Horne Tooke that an intention to depose the King was equivalent to compassing and imagining his death. But both Gordon and Tooke were acquitted.

In 1795 the law of treason was modified by statute. An Act of that year made it treason to 'compass, imagine, invent, devise, or intend death, or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, to the person of His Majesty, or to depose him, or to levy war against him, in order, by force or constraint, to change his measures or counsels, or in order to put any force or restraint upon, or to intimidate or overawe, both Houses or either House of Parliament, or to move or stir any foreigner with force to invade this realm or any other of His Majesty's dominions'; the intention to do any of these things was to be treason, whether expressed by overt act or by publishing any writing; two witnesses were to be required for a conviction.<sup>2</sup> This Act, it will be noted, left the Act of 1352 unrepealed; what it did was to give statutory force to a certain interpretation of part of that Act. Levying war against the King and adhering to the King's enemies still continued to be punishable under the Act of 1352 as extended by judicial construction.

The law regulating procedure in trials for treason was twice modified. An Act of 1747 permitted persons impeached of treason to make their defence by counsel.<sup>3</sup> An Act of 1800 provided that in cases of high treason in compassing or imagin-

<sup>1</sup> How much truth there was in this allegation I cannot say. Juries did not always find the defendant guilty, and this is evidence of their independence.

<sup>2</sup> 36 Geo. III, c. 7. These clauses of the Act were to be in force until the end of the session after the death of George III. In 1817 they were made perpetual.

<sup>3</sup> 20 Geo. II, c. 30. Cf. *supra*, pp. 290-1.

ing the King's death and of misprision of such treason, where the overt act alleged in the indictment was the assassination of the King or any direct attempt against his person, whereby his life was endangered, the accused should be tried in the same manner as if charged with murder and, consequently, should not enjoy the benefits of the Acts of 1696 and 1709.<sup>1</sup>

The year 1795 witnessed legislation against other political crimes besides treason. It was then made a high misdemeanour at any time during the following three years and thereafter until the end of the next session of Parliament maliciously and advisedly by any writing, printing, preaching, or other speaking, to express or publish any words tending to excite the public to hatred or contempt of the King or of the government or constitution of the realm; upon a second conviction the courts were authorized to inflict either the ordinary punishment for high misdemeanour or banishment or transportation for not more than seven years; prosecutions, however, had to be brought within six months of the alleged offence.<sup>2</sup> Another Act provided that no meetings at which more than fifty persons were present—with certain specified exceptions<sup>3</sup>—should be held for the purpose of considering any petition to the King or to Parliament for an alteration of the constitution, or for that of deliberating upon public grievances, unless seven householders of the district in which the meeting was to be held had previously inserted a notice in a local newspaper, of its time, place, and purpose, or had given such notice to the Clerk of the Peace for the County; unless these requirements had been observed, such meeting were to be deemed unlawful assemblies; magistrates were authorized to attend lawful meetings and to order them to disperse if anybody present maintained that the law might be altered except by Parliament or strove to bring the King or the constitution into contempt; further, all places where lectures were given or debates held were to be deemed disorderly houses unless licensed by two J.P.s; but this last

<sup>1</sup> 39 and 40 Geo. III, c. 93. Cf. *supra*, pp. 290-1.      <sup>2</sup> 36 Geo. III, c. 7.

<sup>3</sup> These were: meetings of Counties, Ridings, or Divisions, called by the Lord Lieutenant or Sheriff, or in Scotland, by the Conveners of Counties or Stewartries; or meetings called by two J.P.s or by the majority of the Grand Jury of a County; or meetings of any corporate town called by its head officer; or meetings of any corporate body.

clause did not apply to schools or Universities; prosecutions under this Act were to be brought within six months of the alleged offence; its duration was limited to three years and thereafter until the end of the next session of Parliament.<sup>1</sup>

An Act of 1797 made it a felony punishable by seven years transportation to administer or cause to be administered any oath binding those who took it to engage in any mutinous or seditious purpose, or to belong to a society for such a purpose, or to obey the orders of any body of men not lawfully constituted.<sup>2</sup> Another Act of the same year made it a capital felony to endeavour to seduce members of the forces from their allegiance or to stir them up to mutiny.<sup>3</sup>

In 1799 an Act was passed for the suppression of seditious societies. It suppressed several by name and declared to be illegal all societies which imposed upon their members any oath or declaration not warranted by law, or concealed from the main body of their members the names of any members or the personnel of any committees; societies might, however, impose any declaration which had been approved by the Justices of the Peace of the County where it usually met at Quarter Sessions; finally, the provisions enacted in 1795 relating to lecture-rooms and reading-rooms were re-enacted.<sup>4</sup>

The *Habeas Corpus* Act was partly suspended for a brief period in 1722 and 1746. Such a suspension again took place in 1794; its duration was to be a year, but it was continued by annual Acts until 1801.<sup>5</sup> In that year, however, an Act of Indemnity was passed for anything done or commanded to be done in Great Britain since February 1, 1793, for arresting or detaining in custody any person charged with or suspected of high treason or treasonable practices. The periodical suspensions during the years 1794-1800 had been opposed in Parliament as unnecessary, but the opposition to the passing of the Act of Indemnity was far stronger, for it was agreed

<sup>1</sup> 36 Geo. III, c. 8.

<sup>2</sup> 37 Geo. III, c. 123.

<sup>3</sup> 37 Geo. III, c. 70. The Act was to remain in force until the next session; it was several times re-enacted, lapsed in 1807, and was made permanent in 1817.

<sup>4</sup> 39 Geo. III, c. 79.

<sup>5</sup> These suspensions followed precedent. See *supra*, pp. 285 sqq. It should be added that they were also suspensions of the Scottish Act against Wrongous Imprisonment as well as of the *Habeas Corpus* Act. The Scottish Act resembled the English Act.

that many illegalities had been committed. The minority took the view that nothing could justify the granting of an indemnity which extended over so long a period; but the majority held that strong action had been needed to save the country, and an indemnity was therefore justified.<sup>1</sup>

The only impeachment during this period was that of Warren Hastings. This led to the final settlement of an old controversy. His trial lasted for many years, and in 1790 the Houses had to decide whether or no impeachments were terminated by a dissolution. The precedents were conflicting, and legal opinion was divided, but the Houses eventually resolved that the impeachment was not terminated by the dissolution of 1790.<sup>2</sup> Nor is there any doubt that on broad constitutional grounds that decision was right. Impeachments would have been ludicrous unless they had resulted in a judgement.

Mention must also be made of certain other statutes and legal decisions of the period.

In 1731 it was enacted that all proceedings in the English courts and in the Court of Exchequer in Scotland should be in English.<sup>3</sup> In 1733 the provisions of this Act were extended to Wales.<sup>4</sup> Thus a reform made during the Interregnum and abolished at the Restoration was reintroduced.

In 1736 the English and Scottish Acts against witchcraft were repealed, and it was made an offence punishable by a years' imprisonment to pretend to exercise any kind of witchcraft.<sup>5</sup>

In 1772 the barbarous *peine forte et dure* was abolished. Henceforth prisoners standing mute upon arraignment for felony or piracy were to be convicted and sentenced forthwith.<sup>6</sup>

In 1768 the Crown was disabled from bringing a suit against any person concerning lands held by a title of more than sixty years old. An Act to this effect had been passed in 1621; but, as it was only retrospective, its value had diminished with the passing of time, and the Crown had been able to recover many lands held for over sixty years by private per-

<sup>1</sup> See 41 Geo. III (U.K.), c. 66. <sup>2</sup> See *supra*, p. 151. <sup>3</sup> 4 Geo. II, c. 26.

<sup>4</sup> 6 Geo II, c. 14. This Act was sometimes harshly applied, for prisoners who could only speak Welsh were not always allowed to have the indictment translated for their benefit. See also *supra*, p. 140.

<sup>5</sup> 9 Geo. II, c. 5.

<sup>6</sup> 12 Geo. III, c. 20.

sons; for the courts adhered to the maxim '*nullum tempus occurrit regi vel ecclesiae*'. The Act of 1768 limited the Crown permanently.<sup>1</sup> In 1772 an attempt was made to limit the clergy in a like manner, but the Commons refused leave for the introduction of the bill. Apparently they thought the Crown was too powerful, but the Church was too weak.

Early in the reign of George III the courts were called upon to consider the legality of general warrants. General warrants are of two kinds: they may authorize the arrest of a person or persons unnamed, or they may authorize the seizure of the papers, unparticularized, of a person or persons. Both these characteristics might be combined in the same warrant.<sup>2</sup> Such warrants had been issued by the Secretaries of State during the reign of Charles II in pursuance of their duty to enforce the Licensing Act, nor had their right to issue them been questioned. The Commons, however, had taken exception to the conduct of Chief Justice Scroggs in issuing general warrants and had made it one of the charges in the impeachment they brought against him in 1680.<sup>3</sup> But Scroggs was never tried, and the Secretaries continued to issue general warrants as before. Curiously enough, their validity remained unchallenged long after the final expiration of the Licensing Act in 1695. Ordinary magistrates did not use them, and the Secretaries used them only in political cases. Since, too, the identity of the persons to be apprehended was usually known, few general warrants of the first kind were issued. Recourse was only had to them when a Secretary desired to arrest a number of people in order to obtain information by questioning them. For persons arrested on a Secretary's warrant were regularly brought before him and 'examined' before being committed.<sup>4</sup> General warrants for the seizure of papers

<sup>1</sup> 9 Geo. III, c. 16. A *Nullum Tempus* Bill had been introduced in the previous year, but had failed to pass.

<sup>2</sup> Thus a warrant for the arrest of the author or authors of a certain book would be of the first kind, a warrant for the arrest of John Doe and the seizure of his papers would be of the second kind. A warrant for the arrest of the author of a book and the seizure of his papers would be a general warrant in both senses of the term.

<sup>3</sup> See *supra*, p. 142. No Licensing Act was then in force.

<sup>4</sup> In *Regina v. Derby* (1709) Chief Justice Parker held that a Secretary could commit persons accused of libel as well as of treason or felony, and said he might 'examine them'.

were far more common. In 1733 there was some discussion in the press as to their legality; but popular interest in the subject soon waned. Nor was the issue directly raised in the courts at this time.

A generation later John Wilkes did raise it. In 1763 he was arrested on the authority of a Secretary's warrant for the apprehension of the authors, printers, and publishers of No. 45 of the *North Briton* and for the seizure of their papers.<sup>1</sup> After his discharge he brought an action against Mr. Under-Secretary Wood for trespass in entering his house and seizing his papers. The jury awarded him £1,000 damages after Pratt, Chief Justice of the Common Pleas, had stated in his summing up that general warrants for the seizure of papers were illegal. They were again condemned by the same judge in the case of *Entick v. Carrington*, which was tried shortly afterwards. On this occasion he described them as a danger to the liberties of the subject, and brushed aside the argument that they could be justified by reasons of state; the law could not recognize such an argument.

The contemporary case of *Leach v. Money* turned upon the legality of general warrants for the arrest of persons. Leach, who had been arrested in virtue of the warrant for the apprehension of the authors, printers, and publishers of No. 45, sued the Messengers who had arrested him, and was awarded damages. The defendants then obtained a writ of error; but after the first hearing of the appeal their counsel admitted they had no case; for, as it happened, Leach was neither author, nor printer, nor publisher of No. 45; therefore the warrant could not in any case authorize his arrest. Thus the court had no occasion to determine the validity of such warrants. But there is little doubt that they would have been condemned; for Lord Mansfield, who was one of the judges before whom the appeal was brought, had made some remarks which left no room for doubt as to his opinion. It was precisely in order to avoid such a condemnation that counsel for the appellants—of course directed by the Government—had yielded on another point. But though their formal condemnation had been escaped, general warrants for the arrest of persons were never again used by the Secretaries. Even had

<sup>1</sup> See *supra*, p. 329.



they been legal, their issue would have been dangerous, since the chief object in employing them was to secure the arrest of a number of persons, whether guilty or innocent of the specified offence, who could be questioned by a Secretary, and innocent persons could have sued those who had arrested them.

It is noteworthy that in all these cases the judges held that nothing but a statute or immemorial usage could confer upon the Secretaries of State powers not possessed by ordinary magistrates. For them there was a presumption in favour of the liberties of the subject. The House of Commons eventually concurred with the courts. General warrants were made the subject of several debates, and in 1766 the House passed a resolution condemning such warrants whether they were for the seizure of papers or for the arrest of persons.<sup>1</sup>

In 1772 another great question came before the courts. The legality of slavery in England had long been in doubt, though slavery was unquestionably legal in the Colonies, where it had obtained almost from the first.<sup>2</sup> Many negro slaves had been brought to England from the Colonies, had been treated as slaves in this country, and had sometimes been taken back to the Colonies. Negroes, moreover, had been bought and sold in England. But no statute authorized slavery in England; nobody, moreover, contended that white men could be slaves in England, and it was not easy to make a legal distinction between white men and black men. Yet there were strong practical reasons for recognizing slavery in England, since its existence was legal in the Colonies. Hence there was much reluctance in many quarters to see the question raised, and it was only with the greatest regret that Lord Mansfield

<sup>1</sup> These resolutions had, of course, no legal force. It is curious that general warrants were never declared to be illegal by statute.

<sup>2</sup> The following English cases were concerned with slavery. In *Butts v. Penny* (1677) it had been held that there might be property in negroes sufficient to maintain trover; but the negroes in question were out of England. In *Smith v. Brown and Cooper* (1706) Holt had said that as soon as a negro landed in England he became free; but this was only *dictum*. In 1729 the Law Officers had given it as their opinion that a slave did not become free on landing in England. In *Shanley v. Harvey* (1762) Lord Chancellor Northington held that a slave became free on landing in England and that he might have an action against his master for ill usage; this case arose thus. A lady had made a *donatio mortis causa* to one of her slaves. Subsequently a bill was filed against the negro, claiming the gift as part of the deceased lady's estate; that bill Northington dismissed.

brought himself to decide a test case.<sup>1</sup> The point at issue was whether or no the negro *Somerset* could be forcibly removed from England by his master. Mansfield decided that he could not; slavery, he said, was so odious that nothing could authorize it save positive law. But Mansfield's judgement did not make slavery completely illegal in England; it merely decided that a slave who had been brought thither could not be taken out of the country by force. On subsequent occasions Mansfield held that slaves could not bring actions for wages, and that their masters had a right to their services. Thus a kind of qualified slavery continued to exist in England until 1833.

In 1778 the Court of Session pronounced slavery to be absolutely illegal in Scotland.<sup>2</sup>

<sup>1</sup> Mansfield had done his best to avoid the necessity of determining the principle by endeavouring to bring about a compromise between the parties.

<sup>2</sup> An Act of 1818 for the regulation of slavery said that owners might take slaves who were their personal servants anywhere. This implied that these servants would remain slaves if brought to Britain. See 58 Geo. III, c. 49. Presumably therefore this Act nullified the decision of the Court of Session.

## XII

### THE FORCES OF THE CROWN

THE LAW respecting the forces remained substantially unchanged, though there were many modifications of particular points.

In the middle of the century there was fresh legislation with regard to the Militia. The condition of that force had long been unsatisfactory, and there was a widespread feeling that reform was necessary. In 1756 the Commons passed a Militia Bill which provided for the raising and training of a force of 60,000 foot; in principle there was little objection to the scheme, but the Lords rejected the bill because it was held to contain undesirable features. The Lord Chancellor attacked it on the ground that it was an invasion of the rights of the Crown; for the bill repealed the preamble to the Militia Act of Charles II, required the King to inform Parliament before calling out the Militia, and gave wide executive powers to the Land Tax Commissioners—a body appointed by statute. In the following year, however, an Act was passed which was not liable to these objections. It provided that a fixed number of men for each county in England and Wales were to be selected by lot from those of a certain age and were to be trained for twenty-eight days every year for three years; this force was to be commanded by the Lords Lieutenants, Deputy Lieutenants, and subordinate officers; for the two latter classes there was to be a property qualification, but all were appointed and dismissable by the King; in case of invasion, threatened invasion, or rebellion, the King was to have power to embody the Militia, provided he informed Parliament if sitting, or called it together if not sitting; Militiamen while with the colours were to be subject to the Mutiny Act, but they were not to be deprived of life or limb by the sentence of a court-martial while undergoing training.<sup>1</sup> It will be noted that this

<sup>1</sup> 30 Geo. II, c. 25. Those drawn for service in the ranks could purchase substitutes.

Act at once respected the traditional claims of the Crown and preserved ultimate Parliamentary control over the Militia; it made no provision for their pay; hence annual pay and clothing Acts were necessary. It further required that those in command of the Militia should be men of substance—that is, men drawn from classes supposed to be attached to the constitution. A force so constituted could not be a source of alarm to Parliament; rather, it was one of pride. Indeed, the preamble to a Militia Act of 1786, which consolidated various earlier amending Acts, states that ‘a respectable military force, under the command of officers possessing landed property within Great Britain, is essential to the constitution of this realm, and the Militia now by law established has been found capable of fulfilling the purposes of its institution’.<sup>1</sup> Even at this date the duty of the Militia, as Parliament saw it, was quite as much to preserve the constitution from attack by the regular army as to defend the country from foreign invaders.

The Act of 1757 applied only to England. A bill to establish a Militia in Scotland was introduced in the Commons in 1760, but rejected by the House. In 1797, however, a Scottish Militia Act was passed.<sup>2</sup>

The other legislation with regard to the Militia is not of great constitutional importance.

In time of rebellion or war with a foreign power the Crown on occasion encouraged the raising of bodies of volunteers and the giving of money by private individuals for their support.<sup>3</sup> No notice was taken of this in either House until 1778, when, in the course of a debate on the Army estimates, several speakers declared it was unconstitutional and illegal for the Crown to raise troops and receive money for their upkeep without the consent of Parliament. No motion of censure was carried; but in the following year the Ministers introduced a bill, which became law, to authorize and regulate the raising of volunteers for three years; volunteer companies were to be attached to Militia regiments and to be subject to the same laws as the Militia. During the war with revolutionary France volunteer

<sup>1</sup> 26 Geo. III, c. 107.

<sup>2</sup> 37 Geo. III, c. 103. Its provisions were very similar to those of the Act of 1757.

<sup>3</sup> Volunteers were not in receipt of pay from the Crown; they undertook to fight in case of invasion or rebellion in Britain.

forces of various kinds and under various designations were again raised, but, with brief exceptions, this was done by statutory authority. In 1794, however, a Secretary of State circularized the Lords Lieutenants informing them that subscriptions were invited towards the cost of strengthening the Militia by the addition of volunteers. The propriety of this circular was shortly afterwards discussed in the Commons, and though no vote of censure was passed, the Ministers took care for the future that money should not be collected save in accordance with the provisions of a statute.<sup>1</sup>

The introduction of foreign troops into England without the consent of Parliament continued to be illegal, though it sufficed if the Houses gave that consent by addresses. When Hanoverians were sent to Gibraltar and Minorca in 1775 without Parliamentary sanction, their presence in those places was denounced as illegal by several members of the Lower House; the Ministers contended that foreign troops could be employed outside Britain, especially in time of war or rebellion, but the Prime Minister, by offering to introduce a Bill of Indemnity, virtually confessed the law had been broken and it was perhaps this offer which averted a vote of censure.<sup>2</sup> In the following year a motion was made in the Commons condemning the introduction of foreign troops into any part of the British dominions as unconstitutional and illegal. It was not passed, for its opponents disposed of it by moving the previous question. The landing of some foreign troops on the Isle of Wight in 1795 caused a discussion in Parliament. But the plea that these troops had not remained there for any length of time, coupled with the fact that the Houses had been informed soon after the event, proved satisfactory. The Houses were usually ready to condone breaches of the law in exceptional circumstances, but it was of much importance that any breach might be the subject of proceedings in either House.<sup>3</sup>

The Mutiny Act continued to be passed annually without fundamental change. But until the middle of the century

<sup>1</sup> See also *supra*, p. 95.

<sup>2</sup> The bill was duly introduced in the Commons and was passed by them, but thrown out by the Lords.

<sup>3</sup> In the same way the Commons tolerated excessive expenditure and misapplication of money in war time. See *supra*, p. 344.

there was always opposition to the existence of a standing Army in time of peace, and throughout the century any increase in the scope of the Act was sharply criticized. As it had been doubtful whether or no half-pay officers were liable to the Act, a clause was inserted in 1747 declaring them liable. But the addition was disliked, and in 1749 the clause was struck out. No further attempts to bring new categories of persons under the Act were made until 1788, when a corps of sappers, which had recently been formed, was included.

The Mutiny Act continued to apply to Ireland until 1781.<sup>1</sup>

The Marines were reorganized in 1755 and placed under the control of the Admiralty; from that date Parliament, by annual Acts, made provision for the maintenance of discipline among them, while they were on shore.<sup>2</sup>

Provision was also made at the same time by a permanent Act for the maintenance of discipline among the white troops in the service of the East India Company.<sup>3</sup>

During the rebellion of 1745, and subsequently during wars with foreign powers, a number of temporary Acts were passed authorizing the Justices of the Peace to impress for service in the Army—for a time not exceeding the duration of hostilities—men who had no visible means of support and followed no lawful calling.<sup>4</sup>

The legality of impressing seamen for service in the Navy was definitely affirmed by Lord Mansfield in 1776, when he was called upon to decide whether one Tubbs, a waterman in the City of London, had been legally impressed. The power of pressing, he declared in his judgement, was founded upon immemorial usage and had been indirectly recognized by several statutes;<sup>5</sup> it was justified by the legal maxim that 'private mischief had better be submitted to than that public

<sup>1</sup> An Irish Act of 1780 had given the Crown power to try soldiers by court-martial and to issue articles of war. In 1782 this was repealed, and henceforth troops in Ireland were subject to a biennial Mutiny Act passed by the Irish Parliament.

<sup>2</sup> The first of these was 28 Geo. II, c. 11. While on board ship, the Marines came under the permanent Acts for the maintenance of discipline in the Navy.

<sup>3</sup> 27 Geo. II, c. 9.

<sup>4</sup> *E.g.* 17 Geo. II, c. 15; 29 Geo. II, c. 4; 30 Geo. II, c. 8; 18 Geo. III, c. 53; 19 Geo. III, c. 10. See also *supra*, p. 297.

<sup>5</sup> Various statutes had exempted classes of seamen from impressment; these implied, therefore, the legality of impressment in general.

detriment and inconvenience should ensue.' Mansfield was no doubt right in declaring impressment to be legal. But the maxim he cited was capable of dangerous extensions. The judges, however, were not prone to regard it as justifying encroachments upon liberty which lacked the sanction of immemorial antiquity. They did not uphold the legality of general warrants because of their utility to the Ministers. Pratt paid no heed to reasons of state.<sup>1</sup>

Impressment was legal only as regards seamen. Landsmen could not be compelled to serve in the Navy.<sup>2</sup> Parliament never brought themselves even seriously to consider the desirability of making service in the Army or Navy compulsory for all men. Seamen might be impressed by custom; paupers might on occasion be compelled to serve with the forces by statute; service in the Militia might be made compulsory for large numbers of men;<sup>3</sup> but the ideal of the nation in arms was never fully adopted.

During the reign of Anne and afterwards troops were used on occasion to assist the civil power in the maintenance of order and the suppression of riots. Prior to 1735 they were usually directed by the Secretary at War to refrain from the use of force, unless ordered to employ it by a magistrate. After that year, however, they were merely directed not to use force, unless it was absolutely necessary. The commanding officer, that is, was allowed to use his own discretion. None the less, the opinion obtained that it was illegal to employ the Military against civilians until a magistrate had called on them to act. This opinion seems to have sprung from a misunderstanding of the Riot Act, plain though that statute is.<sup>4</sup> Some even doubted whether the Military could lawfully act against civilians in any circumstances. Burke in 1769 moved for the appointment of a committee of the Commons 'to inquire into the conduct of the magistrates and the employment of the military power in suppressing the riots in the St. George's Fields on the 10th of May last'—May, 1768—'and into the orders and directions given relative thereto by

<sup>1</sup> See *supra*, p. 418.

<sup>2</sup> Except that at certain times paupers might be so compelled in virtue of various Acts.

<sup>3</sup> But the Militia Act of 1756 permitted the purchase of substitutes.

<sup>4</sup> See *supra*, p. 285.

any of His Majesty's Secretaries of State or by His Majesty's Secretary at War'. The motion was defeated, but Burke in the course of the debate declared that nothing less than the danger of the total overthrow of the constitution, if that, could justify such a use of the Army. In 1770 an amendment was moved to the Mutiny Bill providing that requests by magistrates for the help of troops should be made in writing. In opposition to this it was gravely urged that some magistrates could not write, and the amendment was defeated. But the courts never doubted that soldiers might be used to suppress riots in certain circumstances.<sup>1</sup>

In 1780 the Gordon Riots occurred, and one of their consequences was a clarification of men's ideas on the rightful use of the Military to suppress tumults. For some time the troops were not employed against the raging mob because it was erroneously believed that they could only be used if called upon by a magistrate one hour after he had read the proclamation contained in the Riot Act; now, no magistrate had the courage to make use of the Act. In these circumstances the Cabinet met and agreed upon an advice to the King, which they all signed, that the Military should be employed even if no magistrate called upon them.<sup>2</sup> Subsequently the King asked the Attorney General for his opinion, and was told that troops might legally be used to disperse the mob. His Majesty accordingly gave the necessary orders, and the riots were suppressed. A few days later the King made a speech to the Houses in which he informed them that he had been compelled to take drastic steps to suppress the riots, but promised to lay before them copies of the proclamations issued and assured them of his devotion to the constitution and the rule of law. Both Houses thereupon voted addresses in which they thanked the King for his defence of order. In the course of the debate on the address of the Lords, Mansfield gave a luminous exposition of a doctrine that has ever since been regarded as sound law; it was, he argued, the duty of all the King's subjects to use as much force as was necessary, though no more, to stop the committing of felonies or acts of treason; soldiers were legally in the same position as civilians in this respect; however,

<sup>1</sup> There were, however, few relevant cases.

<sup>2</sup> The delivery of a signed advice to the King was most unusual.



any man who used force might be called upon to answer for his conduct, and punished, if he had used it without just cause or to an excessive degree. Mansfield's statement of the law was convincing; but none the less a bill of indemnity was carried, not merely because some technically illegal acts might have been committed in the suppression of the riots, but also because the Prime Minister thought that the use of the Military might otherwise appear contrary to the spirit of the constitution.<sup>1</sup>

The Act of Indemnity, however, did not apply to those Ministers who might be held to have advised the King to order the Military to act. This omission was discussed in the course of a debate in March, 1781, when the following resolution was moved in the Commons: 'That the military force entrusted to His Majesty by Parliament, cannot justifiably be applied to the dispersing of illegal and tumultuous assemblies of the people without waiting for directions from the civil magistrate, but where the outrages have broken forth into such acts of violence and treason that all civil authority is overborne, and the immediate subversion of all legal government is threatened.' It was not denied that the use of the Military against the rioters had been justified, but it was argued that the Ministers should have sought the protection of an Act of Indemnity. The Prime Minister on this occasion held slightly different language. Acts of Indemnity, he said, were passed to protect persons from prosecution; since no Minister had done anything which could render him liable to prosecution, no Act of Indemnity was required; further, the approbation of the Houses was a sufficient proof that the Ministers had not acted improperly; had they done so, they could have been impeached. The motion which had given rise to these observations was eventually withdrawn, after its opponents had condemned its lack of precision and pointed out that it was scarcely within the competence of the House to interpret the point of law in question by resolution. Since no bill either to alter or to declare the law was introduced, it may be assumed that the House came to accept the views of Lord Mansfield.

<sup>1</sup> 20 Geo. III, c. 63.

## XIII

### THE PRESS

THROUGHOUT THE eighteenth century Englishmen gloried in the fact that the press was free in their country. By freedom of the press was meant freedom to publish anything without a licence, not the absence of a law of libel.<sup>1</sup> To compose, print, or publish seditious, obscene, or blasphemous libels was a misdemeanour, and prosecutions were fairly frequent. The law was particularly severe as regards seditious libel; for any written censure of the King, of his Ministers, or of one of the great national institutions, such as Parliament, was deemed libellous. In spite of the law, however, and in spite of the prosecutions, the political literature of the age is remarkable for its invective against persons. Yet there was no great movement in favour of a statutory change of this branch of the law. On the other hand, there was in the latter part of the century much controversy as to the precise functions of the jury in a libel trial, and the controversy was finally settled by legislation. According to one view, the jury had merely to decide whether the accused was the author, printer, or publisher—as the case might be—of the alleged libel, and whether the innuendoes had the meaning assigned to them by the prosecution;<sup>2</sup> these questions, being questions of fact, properly concerned the jury; whether or no an alleged libel was actually a libel was a question of law with which they had no concern; if they found that an accused person had written, printed, or published the document which he was charged with having written, printed, or published, and that the innuendoes had the meaning attributed to them by the prosecution, it was then their duty to bring in a verdict of guilty; the accused could then move in arrest of judgement and contend that the

<sup>1</sup> I am here concerned only with criminal libel.

<sup>2</sup> *E.g.* whether 'K—g' meant 'King', or whether the expression 'certain Ministers' meant 'the King's Ministers'.

alleged libel was not actually a libel. According to the other view, it was for the jury to decide whether the alleged libel was a libel or not.

About earlier trials for libel little information is available.<sup>1</sup> But from the beginning of George II's reign, as far as is known, the judges who tried libel cases always adhered to the former view and directed juries accordingly.<sup>2</sup> Mansfield, as Chief Justice of the King's Bench, stoutly maintained it, and he was by far the greatest lawyer of his age. Granted, however, that Mansfield's interpretation of the existing law was correct, it did not follow that the law ought not to be changed.<sup>3</sup> Many held that the jury should be allowed to determine what was libellous and what was not, whether or no that was a question of pure law or a mixed question of law and fact. Unhappily some of his contemporaries were unable to distinguish between the merits of the law and Mansfield's merits as a judge. Hence the Chief Justice was exposed to a good deal of ill-founded criticism for having done his plain duty.<sup>4</sup>

The case for reform was strengthened by the action of certain juries, which brought in verdicts of 'not guilty', though they had no doubt as to the fact of publication, when they thought the alleged libel was not really a libel.<sup>5</sup> On occasion, too, juries brought in a verdict of 'guilty of publishing only'. In the case of *Rex v. Shipley* the judge refused to accept such a verdict, and induced the jury to alter it to 'guilty of publishing, but whether it is a libel or not we do not know'.<sup>6</sup> These verdicts were a symptom of a general change of opinion, which

<sup>1</sup> In the *Case of the Seven Bishops* the jury were allowed to determine all the issues, even the legality of the suspending power. But that case has never been treated with respect by lawyers, since the judges who tried it were of low calibre. See *supra*, p. 93.

<sup>2</sup> Chief Justice Raymond took this view in 1731 (*Rex v. Franklin*). It also seems to have been taken by Holt in 1704 (*Regina v. Tutchin*).

<sup>3</sup> It was absurd that a jury should return a verdict of guilty and that the judge should record it, when he did not believe the alleged libel to be a libel; yet nothing could be done for the relief of the accused until a motion in arrest of judgement had been made.

<sup>4</sup> See *supra*, p. 411.

<sup>5</sup> Such verdicts were sometimes returned after 1750.

<sup>6</sup> The former verdict would have implied that the document was not a libel. A motion for a new trial was made in this case; Erskine as counsel for Shipley then argued that juries had a right to determine what was libellous. Mansfield's judgement elaborately reviewed the history of the law and refuted Erskine's argument.

ultimately found expression in a statute. The Commons in 1771 had refused leave for the introduction of a bill to allow juries to determine what was libellous. But the question was raised again twenty years later with better success. A bill passed the Commons in 1791, but was rejected by the Lords. In the following year, however, a similar bill was passed by both Houses.<sup>1</sup> The Act of 1792 gave juries the right to bring in a general verdict, and provided that they were not to be directed by the judge to find the accused guilty merely on proof of the publication of the paper charged to be a libel and of the sense ascribed to the same in the indictment or information; but judges were allowed to give their opinions and directions to juries on the matter at issue in the like manner as in other criminal cases.<sup>2</sup>

It is noteworthy that no attempt was ever made, even during the war with revolutionary France, to secure statutory authority for the re-establishment of the censorship. The Ministry, and still more the public, wished the press to remain free.<sup>3</sup>

<sup>1</sup> 32 Geo. III, c. 60. This Act is often known as 'Fox's Libel Act', because that statesman had championed the bill.

<sup>2</sup> This last provision, which was not part of the bill of 1791, was an amendment moved by the Attorney General. The judges for some time interpreted it as permitting them to tell the jury whether they thought the alleged libel was a libel or not.

<sup>3</sup> Heavy duties on newspapers had existed since 1712 and were from time to time increased. But taxation of newspapers is a very different thing from censorship.

**PART V**  
**SOME ADMINISTRATIVE DEVELOPMENTS,**  
**1660-1801**



THE ADMINISTRATIVE history of modern England is largely unknown, though much of it is knowable. The materials for its study are copious and in great part unpublished. We have as yet no histories of such great departments as the Admiralty and Treasury, no history of the civil service, and no full account of military administration. Hence it is at present impossible to give a succinct description of the administrative system as it existed either in 1660 or at any later date. The few observations that follow are merely designed to draw attention to certain features of administrative history during the period.

The tasks of the central government after the Restoration were few compared with their number to-day. The central government was concerned with the conduct of foreign policy and the management of the forces; Irish and Colonial affairs likewise gave it a certain amount of business, and so to a lesser extent did foreign trade; more important than any of these was the business connected with the revenue; on the other hand, the central government had comparatively little other business; with a few temporary exceptions it meddled but little with local government; <sup>1</sup> apart from the Post Office, it provided no social services. The control of administration was in the hands of the King, since, strictly speaking, he was the executive. But the King was not absolutely free to do whatever he pleased. He had to act through agents who were subject to the law. Moreover, there was an elaborate, though in many respects antiquated and inefficient, organization for the performance of administrative duties, and this limited the King's power. The prerogative enabled him to reform it to some extent and to create certain new administrative organs, but a thorough remodelling could only have been effected by statute, and drastic statutory reform would have been a great constitutional innovation. For it was not then commonly regarded as the business of Parliament to concern itself normally with admini-

<sup>1</sup> See *infra*, p. 453.

strative matters. Hence for some time few statutory changes were made, except in so far as revenue Acts imposed duties on the Treasury and Exchequer.

The Restoration was marked by a return, though not a complete return, to the old administrative system; the new machinery devised during the Interregnum was of necessity largely discarded.<sup>1</sup> Now, that system was in some parts, particularly in the finance departments, excessively complex and clumsy, and in others very inadequately developed. Many offices existed which were no longer necessary for purely administrative purposes, though they might be represented as contributing to the dignity of the Crown. As time passed patronage became an important element in the power of the Crown, and a new motive for their continuance arose. Again, drastic simplification and modernization of procedure in the older departments were opposed by many who thought the old ways were bound up with English liberties. Thus the administrative system long continued to retain much that was obsolete. Only a few even of those reforms which could have been effected by the prerogative alone were actually made. For it would seem that Charles II and his successors were so far influenced by the spirit of the age as to be very tender to old usages.

At the head of the great departments there was either a single Minister or a number of individuals. Administration by boards or committees was common in many Continental countries during the seventeenth century, and had not been unusual in England prior to the Restoration. Moreover during the period 1642-60 much use had been made, firstly of Parliamentary committees, and subsequently of committees of the Council of State for administrative purposes. After the Restoration the employment of boards and committees was frequent. Apart from the use—a diminishing use it is true—of committees of the Privy Council as administrative organs, a number of real boards were created. Such were the boards concerned with naval administration and those concerned with the collection of the revenue.<sup>2</sup> Similarly there were always in

<sup>1</sup> The subject is still very obscure. It should be noted that certain taxes devised during the Civil War survived the Restoration. Hence machinery for their collection was still needed.

<sup>2</sup> See *infra*, p. 436.



being either committees of the Privy Council or independent Councils to advise the Crown with regard to trade and the Colonies.<sup>1</sup> Again, in 1683 the Ordnance was reorganized as a civil department. Though the Master-General was then given a great deal of authority—in some matters supreme authority—yet for certain purposes he and the other principal officers were directed to act as a board, and in such cases decisions were to be taken by a majority vote. Further, it became usual to place in commission the two great offices of Lord High Treasurer and Lord High Admiral. The change was gradual; but after 1714 both offices were kept in commission.<sup>2</sup> On the other hand, the Great Seal was usually held by a Lord Chancellor or Lord Keeper. It was only put into commission when, for one reason or another, no suitable person could be found to hold it alone. This happened from time to time throughout the period; but the Great Seal never remained in commission for long.<sup>3</sup>

Doubtless one motive for the creation of boards and the putting of offices into commission was the desire to extend the patronage of the Crown. It may well be also that the King

<sup>1</sup> Charles II sometimes appointed committees of the Privy Council to act as advisory bodies on commercial and Colonial matters, and sometimes separate Councils. Sometimes the same body tendered advice on both classes of business; sometimes, however, there were separate bodies. From 1675 till the creation of the Board of Trade in 1696 there was a special committee of the Privy Council for Trade and Plantations. The chief Ministers were always members of these various bodies together with other persons. But the attendance of these Ministers at meetings was not always regular.

<sup>2</sup> There was a Lord High Treasurer during the following period: September, 1660 to May, 1667; November, 1672 to March, 1679; February, 1685 to December, 1686; May, 1702 to August, 1710; May, 1711 to October 1714. The Duke of Shrewsbury, appointed by Anne on her death bed, was the last Treasurer.

There was a Lord High Admiral during the following periods; January, 1661 to June, 1673; May, 1702 to June, 1708; November, 1708 to November, 1709. After this last date no Lord High Admiral was again appointed until April, 1827, when the office was given to the Duke of Clarence, who held it until August, 1828. Charles II from May, 1684, until his death had neither a Lord High Admiral nor an Admiralty Board, but himself acted as Lord High Admiral with the advice of his brother. James II throughout his reign acted as Admiral.

<sup>3</sup> The Great Seal was in commission during the following periods: March, 1689 to January, 1693; May, 1700 to May, 1701; September to October, 1710; May to April, 1718; January to May, 1725; November, 1756 to June, 1757; January, 1770 to January, 1771; April to December, 1783; June, 1792 to January, 1793.

wished to prevent the concentration of excessive power in the hands of any one Minister. But, however this may be, in spite of appearances to the contrary the administrative system was really in great part controlled by a very small number of Ministers. The revenue boards were from the first partially subject to the Treasury, and rapidly became more and more so. In fact their members, after their exclusion from the Commons during the reigns of William III and Anne, resembled civil servants rather than Ministers.<sup>1</sup> Very much in the same way the Admiralty always had some authority over the other bodies concerned with naval administration, though these, and in particular the Navy Board, appear to have enjoyed more independence than did those boards which came under Treasury control.<sup>2</sup> Nor was this all. When the Treasury and Admiralty were in commission, power was not in fact equally divided between the members of the respective commissions. In general the Treasury board was controlled by one, or at the most two, of its members. The First Lord, if a commoner, was always also Chancellor of the Exchequer, and usually managed financial business much as he pleased; for the junior Lords seldom opposed him. When the First Lord was a peer, the Chancellor of the Exchequer was almost always a commoner; in such cases he and the First Lord seem to have divided the power between them, though not necessarily in equal portions. It may be, indeed, that the existence of a Treasury board made a certain difference; for the fact that he had to inform his colleagues of his proposals was a check upon the first Lord of the Treasury.<sup>3</sup> But no Lord Treasurer has ever been more

<sup>1</sup> The subordinate revenue boards were those of the Customs and Excise (see *infra*); of Wine Licences (first appointed in 1661); of Stamp Duties (first appointed in 1694); of Glass Duties (1696-1700); of Hackney Coaches (first appointed in 1694); of Hawkers and Pedlars (first appointed in 1698); and of the Salt Tax (1702-30 and 1732-1825). The Treasury had also a certain authority over the Commissioners of the Land Tax, who were appointed by the Acts which granted that tax. The Post Office, usually under two Post Masters General, was also largely under the control of the Treasury. (See *infra*, p. 437.) For the Acts excluding revenue officers from the Commons see *supra*, p. 187. For some time prior to its abolition in 1689 there was also a board for the collection of the Hearth Tax.

<sup>2</sup> The subordinate naval boards were the Navy Board, the Commissioners for Victualling, and the Commissioners for Sick and Hurt. The Navy Board was responsible for the designing and building of ships and for the administration of the dockyards.

<sup>3</sup> During the period January, 1687, to November, 1699, circumstances were peculiar. Then Godolphin, one of the junior Lords, seems to have been very influential.

powerful than Walpole or the younger Pitt were as First Lords of the Treasury. It would seem, however, that the First Lord of the Admiralty was never so much the master of his board, at least for any length of time, as was a first Lord of the Treasury who was also a commoner. None the less the tendency in Parliament was more and more to regard the first Lord of the Admiralty and him alone as the Minister responsible for that Department. The First Lord of the Treasury was similarly regarded as responsible for financial administration, though when there was a separate Chancellor of the Exchequer, responsibility was divided between him and that Minister. The powers of the Treasury were greatly increased in the latter part of the reign of Charles II by a change in the method of collecting certain taxes. The practice of farming taxes was an old one, though it had been largely abandoned during the period 1642-60. Charles II, after continuing the experiment of direct collection of the Customs and Excise for a brief space, returned to the practice of farming them in 1662. The Hearth Tax was also farmed for some years after it had been granted. Subsequently, however, a return was made to direct collection. The Customs ceased to be farmed in 1671, the Excise in 1683, and the Hearth Tax in 1684. Again, the Post Office, which had been farmed during the Interregnum and had remained in farm for some time afterwards, ceased to be farmed as a whole before the end of the seventeenth century; though a partial reversion to farming occurred in 1720, when the cross and bye posts were farmed, an arrangement that continued until 1769. These changes, be it said, seem to have been due rather to the desire of the King and his Ministers to save money than to pressure from Parliament.<sup>1</sup> Experience showed that the farmers made unduly high profits, but their conduct does not appear to have been regarded as oppressive by the people. No motion condemning farming was ever carried in either House.

Thus the existence of numerous boards did not prevent the concentration of power in a very few hands. Both the Admiralty and the Treasury supervised and co-ordinated the activities of a group of subordinate boards, and each of them was generally dominated to a greater or lesser degree by one

<sup>1</sup> There was no Parliament in being between 1681 and 1685. Charles II was not influenced by anything save a regard for his financial interests when he made the changes of 1683-84.

man. Moreover, the Board of Ordnance enjoyed only a limited autonomy; it was bound to obey orders conveyed by the Privy Council, the Admiralty, and the Secretaries of State, although it could and did protest against such orders as it thought to be unreasonable. Again, the various Committees and Councils of Trade and Plantations were merely advisory, not executive, bodies. It is true that the Board created in 1696 had at times much influence upon policy and possessed a varying amount of patronage; but its duty was simply to collect information and to advise the Crown when asked. This tendency to give control to a few was strengthened by the development of the Cabinet. Naturally the two great boards were represented therein only by their heads, whose superiority over their colleagues was thus enhanced. On the other hand, the Cabinet became, among other things, a great co-ordinating board.

Besides the Treasury, Admiralty, and Chancery there was one other great office of business—the Secretaryship of State. That office was, and is, peculiar, in that it is a single office, which may be held by any number of persons, although its holders do not constitute a board. Strictly speaking, the Secretaries—there were always two of them and sometimes three—had equal powers, nor was there any legal demarcation of their respective spheres. Such division of duties between them as obtained at any time was dependent upon the King's pleasure. In point of fact the division during the early part of Charles II's reign was somewhat indefinite and fluctuating, but during the latter part of that reign and for a long time afterwards it was as follows. There were two Secretaries, known from their respective connexion with the management of foreign affairs as the Secretaries for the Northern and Southern Departments. The Secretary for the Northern Department was in charge of relations with the Empire, the United Provinces, Russia, Poland, and the Scandinavian countries; the Secretary for the Southern Department was in charge of relations with the other European countries and also of Irish and Colonial business, in so far as it was a matter of Secretarial concern.<sup>1</sup> But cases of interference by one Secretary in the

<sup>1</sup> But the Treasury was also concerned with Irish business, and both the Treasury and the Admiralty were concerned with Colonial business. There never was one Minister upon whom all Colonial business devolved.

Department of the other, especially as regards foreign affairs, were by no means uncommon prior to the middle of the eighteenth century. Such interference, however, was sometimes secret, and was always apt to lead to quarrels between the two Secretaries. Both Secretaries dealt with English domestic business indifferently. After the Revolution the Secretaries began to do a good deal of naval and military business.<sup>1</sup> Prior to 1706 the rule, to which, however, there were occasional exceptions, was that the senior Secretary held the Southern Department, which was regarded as the more important, and the junior Secretary the Northern Department. After that date it became exceptional for Secretaries to change departments. It should be added that after the accession of George I the Northern Department was looked upon as more important than the Southern until about the middle of the eighteenth century; subsequently no difference seems to have existed.<sup>2</sup>

At certain times in the eighteenth century there were three, instead of two, Secretaries. Between 1709 and 1746 there was intermittently a third Secretary, whose province was Scotland and who was always a Scot.<sup>3</sup> In 1768 a third Secretary was again appointed and given charge of Colonial business. But in 1782 a drastic reorganization occurred; the Colonial Secretaryship was abolished by statute, and at the King's command Secretarial business was thus distributed between two Secretaries; one was given charge of foreign affairs, the other of domestic and Colonial affairs.<sup>4</sup> In 1794, however, the exigencies of the war with France led to the appointment of a third Secretary once more; he was given charge of certain military business and was known as the Secretary for War. It so happened, moreover, that the first holder of that Secretaryship, Dundas, concerned himself with some Colonial matters, largely in connexion with operations of war outside Europe,

<sup>1</sup> They had, however, occasionally sent orders to officers before 1689.

<sup>2</sup> Hanover was in the Northern Department. When the King went to Hanover he was usually attended by the Secretary for that Department, who had great opportunities of influencing his master. George III never went to Hanover, and this fact may account for the change.

<sup>3</sup> In 1709-11, 1713-25, and 1742-46. At other times after the Union Scottish business was usually regarded as pertaining to the Northern Department; after 1782, to the Home Department.

<sup>4</sup> See 22 Geo. III, c. 82. It is to be noted that the statute did not regulate the distribution of business between the two Secretaries; that was left to the King.

In 1801 the intimate relationship between military and Colonial business was recognized by giving the care of both to the same Secretary.

The history of the Secretaryship is most curious. How did it come to pass that the Secretaries acquired such diverse powers? It must be remembered that the office was comparatively young and that the Secretaries were primarily channels for conveying the King's pleasure to his subjects. The spheres of many older departments were already more or less fixed, when the state began to undertake new branches of business. Hence the Secretaries naturally took over functions which did not obviously belong to the older departments. The decline of the Privy Council as an administrative body further increased their duties. But the growth of the Secretaries' importance was the result of a series of royal decisions taken to meet needs as they arose, not the result of a comprehensive and carefully thought-out plan.<sup>1</sup> Thus the Secretaries became, as it were, maids of all work concerned with almost every branch of business except finance. In consequence they eventually found themselves, and especially the Secretary for the Southern Department, embarrassed not so much by the amount of their business as by its diversity. Not until 1782 was a serious attempt made to secure a rational division of labour.

None the less the old system, with all its faults, did at times serve one useful purpose. Administrative co-ordination—always a necessity—might come from any one of three sources: the King personally, the Cabinet, or the Secretaries. Charles II and James II supervised administration pretty closely, though they made much use of their Secretaries. William III increased the Secretaries' powers in one direction—the control of naval operations—but kept the management of foreign affairs in his own hands. But after William's death the co-ordinating functions of the Secretaries for the Northern and Southern Departments assumed great importance. They dealt with foreign affairs, sending orders to and corresponding with the envoys in their Departments. They sent orders to the Admiralty and to Admirals at sea, but their intervention in naval business was confined to the control of certain operations;

<sup>1</sup> These observations, of course, refer as much to the period before 1660 as to the subsequent period.

they did not meddle with technical questions of naval administration. They likewise gave orders to Generals in the field, and also in part directed the activities of the Secretary at War, that curious person who was neither a civil servant nor—till the end of the period—a true Minister.<sup>1</sup> Thus, especially in time of war, the Secretaries could jointly co-ordinate diplomatic, military, and naval activities to a considerable extent.<sup>2</sup> Even when due allowance has been made for the importance of the Cabinet as a co-ordinating body, it is plain that much depended upon the Secretaries. For the Cabinet was more fitted to determine broad questions of policy than to regulate matters of detail.

The Ministers who directly controlled the working of the administrative machine were few: the Lord Treasurer, Lord High Admiral—or the heads of the Treasury and Admiralty commissions—and the Secretaries of State. Perhaps the Lord Chancellor—or Lord Keeper—should be added; for the Great Seal was needed for innumerable purposes, and its custodian was responsible for that use. But the use of the Great Seal was generally directed by the Privy Seal, which in turn was moved by the Signet, the Secretaries' seal.<sup>3</sup> If his connexion with the legal system be ignored, the Lord Chancellor was not really an administrator. This concentration of power undoubtedly conduced to efficiency. But the degree of efficiency achieved must not be exaggerated. The administrative machine remained complicated and cumbersome, with many a useless

<sup>1</sup> The history of the Secretaryship at War is as yet imperfectly known. The Secretary at War first appeared in the second half of the seventeenth century as the personal secretary of the Commander-in-Chief; later his position changed. After the Revolution he was always a member of the Commons; he prepared the Mutiny Bill, presented the Army estimates to the House of Commons, and performed many administrative functions with regard to the management of the Army. But not until the end of the period was he regarded as a responsible Minister. The entry of Windham into the Cabinet as Secretary at War in 1794 indicates that he was by then so regarded. The King long continued to manage many military matters with the aid of the Secretary at War, nor did the Houses hold him responsible for his advice on such matters for some long time. The Secretary at War was also in certain respects controlled by the Secretaries of State and in others by the Captain-General or Commander-in-Chief.

<sup>2</sup> The Secretaries, it may be added, were particularly concerned with the management of combined military and naval operations.

<sup>3</sup> Of course the Chancellor was responsible for his use of the Great Seal; but that is another matter.

wheel; the chief Ministers were restricted in many ways by law and custom; there was a routine method, more or less compulsory and not always very sensible, of doing many things; control over certain minor departments was far from complete; plenty of room existed for undesirable practices; the division of business between the great Ministers was often irrational; even a bare recital of the Secretaries' duties before 1782 reveals a fundamentally absurd arrangement. But there also existed other absurdities scarcely less glaring. In 1774—several years after the establishment of the Colonial Secretaryship—one who knew what he was talking about could speak thus of the management of Colonial affairs: 'While the military correspond with the Secretary of State, the civil in one part of their office with the Secretary of State, in another with the Board of Trade; while the Navy correspond in matters not merely naval with the Admiralty; while the Engineers correspond with the Board of Ordnance; the officers of the revenue with the several boards of that branch; and have no communication with the department which has or ought to have the general direction and administration of this great . . . commercial interest, who will be the person that can collect; who ever does or ever did collect into one view all these matters of information and knowledge.'<sup>1</sup> Criticisms of a similar kind might have been levelled against the administration of the Army, which was never really fully controlled by any one Minister; the Secretaries of State, and even the Secretary for War after 1794, were not in charge of all matters of military administration; they had only a partial control over the Ordnance and the Secretary at War, and no control over the Paymaster of the Forces; the Treasury, too, was concerned with the making of certain Army contracts, and the Treasury was fully autonomous. These examples—they are only examples—will suffice to show the need of administrative reform. But for reform there was no great desire in influential quarters until the latter part of the period.

In the ninth decade of the eighteenth century a long era of reform began. The changes of 1782 with regard to the Secretaryship were designed to effect a measure of rationalization; other changes were intended to secure economy and

<sup>1</sup> F. Pownall, *Administration of the Colonies*, I, 15 (ed. of 1774).



honesty in administration. Statutes were passed to remove an old abuse, the retention of large sums of public money by the heads of subordinate Treasuries for long periods during which their holders used them for their own profit.<sup>1</sup> The Board of Trade set up in 1696 with eight paid members was abolished, as were a number of other minor offices of various descriptions.<sup>2</sup> Further, the procedure of the Exchequer was reformed and a number of useless offices therein were abolished.<sup>3</sup>

In this same decade two new departments were created. In 1784 the Board of Control was set up by a statute.<sup>4</sup> The Board, consisting of a Secretary of State, the Chancellor of the Exchequer, and four Privy Councillors—all appointed and dismissable by the King—was given wide powers of regulating the governmental and military activities of the East India Company. After a few years, however, the President, who was granted a salary in 1793, became the sole active member of the Board. Very much the same thing happened to the new Board of Trade. The old Board had been abolished in 1782, but the Act which abolished it had directed that such powers as it had possessed might for the future be exercised by a committee of the Privy Council. Accordingly such a committee was set up in 1784 by Order in Council; it was empowered to collect information and to tender advice on commercial and Colonial matters. In 1786 it was reorganized. It was always a fairly numerous body, but before the end of the century most of its members had ceased to attend regularly, and the bulk of its work had been left to the President and Vice-President alone. Thus, though the old custom of entrusting business to boards

<sup>1</sup> The office of Paymaster of the Forces was reformed by 22 Geo. III, c. 81 (Burke's Act); this Act was repealed by 23 Geo. III, c. 50 and other provisions substituted for this purpose and for the regulation of payments to soldiers; these last also affected the Secretary at War. The office of Treasurer of the Navy was reformed by 25 Geo. III, c. 31.

<sup>2</sup> 22 Geo. III, c. 82. This Act abolished the Colonial Secretaryship, the Board of Trade, the offices of the Lords and Gentlemen of Police in Scotland, the principal officers of the Board of Works, the principal officers of the Great Wardrobe, the principal officers of the Jewel Office, the Treasurer of the Chamber, the Cofferer of the Household, the six clerks of the Board of Green Cloth, the Paymaster of Pensions, the Master of the Harriers, the Master of the Fox-Hounds, and the Master of the Stag-Hounds. It will be observed that most of these are Household offices. For Parliament's claim to control civil-list expenditure, see *supra*, p. 342.

<sup>3</sup> 23 Geo. III, c. 82.

<sup>4</sup> 24 Geo. III, Sess. 2, c. 25.

was nominally continued, what happened in practice was that power was given to single Ministers.

The history of the civil service in this period, though as yet very imperfectly known, seems to reveal a steady progress. The civil service in its present form is, indeed, mainly the creation of the last hundred years. Entry by competitive examination into the highest grade, the virtual elimination of patronage, and the establishment of a proper pensions system, all date from the nineteenth century. In the period here discussed things were very different; many appointments were then the result of sheer favouritism; many posts were virtual sinecures; the duties of many others were performed, not by their actual holders, but by ill-paid deputies. Moreover, numbers of civil servants besides deputies were so badly—and sometimes so irregularly—paid that they were forced to supplement their meagre salaries from other sources. Those who did business with the great departments in London had often to pay fees to certain members of their staff, and sometimes also to the Ministers at their head. For instance, fees were payable for the passing of commissions and many patents. Again, many civil servants were entitled to periodical gratuities from various sources. Finally, many were in receipt of perquisites of one kind or another; nor is it always easy to draw the line between perquisites which were more or less legitimate according to the standard of the age and gains that could only be called corrupt. What is obvious is that these customs all lent themselves very easily to the grossest abuse.

In practice conditions were never quite so bad as the above description would seem to indicate. Even during the latter part of the seventeenth century there were a number of able and industrious civil servants who, though they might do many things highly culpable by modern standards, yet did their country good service. Such men as Pepys and Blathwayt were in many respects comparable with the best civil servants of the twentieth century. Moreover, the civil service escaped one great evil: the spoils system never really obtained. Though many appointments were always due to favour rather than to the merit of the appointees, yet dismissals for any reason save misconduct were uncommon. The Revolution was far from causing a complete change of staff in all departments; such a

change would, indeed, have wrecked the administrative machine. Nor did the great Ministers of the eighteenth century regularly turn out all those who had been put into their departments by their predecessors. The Commissioners of the Customs were never all changed at the same time. William Lowndes remained Secretary of the Treasury from 1695 until his death in 1724;<sup>1</sup> Josiah Burchett was Secretary to the Admiralty from 1695 to 1742. There was, in fact, a marked reluctance to turn a man out of his job, and civil servants then came near to enjoying that same security of tenure conditional upon good behaviour which is theirs at the present day. To this generalization one exception must be made. After Newcastle's resignation of the First Lordship of the Treasury in 1762 many of those whom he and his brother had appointed to posts in the revenue departments were dismissed. The reason for this, however, was that the victims possessed electoral influence which they wished to go on using in Newcastle's interest. But it is significant that when Rockingham became First Lord in 1765 he refused to act upon the proposal of Newcastle—then Lord Privy Seal—for a general retaliation. The dismissals of 1762 therefore remained exceptional, though they furnished a strong argument for the disfranchisement of the revenue officers, which took place in 1782.<sup>2</sup>

The evil effects of patronage, again, must not be exaggerated. Some regard had to be paid to the efficiency of candidates for civil-service posts if chaos was not to ensue, and, in general, care was taken that a fair proportion of the appointees to the major posts should be competent men. The Commissioners of Customs and Excise were on the whole desirous that their departments should be well run, and were not reluctant to urge their views on the Treasury; a real effort was made to ensure that the holders of many subordinate positions in these

<sup>1</sup> Lowndes was also an M.P., but his position in many ways corresponded to that of a civil servant. There are a number of other cases of permanent officials who also sat in the Commons. Such men seem to have promoted the interests of their department in the House and to have avoided taking a prominent part in general political controversies. It may be added that in 1711 a second Secretary of the Treasury was appointed. After that date until the middle of the eighteenth century one Secretary was a permanent official, while the other retired with his patron. After the middle of the century both Secretaryships became political.

<sup>2</sup> See *supra*, p. 322.

departments should possess certain minimum qualifications.<sup>1</sup> The Treasury itself seems always to have had a fairly good staff, and at most times the same was true of the other great departments.

The dependence of so many officials upon fees, gratuities, and perquisites, was undoubtedly an evil, but one that could not be abolished until the state was able and willing to pay adequate salaries. Attempts, however, were made to make that evil as small as possible. If fees had to be paid, at least their amount might be fixed, and it gradually became the rule to hang up a table of fees in all public offices. By the end of the eighteenth century a reform had been introduced into many departments. Burke's Act for the reform of the office of Paymaster of the Forces provided that the fees payable for services performed therein should not go to individuals, but be paid into a fund from which fixed payments were to be made to the clerks of the office; the surplus, if any, was to go to Chelsea Hospital.<sup>2</sup> In November, 1782, the Lords of the Treasury abolished the receipt of fees, gratuities, and perquisites by individuals, and directed that fees should be paid into a fund out of which salaries were to be paid to secretaries and clerks.<sup>3</sup> These regulations, whether or no they were due to Pitt, who was then Chancellor of the Exchequer, seem to have been consonant with his wishes; for in 1785, when he was Prime Minister, he introduced a bill, which became law, for the appointment of a commission to inquire into certain public offices.<sup>4</sup> The commissioners were to ascertain the amount and source of the emoluments of the staff of these offices, to investigate the duties of those therein employed, and make such

<sup>1</sup> Qualifying examinations for certain posts were instituted in the late seventeenth and early eighteenth centuries.

<sup>2</sup> See *supra*, p. 443. Burke's Act was repealed in 1783, but the Act of that year for the regulation of the Pay Office re-enacted its provisions with regard to fees.

<sup>3</sup> Certain Treasury officials both before and after this date received salaries from the civil list.

<sup>4</sup> 25 Geo. III, c. 19. The departments affected were the Treasury, Admiralty, minor revenue and naval departments, Ordnance, office of the Paymaster of the Forces, War Office, Home and Colonial Office, and Foreign Office. With this Act may be compared 29 Geo. III, c. 64, which authorized the Treasury to appoint a commission to enquire into the emoluments of the officers of the Customs and Excise in England and Scotland and to report to the Treasury.

suggestions for reform as they thought would lead to increased economy and efficiency; their reports were to be presented to the King in Council, but were ultimately laid by him before the Commons. The commission appears to have prosecuted its inquiries with diligence and to have been genuinely desirous that the taking of fees by individual civil servants should be made to cease. Nor were its efforts vain. For this reform was adopted in many departments, and even in those of the Secretaries of State. Hitherto the Secretaries had not only appointed their staff, but had also paid their salaries—in so far as they received any salaries, and were not exclusively dependent upon fees and gratuities—out of their own pockets. In 1795, however, an Order in Council provided that the fees should go into a fund from which regular salaries were to be paid; any deficiency in the fund was to be made up from the civil list. At the same time the Secretaries, who were likewise deprived of the fees hitherto payable to them, were granted an increase of salary. The commissioners further made a number of recommendations as to the discharge and distribution of duties in the various departments, and many of these were adopted.

A proper pensions system would have been a desirable concomitant of these reforms. The Commissioners were anxious that some provision should be made for civil servants who were too aged or decrepit to continue in their posts. But no general pensions scheme was adopted; though payments were made either from the fees fund or from the civil list to retired members of the staff of some departments. It had, indeed, always been customary to give pensions or sinecures to a number of fortunate persons in order to enable them to retire.<sup>1</sup> But even at the end of the eighteenth century, though the provision of pensions or their equivalents had been greatly increased, many civil servants were still compelled to cling to their posts after they had ceased to be efficient.

<sup>1</sup> In 1712 the Customs Board had established a fund from which pensions were paid to superannuated tidesmen. I am not aware how far this practice obtained in other departments during the early eighteenth century; but I am inclined to think it was uncommon. Most pensions to retired civil servants then came from the civil list and their grant was a matter of favour.

The various reforms briefly mentioned above were by no means the only reforms that were needed. But they were signs of a new spirit in Parliament and the Ministry, which had begun to co-operate in order to improve the administrative system. In the nineteenth century that co-operation was to continue with far more sweeping results.

**PART VI**  
**ENGLISH LOCAL GOVERNMENT**





THE SYSTEM of local government created by the Tudors survived in great part until the nineteenth century. It is a striking tribute to its merits that it did not completely break down during the troublous years 1642-60; there was in that time much confusion and much irregularity, but on the whole the local authorities continued to discharge their duties as best they could. Neither the Long Parliament nor Cromwell, when he became Protector, attempted a complete reorganization of local government; for the old system seemed well adapted to the needs of the country and compatible with the security of the central government. Hence there was in the eyes of most contemporaries no general problem of local government after the Restoration; in that age of conservatism the maintenance of the old system appeared proper and natural. Only in one respect was it changed; but that was significant. Prior to the Civil War the King had supervised and controlled the local authorities through the Privy Council. During the years 1642-60 the central government interfered with them in many ways, sometimes most arbitrarily. Cromwell even endeavoured to subject them all to systematic and strong control through the Major-Generals; but the experiment proved so unpopular that it was speedily abandoned.<sup>1</sup> The events of these years, if anything, increased the general dislike of central control, which had not been too popular before 1640. Charles II could not make use of the Privy Council as his predecessors had done, for the Council had lost its jurisdiction over domestic matters in 1641. Nor was there any likelihood that the Houses would have responded to a request for the bestowal of permanent statutory powers either upon the Council or upon any Minister. Most men would then have argued that the need for thorough central control was not proved. The duty of the local authorities was to obey and apply the laws which were to be found in the statute book; if they broke these laws, redress might be obtained from the courts; if the laws

<sup>1</sup> See *supra*, p. 42.

were in any way defective, Parliament could alter them; normally the conduct of the local authorities was no concern of the King's; at most he might direct them to execute the existing laws by proclamation or by letters from the Secretaries of State. These were the considerations in the minds of the majority, who had no desire to see England become a strongly centralized state.

The attitude of the Houses was made plain by the terms of the Corporation Act in 1661. The condition of the municipal corporations after the Restoration was peculiar. Numerous 'purges' had been violently effected during the time of troubles, and Cromwell, largely with a view to influencing Parliamentary elections, had even forced many boroughs to accept new charters. The consequences of these events were twofold: on the one hand, Charles II naturally desired that control of the corporations should be placed in the hands of those upon whose loyalty he could depend; on the other, many of the local authorities were in doubt as to their legal position. Numerous petitions relating to disputes in the corporations were addressed to the Crown. Of these some were dealt with by the Privy Council, others by the Secretaries of State and the Law Officers. As a result not only were many ejected royalists restored to office, but several boroughs were induced by threats to surrender their charters and accept new ones in return, remodelled according to the King's wishes. But a number of boroughs refused to yield to pressure, and the King was compelled to apply to the Houses in order to secure power to alter the personnel of the corporations. The Corporation Act gave him most, but not all, of what he wished. Besides its permanent clauses described elsewhere, the Act contained a clause empowering the King to appoint a commission to administer it until March 25, 1663;<sup>1</sup> the commission, or any five of them, were given power to dismiss holders of municipal offices and to fill the vacancies thus created from the inhabitants of the respective boroughs, and this power was freely used. But it is evident that the Houses were jealous of royal interference with local government, both from the time-limit set to the commission and from the further provision that no municipal charter was to be forfeited by reason of anything done or omitted to be done before May 8, 1661.

<sup>1</sup> 13 Car. II, Stat. 2, c. 1. See also *supra*, p. 77.

The King, who wanted a permanent, not merely a temporary, control of personnel, strove to secure this by other means. It must be remembered that he could appoint and dismiss Justices of the Peace and Lords Lieutenants at pleasure. Hence it was not strange that he desired to have the same power over the local authorities in the corporations as he had over those in the counties. Now, the Crown possessed one great weapon against the corporations. Since most ancient charters had been violated in one or more particulars, their forfeiture could usually be obtained by bringing a *Quo Warranto* against the corporations. Hence a mere threat to do so was often enough to procure the surrender of a charter. The Crown was thus enabled to impose new charters on many boroughs, charters which generally gave it the right to veto elections to certain offices. On the other hand, those charters often conferred valuable privileges. But this policy proved unpopular, and was apparently suspended after a few years, only to be revived in the last part of the reign. Charles then pursued it with unprecedented vigour. A *Quo Warranto* was brought against the City of London, and the Court of King's Bench declared its franchises to be forfeited. Similar proceedings led to the forfeiture of several other charters, while many more were surrendered. In their stead new charters were granted which usually gave the Crown the right both to approve or veto elections to local offices and also to dismiss office-holders at pleasure; the Crown, too, secured to itself the nomination of the first members of the corporations. James II not only continued this policy, but also made great use of his right to dismiss and even himself appointed—perhaps illegally—to many vacant offices.<sup>1</sup>

The consequences of the royal triumph were curiously limited. The Crown undoubtedly gained a certain, though a far from complete, influence upon Parliamentary elections in some constituencies and also additional safeguards against rebellion; but there is little evidence that either Charles II or James II exercised much control over the ordinary business of local government. They could, and did, stimulate or restrain the application of the laws against those guilty of political offences; but with the application of other laws they

<sup>1</sup> See also *supra*, p. 63.

were little concerned. Nor did they seek to carry out a policy as to poor relief or any such matter. It must, however, be remembered that the King's powers remained very restricted. The worst he could do to those who were negligent in carrying out his wishes was to dismiss them, and dismissal was not always feared. In any case, dismissal was usually inflicted for political reasons, and not as a penalty for mere slackness or inefficiency. But these faults were far from uncommon, particularly, perhaps, among the county authorities. Indeed, about half the Justices of the Peace omitted at this time to qualify themselves to act by taking the oath of office, while many of the others were very remiss. Nor had the King an efficient agent at the head of each county; the combined offices of Lord Lieutenant and Custos Rotulorum were usually conferred upon some great nobleman who was very little inclined to be active in the exercise of even the limited powers which he possessed. Nor could the Sheriff then be made an important administrative agent of the Crown.

The Revolution still further weakened central control; the policy of Charles and James towards the municipal corporations was denounced as illegal by the supporters of William and Mary, who were careful not to try to renew it. The corporations themselves, however, were left in an ambiguous position. James, a few weeks before his flight, had endeavoured to conciliate public opinion by issuing a proclamation stating that their old charters were to be restored to the corporations unless they had been declared by the courts to have been forfeited or they had been surrendered and their surrender had been enrolled. To what extent this proclamation was acted upon is doubtful; some of the corporations certainly ignored it. But whether it was acted upon or ignored, a minority in every corporation was left with a grievance which often led them to go to law.<sup>1</sup> Nor was the question settled by legislation. Parliament in 1690 passed an Act for the restoration of its old franchises to the City of London, but no provision was made for the other corporations. In the spring of 1689 a bill was indeed introduced in the Commons to restore all corporations to the state they had been in on May 29, 1660, but a prorogation intervened

<sup>1</sup> The whole subject is as yet very obscure. Much research would be needed to discover what happened in each particular case.

before it had passed the House. Towards the end of the year another bill was brought in to annul the surrenders of charters and judgements upon *Quo Warrantos* during the last two reigns. In January, 1690, an attempt was made in the Commons to insert a clause in the bill disabling from municipal office for several years all Mayors, Aldermen, Councillors, and others who had helped to prosecute a *Quo Warranto* or had consented to the surrender of a charter;<sup>1</sup> but the House, after accepting the clause, ultimately changed its mind and deleted it. The bill then went to the Lords, who struck out a declaration therein contained that the surrenders of charters and the judgements given upon *Quo Warrantos* had been illegal from the first.<sup>2</sup> Before they had finished their deliberations upon the bill, Parliament was prorogued. Nor was any further bill dealing with the corporations as a whole introduced in either House.

After 1688 the ordinary conduct of local government was exempt from central control. The Secretaries of State—after the changes of 1782, the Home Secretary—had, indeed, some slight connection with the local authorities; they occasionally directed them to secure the arrest of persons suspected of political offences and also corresponded with them concerning the maintenance of order and the suppression of treasonable and seditious activities; they collected information from them on these subjects and sometimes gave them advice. But they did not attempt to control the ordinary work of administration, and they always treated the Justices of the Peace with the greatest respect. The Houses, which contained many Justices, would have viewed with a jealous eye any systematic attempt by the King's Ministers to bring the local authorities under their direction. For most purposes, therefore, the activities of these authorities were only regulated by statute. But statutory regulation could not but be imperfect. Though a remedy for many breaches of the law could be obtained from the courts, such a course was not really available to many poor persons. Hence the local authorities were often able to break the law with impunity. To make them perform all their statutory duties properly was almost impossible. The central courts

<sup>1</sup> This clause was known from its mover as the Sacheverell clause.

<sup>2</sup> The Lords first consulted the judges as to whether a corporation could surrender a charter. The judges were divided in their opinion.

could, indeed, compel the performance of certain specific acts, but that was not the same thing. On the other hand, the local authorities were often able to make use of their extensive freedom from real control to solve the problems that confronted them by extra-legal means; they were frequently ready to act in excess of their powers if circumstances seemed to call for such action. Thus there was throughout the period at once much slackness, much wrong-doing, and much experimentation of doubtful legality. In consequence the old system—always flexible—became full of divergencies and anomalies. Very few statements about local government in the eighteenth century will hold good of the whole country.

Certain processes of decay and growth seem to have gone on side by side. The Sheriff, for instance, tended to become more and more of a figurehead who delegated most of his not very important duties to a deputy. The Lords' courts, too, by whatever name they were known, in general lost their old importance as organs of local government.<sup>1</sup> But the Justices of the Peace played an increasingly large part, and Parliament steadily added to their powers.<sup>2</sup> There were separate commissions of the peace for some fifty counties or parts of counties and for some thirty liberties, cities, and towns. Not all those appointed Justices qualified themselves to act, but the number of those who did so gradually increased. The character of the Justices was not, indeed, always of the best. Particularly in the early part of the eighteenth century many of the Justices in country districts appear to have been ignorant and tyrannical, and many of those in urban areas—especially in Middlesex—appear to have regarded their office chiefly as a source of income to be obtained from extortionate fees or from direct bribes. But in the second half of the century the quality of the Justices improved greatly. They then included many clergymen in their number, and these were as a rule conscientious and active magistrates, whose example influenced their

<sup>1</sup> The nomenclature of these courts varied. The lawyers rigorously distinguished between Courts Baron and Courts Leet; but their distinctions were formal rather than real. When the same Lord had both manorial and leet jurisdiction, both were exercised in what was practically the same court. By 1689, however, most Courts Leet had lost their jurisdiction over all offences, save nuisances, to the J.P.s or to the Justices of Assize.

<sup>2</sup> To some extent, however, their powers were in some regions diminished by the creation of statutory authorities. See *infra*, p. 463.

colleagues. This improvement may have been partly due to an Act of 1732, which provided that all Justices should have an estate worth £100 a year at least.<sup>1</sup> Thereby the appointment of persons who were dependent on their office for their livelihood was prevented.

The increased powers of the Justices can be seen very clearly from a brief survey of their connexion with the government of the parish and the county.

Ever since the early part of the sixteenth century Parliament had tended to treat the parish as a unit of local administration. But uniformity did not exist. In many parts of the country, especially in the North and in Wales, the unit for many purposes, such as road maintenance and poor relief, was not the parish, but the manors and townships within it. Parishes, too, throughout the country varied widely in size and population. Parliament, however, had, for purposes of convenience, imposed a series of obligations upon units that already existed; to divide the country into entirely new districts and to make each of these a unit for all branches of local government was a task beyond the powers, and perhaps beyond the conception, of Tudor statesmanship. That task, indeed, was not undertaken until the nineteenth century, and then only imperfectly. Nor, what is far more strange, did any statute ever determine what made a person a full member of a parish. It was possible to belong to one for some purposes but not for others. Yet the parish was responsible for the discharge of a number of duties, such as poor relief, highway repairs, the upkeep of its church, and, in a sense, the maintenance of order.<sup>2</sup> It had its officers—the Overseers of the Poor, Surveyors of the Highways, Churchwardens, and Constable—all of whom had more or less clearly defined duties. The Constable was, it is true, strictly speaking an officer of the manor or vill, and in certain districts was chosen by the Court Leet. But virtually he had become a parish officer. All these officers were appointed for a year at a time, but could not retire until their successors had been appointed. Service was obligatory for those who had the necessary qualifications; since the officers were unpaid, there

<sup>1</sup> 5 Geo. II, c. 18. Amended by 18 Geo. II, c. 20.

<sup>2</sup> Henceforth I speak of the parish without adding the qualifications relating to the North and to Wales.

was often difficulty in getting competent men for any office save that of churchwarden, which was less burdensome and of greater dignity than the others. Many persons tried to escape service; others employed deputies. In any case no officer had the chance to acquire much experience.

Over the appointment of most of these officers the Justices of the Peace gained a measure of control. A statute of 1663 provided that any two Justices might appoint a Constable when appointments were not made by the Court Leet. In 1692 it was enacted that the parish officers and a majority of the inhabitants were to present a list of those qualified to become Highway Surveyors to two local Justices, who were to appoint from that list.<sup>1</sup> The choice of the Overseers of the Poor had always been in the hands of the Justices. Moreover, all these officers were bound to obey the orders of the Justices in many respects.<sup>2</sup>

The degree of power actually exercised by the Justices varied a great deal. Some parishes acquired much control over their own affairs; those of their members who could attend Vestry meetings often made use of that right to extend the functions of the Vestry beyond their strictly legal bounds. Some Vestries became more and more democratic in composition; others were and remained close bodies, composed of life-members and recruited by co-optation. Vestries of both kinds might become either instruments of corruption or of active and efficient administration. Thus a parish, if the local J.P.s were compliant, might achieve a large measure of autonomy and might make a number of extra-legal experiments. On the other hand, energetic J.P.s who had to deal with apathetic parishes could often manage their affairs pretty much as they wished. Parliament, though in general favourable to the J.P.s, showed no hostility to the more independent parishes. At the end of the seventeenth and beginning of the eighteenth centuries there was some criticism of the metropolitan close vestries in the Houses, but that criticism was aroused rather by their political complexion than by their administrative activities.<sup>3</sup> But no bill for their reform was then carried.

For certain purposes the county was a unit of local govern-

<sup>1</sup> 14 Car. II, c. 12, and 3 Will. and Mar., c. 12.

<sup>2</sup> I forbear to enumerate the duties of the parish officers, since most of them were imposed in an earlier period.

<sup>3</sup> They were for the most part controlled by extreme High Churchmen, that is by men often suspected of Jacobite inclinations.



ment, and in this sphere the powers of the Justices were enormous. The Lords Lieutenants concerned themselves but little with the ordinary business; but the Justices were charged with the exercise of a mass of functions, alike judicial, administrative, and legislative. In strict theory, perhaps, all their functions were judicial; they were supposed to decide all matters according to the evidence and to apply the law. But in practice they often formed policies, made rules for the conduct of business, and acted as administrators. They could not very well avoid so doing when statutes compelled them to supervise such matters as the execution of the poor law and the upkeep of the roads. This state of things could be disguised, but could not be altered, by the fact that most of their acts were supposed to take the form of judicial decisions.

What, then, in brief, were their duties? The law required the Justices of each county to meet at Quarter Sessions four times yearly.<sup>1</sup> Quarter sessions had a considerable criminal jurisdiction exercised by the Justices sitting with juries; but their other functions were of a very different character. At these sessions were present a grand jury of the county, the hundred juries, and also the several Petty Constables and High Constables.<sup>2</sup> All these were bound to present those seeming guilty of such breaches of the law, including nuisances, as came within their cognizance. Further, each Justice could himself present on 'his own view'. Thus Quarter Sessions were supposed to punish not only ordinary crimes, but also omission to perform the various duties imposed on parishes and counties; in this way their task was one of supervising administration. A great part of it had to be discharged in open court, but there was nothing to prevent the Justices from deciding at private meetings upon certain general principles to be applied by them. The Justices therefore tended more and more to use Quarter Sessions as a means of forming and executing a policy. Nor was this strange; for there was need of policies, and policies could only be devised by the Justices. After 1700 the hundred juries gradually disappeared, and the High Constables

<sup>1</sup> Nothing prevented these meetings from being adjourned to different places, and this was often done.

<sup>2</sup> Each hundred had a High Constable appointed originally by a Court Leet, but after 1689 usually by the Justices at Quarter Sessions. The High Constables were administrative agents of the Justices. *E.g.* they levied the county rate.

usually made only such presentments as the Justices desired; further presentments by individual Justices increased in frequency. Hence the Justices were able to make a growing use of judicial machinery in order to carry out an administrative policy. For instance, the Justices had been given power by an Act of 1691 to levy a rate not exceeding 6*d.* in the pound upon a parish for the upkeep of a highway. But when a sum exceeding that thereby obtainable was desired, they often raised it by imposing a fine upon a parish for not discharging its highway obligations.

Only a fraction of the Justices' duties were performed at Quarter Sessions. They are also found acting alone, acting in pairs, and acting at Special and Petty Sessions. In each of these capacities their functions were equally mixed. According to the law, some things could be done by a single Justice, others by any two Justices, and others, again—such as the enforcement of various statutes relating to highways and liquor licensing—by the Justices of a division meeting at Special Sessions.<sup>1</sup> In the eighteenth century the Justices in each division took to meeting together for other purposes at regular intervals, and these meetings became known as Petty Sessions. The Justices there assembled had a certain criminal jurisdiction—such as was assigned by statute to any two J.P.s sitting together—and also exercised some quasi-administrative functions.

As the eighteenth century advanced the Justices made alterations in the methods of local government. In many counties they began to employ a small salaried staff; much business was referred by Quarter Sessions to committees; at the same time Quarter Sessions themselves tended to become a court of appeal from the Justices sitting alone or in Divisional Sessions. Many of the new developments were extra-legal, and the virtual assumption of power by the Justices at Quarter Sessions to act as a subordinate law-making body was definitely illegal. But Parliament encouraged the Justices to ignore the letter of the law by continually adding to their functions and by increasing the number of purposes for which they could levy rates.<sup>2</sup>

<sup>1</sup> The counties were split up into 'divisions'.

<sup>2</sup> It would be impossible to give a description, at once clear and brief, of the new statutory powers and duties of the Justices. It must suffice to say that these chiefly related to highways, prisons, liquor licensing, and the poor law.

Besides the parish and the county the borough must also be considered. The term borough as employed by the leading historians of local government in this period designates a number of units which differ very widely in structure and constitution. There were what may be called 'manorial' boroughs—boroughs which possessed a court of the old type known by various names and exercising fairly large powers of jurisdiction, legislation, and administration, with partial or complete freedom from the Lords' control; there were 'chartered townships', in which a body that had obtained by charter powers to manage its property had grown into an effective unit of local government; in some places control was shared between a manorial court and one or more guilds; in others there existed a municipal organization of another kind, which was virtually independent of the Lords' court; finally there were the municipal corporations.<sup>1</sup> All these types differed from each other, and most members of each type had peculiar features. Again, control of whatever powers might be possessed by any of these bodies sometimes rested in the hands of a more or less close oligarchy, recruited by co-optation, sometimes in those of something not too unlike a democracy. Hence it is not possible to make many general statements about the boroughs.

All the boroughs, and more especially the municipal corporations with their own Justices, possessed a certain degree of autonomy. In some boroughs the municipal and the county Justices had concurrent powers; in these the former were unable to hold separate Quarter Sessions. In other boroughs separate Quarter Sessions could be held, although sometimes only with jurisdiction over misdemeanours. In others, again, the county Justices could exercise no powers. But it must be added that some boroughs allowed many of the powers nominally possessed by their Justices to fall into desuetude.

During the eighteenth century the activity and importance of the manorial courts in the boroughs tended to decline, while

<sup>1</sup> These are defined by Mr. and Mrs. Sidney Webb as 'those communities which whether by prescription or by charter actually enjoyed the privilege of clothing one or more of their members or officers within the limits of the borough, without personal appointment by the Crown, with the well-known powers given by the commission of the peace'. Of these there were some two hundred. There were also a number of non-municipal boroughs, of which the Mayor and sometimes other members were always included in the commission of the peace for the county. Sometimes, however, a separate commission was regularly granted for such boroughs.

the Justices, Aldermen, and Councillors tended to play an ever greater part in the management of local affairs. These last were, it would seem, more capable of providing for new municipal needs. Many boroughs developed social services and began to use a paid staff. Nor in this respect can much difference be noted between those with an oligarchic and those with a more or less democratic constitution. Both types furnished examples of progress and slackness, of good and bad administration.

In general, as time passed the old system became steadily less capable of meeting the needs that made themselves felt both in the boroughs and outside them. That system, indeed, was subjected to a far greater pressure than it had been designed to meet. Statute labour might maintain roads adequate for the England of Elizabeth; it could not do so for the England of George III. A poor law devised in the reign of Elizabeth inevitably became inadequate in the late seventeenth and eighteenth centuries. The towns, too, came to require new machinery for the maintenance of order and the provision of such services as the lighting of streets. However active the old authorities might be and however ready to go beyond the strict limits of their legal powers, they could not really do all that was wanted. Parliament alone could provide the necessary machinery, but was long reluctant to do so. For some time the policy of the legislature seems to have been to attempt to reduce needs rather than to increase the means of satisfying them. Thus numerous Acts imposed strict regulations as to the kind of vehicles that might use the roads; for to do this seemed easier than to improve the roads. Similarly Parliament strove to keep the parish as the unit for the administration of poor relief, though it was becoming less and less suitable for that purpose. A celebrated Act of 1662 restricted the mobility of labour with this end in view; it empowered the Overseers of the Poor, with the consent of two Justices, to remove within forty days any new inhabitant of a parish who occupied a dwelling worth less than £10 per annum and was deemed likely to become chargeable to the parish.<sup>1</sup> Nor did Parlia-

<sup>1</sup> 14 Car. II, c. 12. Labourers, however, were often granted certificates which enabled them to move freely about the country in search of work. The certificates made their original parish responsible for the care of those who became paupers. It would seem that the Act of 1662 did not impede the development of industry in the eighteenth century.

ment devise a new national scheme to put into effect the old policy of giving employment to the able-bodied poor, a policy which the individual parish was more and more unable to carry out, although it was supposed to do so.

Parliament, however, though it declined to remodel the old system as a whole, was not unwilling to modify it as regards particular districts. Particularly in the eighteenth century a number of Acts were passed conferring new powers either upon the old authorities of a particular locality or upon new authorities created for the purpose of their exercise. These powers may roughly be divided into the following classes: those relating to sewers, those relating to the poor, those relating to roads, and those relating to the provision of miscellaneous services in urban areas. A brief survey of the latter may serve to indicate their scope.

Towards the end of the seventeenth century Parliament began to pass Acts authorizing particular parishes to combine for the purpose of maintaining a workhouse wherein the able-bodied poor might be employed. These workhouses were governed by corporations of Guardians. Sometimes, too, special Acts enabled a single parish to establish a workhouse under the supervision of a corporate body. Mention must also be made in this connection of two general Acts, passed in 1723 and 1782 respectively. The former authorized any individual parish, with the consent of the Overseers, Wardens, and Vestry, to set up workhouses, and likewise permitted two or more parishes to combine for that purpose; when a workhouse had been set up, Overseers were allowed to refuse relief to persons who would not enter it.<sup>1</sup> Little use, however, was made of this Act; for when parishes wished to establish a joint workhouse, they usually sought to obtain a special Act giving them power to constitute a corporation for its management; without a corporation, co-operation always proved difficult. The Act of 1782 allowed neighbouring parishes to combine in order to maintain joint workhouses for old and sick persons and for children; their management was to be entrusted to salaried Guardians appointed by two Justices of the neighbourhood from persons suggested by substantial ratepayers in the parishes concerned.<sup>2</sup> The Act further made careful provision for the management of the workhouses. But none the less the

<sup>1</sup> 9 Geo. I, c. 7.

<sup>2</sup> 22 Geo. III, c. 83.

condition of most of the workhouses established under it was no better than that of most of those established under earlier Acts—that is, it was deplorable.

Perhaps more important, and certainly more efficient, than the above bodies were the Turnpike Trusts. The appalling state of the roads caused Parliament in the eighteenth century with increasing frequency to pass Acts for the creation of authorities with powers to keep up certain roads and to defray their expenses by levying a toll on non-pedestrian traffic. These powers were given to trustees appointed in the first instance by the Acts themselves and recruited by co-optation. Parishes were still required to discharge their old highway obligation even within the areas that came under the Trusts; indeed, the Trusts were given the right to direct the use of a portion of the parochial statutory labour on the highways or to receive instead a sum of money. They were created in the first instance for a term of twenty-one years, but they could always obtain a renewal of their powers. Before 1760 they were subjected to the control of Quarter Sessions in many respects, but after that date this was largely removed. The Justices had no objection to the changes, because many of them were members of Trusts. Roads under the care of the Trusts were usually better than those for which the parishes remained solely responsible. But the Trusts not unnaturally put their own interests before those of the country as a whole. Moreover, Parliament, in granting powers to the various applicants, dealt with each request as an isolated case; there was never any serious suggestion of a scheme for the country as a whole. Hence at the end of the period it was more or less a matter of chance whether or no any particular stretch of road came under a Turnpike Trust.

Lastly, there were the Improvement Commissioners. Bodies of these were set up in a few towns during the seventeenth century and in many after the middle of the eighteenth. They were given power to provide for certain social services, such as street-lighting, paving, police, harbour maintenance, and drainage. They were to be found in both incorporated and unincorporated towns. Usually some of their members sat *ex officio*, while the others were in the first instance appointed for life by the Act; vacancies were filled by co-optation. Sometimes, however, a proportion of the members were elected by

the substantial inhabitants of the town. In other cases all the inhabitants with a certain property qualification were combined with the *ex officio* members and those named in the Act. Members of these bodies were often slack in attendance at meetings, especially the *ex officio* members. Moreover, even where a proportion of the members were supposed to be elected, vacancies were in practice often filled by co-optation. It should be added that sometimes statutory powers similar to those of the Commissions were granted to municipal corporations. All these various authorities were able to do much that could not otherwise have been done. But their methods were sometimes very inefficient. For instance, they frequently got rid of the burden of administration by letting out services to contractors, a practice that lent itself to many abuses. On the other hand, some of them showed much energy and enterprise. Nor did they ever become widely unpopular.

The creation of these statutory authorities conferred certain benefits on particular localities. Many interesting experiments were made, and valuable lessons could have been drawn from a general survey of their activities. But it was not the business of any Minister to collect such information, still less to make proposals for general reforms. Yet what was needed at the end of the eighteenth century was a complete reorganization of local government. The special provisions made for particular areas were, in a sense, injurious to the country; for they helped to delay consideration of the problem as a whole. Moreover, the setting up of new bodies that did not fit into the old system inevitably led to a good deal of chaos. Parliament, however, seemed incapable of general views. Nor did they wish to do anything which would irritate the Justices of the Peace or the vested interest in the towns. Those Acts which affected particular areas were framed to meet the wishes of the local notables. Nor must it be forgotten that in one way the eighteenth century witnessed a great improvement in local government. Both the Justices and the other authorities tended, though with many exceptions, to become more conscientious in the discharge of their duties. The need for sweeping reforms was not due to their defects so much as to the development of new problems and the steadily growing desire for administrative efficiency. But it is not very strange that Parliament was slow to understand the new situation.

## CONCLUSION

THE CONSTITUTIONAL developments outlined in this study make it plain that the period witnessed a great increase in the power of the state and a great change in the distribution of political power within the state. The gradual disappearance of the once-prevalent belief in fundamental law inevitably led to an exaltation of the state, though the extent of this must not be exaggerated. As has been said, a fundamental conservatism continued to obtain even at the end of the eighteenth century, a conservatism which was strengthened by the widespread hatred of the French Revolution. Hence, though no limits were set to the power which the legislature might exercise in emergencies, its activities were in practice usually restricted within fairly narrow limits. These considerations do not only explain why Britain was in no danger of becoming a totalitarian state; they also help to elucidate another problem.

It has often been said that Britain during the eighteenth century was ruled by a landed aristocracy. But such a statement is by itself somewhat misleading. It is, indeed, true that one result of the constitutional conflicts of the seventeenth century was a great increase in the power of the Houses of Parliament, and that these became even stronger in the eighteenth century. Further, the distribution of power between the two Houses was steadily altered in favour of the Lower House; but in this context that fact is of minor importance because of the considerable degree of social homogeneity between the two Houses. Undoubtedly control of the Houses was largely in the hands of a small number of persons, most of them men of wealth. Throughout the period, and in fact for a considerable time before it had begun, the great majority of the Lords and very many of the Commons were wealthy landowners. It is well known, too, that the possession of a large estate carried with it a great deal of electoral influence. In the language of the eighteenth century the great landowners had a



‘natural interest’ in the district wherein their estates lay. County elections—at least after the Revolution—were, in a sense, often little more than contests between a few great families, in which victory fell to the side with the longest purse. In the boroughs things were rather different, owing to the wide variety in the borough franchise and to certain other causes; some boroughs had a fairly democratic franchise; others had a narrow franchise, and were often controlled by the Ministry or by a single private individual, though the latter form of control was always difficult to preserve for any length of time; other boroughs, again, were permanently controlled by municipal oligarchies to whom the franchise was confined. The boroughs were on the whole more corrupt than the counties; some borough seats could be purchased outright, many could be won by bribery, if the elections were contested. But since by no means all borough constituencies were controlled by the landed men, many merchants were able to secure their return to the Commons either because the electors conscientiously wished them to be returned or by means of their expenditure in bribes. Nor were the Commons exclusively composed of rich men, whether landowners or merchants. Among the members of the House were also a number of other persons. The relations of the great landowners, distinguished officers, able lawyers, and some men of political talent, but neither of good birth nor of great fortune, often obtained seats owing to the favour of the Ministers or of a private patron. Nor was even the Upper House the exclusive preserve of the old landowning families. A number of officers and lawyers were given peerages as a reward for their professional eminence, and the Lords Spiritual were often men of modest origin.

It might, however, be argued, and with some force, that the Houses were dominated by the landowning class. But it must be understood that the landowners were never a caste. Marriages between landed men and the daughters of moneyed men have always been common in this country; common likewise has been the purchase of land by those who have made great fortunes in a trade or profession. Granted, then, that Britain in the eighteenth century was a country in which an aristocracy had annexed the bulk, though not the whole, of political power, yet that aristocracy was of a mixed character,

and was continually being reinforced by new blood. It was thus far from resembling the closed Venetian oligarchy, and Disraeli's jibe to that effect can only be explained by his ignorance either of British history or of the constitution of the Serene Republic. Nor does it seem that the constitutional history of this period is essentially nothing more than the history of an attempt by the aristocracy to secure control of the state in order to further their own interests. Those who strove to limit the power of the Crown in the seventeenth century were for the most part genuinely convinced, whatever their social or economic status, that they were in some sense upholding fundamental law. With a few exceptions, they were far from being conscious and deliberate revolutionaries, as was shown by the Restoration and the conservative character of the Revolution settlement. Again, though the monarchy grew yet weaker in the eighteenth century, the King was never reduced to impotence, and it was generally felt that he ought to have a considerable degree of independent power. Nor did the aristocracy, which thus continued to respect the rights of the Crown, treat the wishes and interests of the common people as negligible. It was of far more than merely theoretical importance that the majority of M.P.s regarded themselves as the representatives of the nation as a whole, not merely of their constituents, and still less of a particular class. By whatever means they secured their seats, they generally held themselves bound so to demean themselves as to further the interests of their country. To say this is, of course, not to deny that they sometimes consciously fell short of that ideal, and often confounded sectional interests with the common weal. It must also be added that the richer members of the community were widely supposed to be entitled to an influence in political affairs quite disproportionate to their numbers. None the less the aristocracy were never deliberately hostile to, or hated by, the mass of the people, and this can be explained both by the reason given above and by another of equal importance.

Roughly speaking, the aristocracy comprised the chief sections of the community which were continuously politically conscious. The bulk of the people were only intermittently interested in politics, and when they were interested in them, were usually only interested in so far as they were also religious

questions. It was, for instance, chiefly the religion and the religious policy of James II which alienated the majority of his subjects from him. The almost complete disappearance of religious issues from politics after 1718, together with the decline of the Jacobite menace, largely accounts for the character of subsequent elections.<sup>1</sup> The average voter, like the average non-voter, did not concern himself greatly with those questions of foreign and—later—of Colonial policy with which the Houses were so much occupied. Thus, as he rapidly ceased for the time being to have real political preferences as between rival candidates, he more and more often allowed his vote to be bought, and this indifference on the part of the voter was shared by the great majority of the unenfranchised. Throughout the period the advocates of really democratic reforms were few. The aristocracy during the time of their ascendancy respected and largely shared such political feelings and prepossessions as were common among the lower classes.<sup>2</sup> The ascendancy of the aristocracy was largely due to the fact that they, and they almost alone, were ready to bear the concomitant burdens and responsibilities. It was not imposed by force, legal or illegal, upon a recalcitrant majority. Hence that aristocracy was able to devote itself to political business without being haunted by the fear of a revolution until, at the end of the eighteenth century, the events in France caused them to fear lest their own country should suffer a like fate. But even then by far the greater part of the common people had no desire for a revolution, and the fears of Englishmen were in time allayed. When, in the early nineteenth century, the increasing political consciousness of the middle class impelled them to demand Parliamentary reform, their demands not unnaturally excited much opposition in conservative circles. But large sections of the aristocracy supported them, and the masses eventually became enthusiastic for reform. The desire for reform, thus widely diffused, determined the result of a general election, and the bill to reconstruct

<sup>1</sup> The various subsequent proposals for the relief of the Dissenters did not stir the masses. But note the Gordon Riots.

<sup>2</sup> It is worth noting that such a project as Walpole's Excise Bill had to be dropped because an outburst of popular indignation turned the Commons against it. The fact that this outburst was in part, though only in part, due to the propaganda of the merchants does not invalidate that statement.

a system of representation alleged to be anomalous, unjust, and unrepresentative, was passed by the majority then returned. That so great a change as that effected in 1832 could be brought about without a revolution was profoundly significant. What then happened was that a section of the community hitherto outside it was merged with the old aristocracy for political purposes. That this should have come to pass in such a way well illustrates the flexible character and political sagacity of that aristocracy.

## BIBLIOGRAPHICAL APPENDIX

### A. NOTE ON SOURCES

THIS STUDY is based principally upon printed sources and the works of modern writers; manuscripts have only been consulted occasionally on certain special points. Of those used the following are the most important. A diary recording proceedings in the House of Commons 1666-68 by J. Milward, M.P.;<sup>1</sup> a series of transcripts of the correspondence of the French envoys in London ending in 1714;<sup>2</sup> transcripts of the despatches of L. F. Bonet, the Prussian Resident in London during the years 1696-1720; the transcripts cover the years 1697-1701;<sup>3</sup> transcripts of the despatches of the Dutch envoys in London; these have been consulted for the period 1689-1714;<sup>4</sup> the voluminous collections of the Newcastle and Hardwicke papers have been consulted on certain points;<sup>5</sup> so also have the State Papers Domestic in the Public Record Office.

The chief classes of printed sources used are as follows.

The Ordinances and Acts issued on the authority of Parliament alone or of the Protector during the period 1642-60 are for the most part collected in *Acts and Ordinances of the Interregnum 1642-60* (edited by C. H. Firth and R. S. Rait. 3 vols. 1911). All public Acts which received the royal assent prior to the death of Anne are reprinted in the *Statutes of the Realm* (11 vols. 1810-28). For later Acts I have used D. Pickering's edition of the *Statutes at Large*. The numbering of some of the earlier Acts varies in different editions; a useful comparative table may be found in the *Chronological Index to the Statutes*.<sup>6</sup> The formal proceedings of the Houses are recorded in their *Journals*. These also often contain reports of inquiries.<sup>7</sup> Of the debates there is no official report. For the period prior to

<sup>1</sup> British Museum, Additional MSS. 33,413.

<sup>2</sup> Public Office Record, Baschet's Transcripts.

<sup>3</sup> British Museum, Additional MSS. 30,000, A.-E.

<sup>4</sup> British Museum, Additional MSS. 17,677.

<sup>5</sup> British Museum, Additional MSS. 32,696 sqq. and 35,349 sqq.

<sup>6</sup> Of this there are many editions; the first to contain the table was that published in 1893. It should be added that prior to the reform of the Calendar those Acts which received the royal assent between January 1 and March 25 of any year are dated a year too early in the editions of the statutes. This has sometimes been a cause of error in modern works. I have tried to assign all Acts to their right year.

<sup>7</sup> See H. H. Bellot 'Parliamentary printing 1660-1837,' *Bulletin of the Institute of Historical Research*, XI, pp. 85 sqq. This article also discusses Parliamentary papers.

1660 there is a useful collection called *The Parliamentary or Constitutional History of England* (24 vols. 1751-62). This can often be supplemented from other sources, as can collections of debates for later periods.<sup>1</sup> Indeed, the best sources for debates are not, generally speaking—at least until the latter part of the eighteenth century—the collections of reports of debates, which were all unauthorized, but contemporary letters, memoirs, diaries, and the despatches of foreign envoys in London; these last, however, are not always available. It is well known that the collections of debates are often meagre and inaccurate; but I am inclined to think that their unreliability has sometimes been exaggerated. Granted that they often misrepresent particular speakers, yet they seem as a rule to give a fairly adequate summary of the arguments used for and against particular proposals. A series of critical studies of the sources for various periods would be of the greatest utility.

The records of the great departments of state are largely preserved in the Public Record Office. Calendars of certain classes of these documents have been published.<sup>2</sup> But by far the greatest part as yet remains uncalendared.

Much correspondence of the seventeenth and eighteenth centuries has been printed at various times, as also have a number of diaries and memoirs of persons who lived in those centuries; though the editing, especially of the correspondences, has often been of poor quality.<sup>3</sup> From these sources a vast amount of information of all kinds is to be obtained, since a portion, though often a small portion, of the unofficial correspondence of most of the more prominent public men of the period may be found in print, and many writers of diaries and memoirs moved in political circles.

Of at least equal importance are contemporary pamphlets, which are most numerous.<sup>4</sup> Almost all the questions which aroused interest at the time are discussed in pamphlets. Their writers, of course, were often moved by strong passions and often completely unscrupulous in what they said. But pamphlets do help us to understand how the great issues appeared to contemporaries, and a study

<sup>1</sup> For a bibliography of later collections of debates and criticisms thereof see 'General Collections of Reports of Parliamentary Debates since 1660' *Bulletin of the Institute of Historical Research*, X, pp. 171 sqq.; see also the books by Professor Turberville cited below.

<sup>2</sup> See *List of Record Publications* issued by the Stationery Office.

<sup>3</sup> Editors have often published a selection of the MSS. with which they were concerned instead of the whole. Their principles of selection are frequently open to criticism.

<sup>4</sup> There is no complete bibliography of pamphlets, nor would it be possible to compile one. For an attempt to list all the books and pamphlets published during a brief period see W. T. Morgan, *Bibliography of British History 1700-1715*, Vol. I (1700-7), Bloomington, Indiana, U.S.A., 1934; the list there given is incomplete. There are a few catalogues of special collections. E.g. G. K. Fortescue, *Catalogue of the Pamphlets collected by G. Thomason, 1640-61*, 2 vols., 1908.

of the types of argument they employ is extraordinarily interesting. I have made much use of pamphlets, especially for the period after 1660. Since most pamphlets are anonymous and their titles are often a very imperfect indication of their contents, the most convenient method of studying them is to work through a large collection which is arranged, at least roughly, in chronological order. Such a collection exists in the Library of University College, London, and upon that collection I have chiefly depended.<sup>1</sup> Naturally it contains only a fraction of the total number of pamphlets published; but it appears to be a very representative selection.

A number of formal treatises on the constitution were published during this period. Most of them suffer from a lack of realism, but for all that they are of great interest.<sup>2</sup>

About administrative questions comparatively little was published in the seventeenth and eighteenth centuries. A few scraps of information, not always reliable, may be found in contemporary books and pamphlets. In Parliamentary papers there is a good deal of useful material. But that material often requires to be compared with as yet unprinted records before it can be properly used.

I forbear to enumerate all the printed sources which I have consulted. Details as to editions of correspondences, memoirs, diaries, and other sources may be found either in the separate bibliographies mentioned in the first part of this Appendix or in the bibliographies appended to the works mentioned in the second part.<sup>3</sup> Since most of the relevant information is easily accessible and this volume does not contain references to sources, with the exception of statutes, I have not deemed it necessary to give a list of the sources I have used. On the other hand, I have tried to mention below every modern book and article to which I am conscious of owing anything; any omissions are due to inadvertence. My debt to the writers of these works is great and obvious. Much has been written on the political history of the period, but comparatively few books or articles have been exclusively devoted to constitutional matters, though all general histories and many biographies naturally treat of constitutional topics to a greater or

<sup>1</sup> Of course I have also used a number of pamphlets not to be found there. In general I have attempted to read all the well-known pamphlets and a representative selection of the lesser known pamphlets for the period 1660–1801. For the period 1642–60 I have read comparatively few pamphlets. Extensive use of pamphlet material was made by Gardiner, Firth, and certain other writers on that period, and upon these I have chiefly depended.

<sup>2</sup> For these and for legal sources see W. H. and L. F. Maxwell, *Bibliography of English Law*, 3 vols., 1925–33.

<sup>3</sup> See, besides the bibliographies mentioned above, G. Davies, *Bibliography of British History 1603–1714*, 1928; J. T. Gerould, *Sources of English History 1603–89*, Minneapolis, Minnesota, U.S.A., 1921. G. E. Manwaring, *Bibliography of British Naval History*, 1930, is sometimes useful for administrative history. Much bibliographical information may be found in certain of the works listed below. E. g. those of Clark, Furber, Realey, Thomson, Trevelyan, Turberville, Turner, and Veitch.

lesser extent. Administrative history was largely ignored until the present century, and only a small portion of the field has as yet been covered. It is curious that while the Union between England and Scotland has been the subject of several excellent monographs, there is as yet no satisfactory constitutional study of the Union between Britain and Ireland and its antecedents. English local government has been described in the monumental work of Mr. and Mrs. Sidney Webb, which will long remain without a rival, but detailed studies of particular counties and towns sometimes supplement it. Few such studies have as yet been written—few, that is, satisfactory to the student of to-day—but many more are needed; for there was the greatest diversity between different localities.<sup>1</sup>

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