THE ENGLISH CONSTITUTION

A COMMENTARY ON

ITS NATURE AND GROWTH

BY

JESSE MACY, M.A.,

PROFESSOR OF POLITICAL SCIENCE IN IOWA COLLEGE

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TO

My Wife

MY MOST CONSTANT AND EFFICIENT COLABORER

THIS WORK

IS GRATEFULLY DEDICATED

PREFACE

My knowledge of the present English Constitution has been derived primarily from the study of standard works upon the subject, but that has been supplemented by two periods of personal observation. A year's residence in England, from July, 1887, to July, 1888, gave opportunity for an acquaintance with British politics at a most interesting and important juncture of affairs. It covered the later month of the Queen's Jubilee year, and the time when, the Liberals having been defeated on the Home Rule Bill for Ireland, the Conservatives were inducted into office through the coöperation of the Liberal Unionists. Eight years later, I passed the months from February to July, 1896, in London, when the same party had again just returned to power after the failure of the second Home Rule Bill.

In the prosecution of the work of direct observation, I have been the recipient of innumerable courtesies and favours in the form of gifts of books and papers, access to records, and personal information of great value. Among those thus furthering my plans, I take pleasure in mentioning Mr. James Bryce, M.P.; the late Professor Edward A. Freeman; Mr. Sam: Timmins, of Birmingham; Mr. H. H. Howorth, M.P., of Manchester; Mr. Joseph Wilkinson, of York; the late Canon Raine, of York Cathedral; Judge Chalmers, of Leamington; Mr. Alexander Ure, of Edinburgh; and the late Mr. Henry Richards, M.P.

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In the introductory chapter, the statement is made that one object of the book is to enable American readers to gain a better knowledge of the American government. It may be an advantage to some readers for me to add that Part I. was prepared specifically in order that Americans might be able to read with greater profit Bryce's *The American Commonwealth*. To fully appreciate that great work, the American needs to be well grounded in English politics. He must know the present Constitution in its theory and in its practice.

Part II. is designed to answer certain questions often raised in an attempt to understand the present English Constitution. Americans should never forget that, until the founding of the colonies, English history is our history. Nor should they fail to remember that for a hundred years after, there was a persistent effort to establish in England a government according to what would now be called the American model, — that is, a government based upon an artificial constitution whereby the Legislature and the Executive should be balanced one against the other. It was not until the coming in of the House of Hanover, in 1715, that English constitution-making became of a distinctly different character.

If this book shall prove to be of interest to English readers, it will be by reason of the presentation of the subject treated from an American point of view, rather than from any display of superior knowledge.

January, 1897.

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INTRODUCTION

THE American lives under a constitution which he thinks he understands. He reads it. As a schoolboy he often commits it to memory. He knows when and how it was made. In the course of his life he learns many facts about the agencies of government. Many strong tendencies combine to give to the American an impression that he possesses a knowledge of his own government in advance of his actual knowledge, and to create a belief that the Constitution is more artificial than it really is.

The natural and convenient corrective to these erroneous impressions and false beliefs is a study of the English origin of our own political institutions. And to keep the American citizen alive to the fact that he is subject to a living and ever-changing constitution nothing is more effective than a study, by way of comparison and contrast, of the latest developments of the Constitution of the mother-country.

In a recent work on Sir Robert Walpole, Mr. John Morley observes: "The great constitutional question of the eighteenth century, as every reader knows, was whether the government of the realm should be parliamentary or monarchical. Was it to be an absolute rule of the king; or, as Cromwell sought, a Parliament making laws and voting money, coördinate with the Chief Person, and not meddling with the Executive; or a Parliament contain-

ing, nominating, guiding, and controlling its own Executive?"[1]

Apart from the absolute monarchy there are here recognized two distinct forms of free government. America to-day represents one form, and England is the best representative of the other form. The Chief Person in the United States is the President of the Republic, and it is the business of Congress to make laws, to vote money, and not to meddle with the Executive; while in each State the Chief Person is the Governor of the State, and it is the business of the State Legislature to make laws, vote supplies, and not meddle with the Executive.

The American colonies were founded during the century in which there was continuous discussion of the nature of the English Constitution — the century in which there were many efforts made to change in an artificial way the English government. All such efforts at conscious artificial alteration failed, and the English Constitution, as Americans would say, was allowed to drift. Or, as the English are wont to say, after the century of debate and attempted revolution the English Constitution went on growing and developing in its characteristic, normal way. In America the normal way for a constitution to be made or changed is by a conscious act of the people, and this idea has been emphasized in such a way as to tend to obscure the equally important fact of the unconscious growth and development of the American Constitution. In no way can the American citizen so conveniently and so profitably gain the needed sense of the natural growth of his own Constitution independently of all efforts at conscious amendment, as by following out and studying the results of such change in the other branch of the common constitutional stem.

This work on the English Constitution has grown out

[1] *Walpole*, p. 139.

of efforts to assist American students to a better understanding of the constitution of their own government. In order to secure in the mind of an American student a continued interest in a constitution he must at least be made to believe that it is being explained. It is a fundamental element in his notion of a constitution that it is something to be commented upon and explained. To the Englishman the Constitution of his country is simply an undistinguished part of that universe of which he is himself a part. He has no acute sense of the need of an explanation of the one more than of the other. Many British writers have done admirable and useful work in explaining the present English Constitution, just as many of them have taken a leading part in the scientific explanation of the universe. But it is not to be expected that an English author would furnish such a commentary upon his own government as would be in all respects suited to the needs of the average American.

In the same chapter of Mr. Morley's life of Walpole, from which I have already quoted, are found the words: "To-day it is correct to say that the Cabinet has drawn to itself all, and more than all, of the royal power over legislation, as well as many of the most important legislative powers of Parliament." How is it that a Parliament "contains, nominates, guides, and controls its own Executive," while at the same time the Executive has drawn to itself all, and more than all, the royal power over legislation, as well as many of the most important legislative powers of Parliament? To the English statesman, or to the American, whose acquaintance with the political literature of England has enabled him to use words in the English sense, the question suggests no difficulty — he sees nothing to be explained. Parliament is the name of the united government exercising sovereign power — legislative and executive as well. It is, however, a cus-

tomary form of speech to use the word in a more limited sense as applied to the two Houses apart from the Executive. So to the Briton there is an obvious sense in which the Cabinet controls the two Houses, and likewise an obvious sense in which the two Houses control the Cabinet. But to the ordinary American reader Parliament is but one of a multitude of names for a legislative body, and with him it is a cardinal principle that a legislature shall not meddle with the Executive. There is, of course, no difficulty in understanding the bare fact that the Parliament contains the chief executive officers. But the American sense of the word Parliament, and the American sympathy with and prejudice in favour of the parliamentary party, as presented in English history and in the political writings of Englishmen which Americans read with approval, all tend to give undue emphasis to the importance of the two Houses apart from the Executive, and to obscure the actual relations of the Cabinet and the Crown to the Houses.

Only since the formation of the American Union can it be said that Parliament has in any proper sense habitually nominated, guided, and controlled the Executive. Parliament has always in a manner contained the Executive ; but until recent years it would be much nearer the truth to say that the Executive habitually nominated, guided, and controlled the House of Commons, than that the House chose and controlled the Executive. The dominance of the House of Commons has been attained only after centuries of political conflict; centuries of contention that Parliament, or the nation as represented in Parliament, ought to rule. The triumph of Parliament has been secured in large part because of the fact that the English political writing with which Americans are most familiar has emphasized, often beyond the line of accurate statement, the powers of Parliament as

compared with those of the Crown. And the peculiar difficulty which the American reader experiences in understanding the executive side of Parliament is therefore rather increased by his acquaintance with this partisan political literature.

Those who read attentively such books as Bagehot's *English Constitution*, Anson's *Law and Custom of the Constitution*, and Dicey's *Introduction to the Study of the Law of the Constitution*, get a clear idea of the working of the present Constitution. But an American reader is not satisfied with knowing what a constitution is; he wants also to know how it was made.

In this work I have undertaken first to translate into American forms of speech English descriptions of the English Constitution, and second to explain the origin of the present Constitution. I have not intended to furnish in any sense a substitute for English works on the same subject, but rather to facilitate their use. The work is in fact the result of experience in the effort to interest American college students in the study of standard authorities on the English government.

The Second Part of my book is not a constitutional history of England in the accepted meaning of the term. It is rather a commentary on that history. It is a selection of such facts, incidents, and opinions as I believe to be helpful to an understanding of the present Constitution. In the ordinary constitutional history the point of view is from the contemporary society of each period described. In such a history events are recorded without especial reference to their obvious bearing upon present political experience. In this work the point of view is present facts and experience. Events in the past not having obvious bearing upon the present Constitution are intentionally omitted. This plan necessitates "tracing history backwards." It is a use of political literature for

the single purpose of explaining present political institutions in their practical workings. The aim is to make the existing Constitution thinkable. A thinkable constitution must necessarily precede a correctly understood constitution. It is by no means expected that all the views and opinions here expressed will be accepted as correct by that class of readers who take the trouble to think for themselves upon the subjects discussed.

I have written the book without attempting a formal, technical definition of the principal term. It may, however, be helpful to the reader to accept the following as a convenient working definition: *A political constitution is that whereby the instrumentalities and powers of government are distributed and harmonized.* If there is any peculiar merit in this definition apart from its brevity, it is found in the words "that whereby." The phrase being entirely general will admit of the substitution of anything that has ever been called a constitution, whether it be a written document proceeding direct from the body politic, or whether it be a body of customs, habits, and understandings, or a body of fundamental laws proceeding from a sovereign ruler or a sovereign legislature; or whether it be a mere matter-of-fact government without reference to origin. Almost anything which is called a constitution in current political writing may be described as that whereby the powers of government are distributed and harmonized. Viewed in an active sense it is the object of a constitution to secure harmony in the exercise of governmental power; that is, to prevent encroachments of the various parts one upon another.

Part I

NATURE OF THE CONSTITUTION

CHAPTER I

A COMPARATIVE VIEW OF THE ENGLISH AND AMERICAN CONSTITUTIONS

IT is difficult to adhere to a technical definition of the word "sovereignty" in a prolonged discussion of actual political institutions. It is a favourite theory of some writers that in all cases true sovereignty rests with the people; that he who is called sovereign, or the body of persons who are regarded as exercising sovereign power, should be viewed, not as the real sovereigns, but rather as agents of the sovereign people. According to this theory the Czar of Russia rules by the permission, or by the will, of the Russian nation.[1] Whatever may be the value of this theory as applied to other nations, it seems to be the only theory that is applicable in the case of the United States. If there is anywhere in this country a supreme and ultimate authority, it is vested in the people. When our forefathers ceased to acknowledge English authority, they began to create agencies for a general government, and, at the same time, to adopt written constitutions for the government of the separate states. A few years later, the people ordained and established a written Constitution for the general government. According to all these constitutions, there is no one officer who does not act under limitations and restrictions, not one who may not be

[1] Rousseau, *Social Contract*, Bk. II.

removed from office and punished for official wrongdoing. There are no officers whom we call sovereign, or whom we are accustomed to think of and speak of as exercising sovereign power. It may be accepted as a fundamental principle of our Constitution that every exercise of the power of government shall be limited. If, in the strict sense of the word, sovereignty exists in such a government, it must be in the people that enact the written constitutions, define the sphere of government, and determine the powers of the agents or officers of the government.

The people of the United States have ordained, through their constitutions, that a part of the business of government shall be transacted by federal officers, and part shall be left in the hands of the states. This peculiarity of the government has led to a novel use of the word "sovereign." We say that the federal government exercises sovereign authority over certain matters, such as foreign relations and the postal service, while the states exercise sovereign authority over certain other matters, such as general police regulations. This has been called "divided sovereignty." In one sense this is an absurd expression; yet the thing which the term describes is not absurd. We live under the authority of two governments, each acting through separate and, for the most part, independent agencies. In our famous controversy respecting the conflict of these two sovereignties, the most extreme of the state-rights party admitted that there were some things which the federal government alone had the authority to do. On the other hand, the most extreme advocate of federal authority admitted that there were some things which the states alone could do. The Civil War may be said to have settled the principle that hereafter a state or a group of states intending to form a separate and independent govern-

ment must obtain the consent of the general government or pursue the old-fashioned plan of revolution, and not attempt to accomplish the object by the exercise of an alleged guaranteed constitutional right. Undoubtedly the War served to emphasize in the public mind the importance of federal authority; yet, in its main features, the Constitution remains unchanged. We are still subject to a "divided sovereignty."

At the time of the formation of the Constitution of the United States, a discussion of the various theories of sovereignty was carried on by a number of philosophers and statesmen, and these theories undoubtedly had some influence upon the result, but they were not the controlling factors. Besides the form of words embodying the notion that all power is derived from the people, there is little in our constitutions or laws to remind us of any theory or peculiar view concerning the nature of sovereignty. It was the fact of the coexistence of two sets of governmental agencies rather than any theory on the subject that gave to our Constitution this unique feature.

But when we come to the study of the English Constitution, the case is different. The substance of the English Constitution is in large part a matter of theory or opinion. It is worth while for the American student to take some pains to get out of the matter-of-fact state of mind which is necessary to enable him to understand his own Constitution, and get himself into a state of mind whereby he can contemplate and consider the influence of theories and weigh the effect of vague and varying opinions and mere conventions in the formation of constitutions.

In the study of the English Constitution we are confronted on every hand with facts and fictions which can be explained only by a knowledge of certain theories of

sovereignty. According to the views of the leading writers and publicists of the present day, sovereignty in England is vested in Parliament, and the ruling branch of Parliament is elected by the people. In America, the people in their sovereign capacity, at the beginning adopted written constitutions for the general and for the state governments, and, on rare occasions, they act in the same capacity when they amend their constitutions or enact new ones. Only thus does sovereign action appear in America. In England, the people act in their sovereign capacity when they choose members of Parliament, and a newly elected Parliament in England embodies in itself all the powers of sovereignty.[1]

Here is one great contrast between the English and the American constitutions. Abolish all our state governments; in the separate and independent federal executive let there be a Cabinet composed of members of the Congress, who at the same time control both legislative and executive business; remove from our Supreme Court its power to refuse to give effect to a law of Congress; leave every power of government, local and general, in the hands of a Congress controlled by a Cabinet and of such agencies as the Congress may choose to create; and we should have in this country a counterpart of the English Constitution: we should then know more about the sovereignty of a government in action than we can ever learn from a study of our actual institutions. The Englishman votes for officers who exercise sovereign power, because in voting for members of Parliament he virtually chooses the party leaders who form the Cabinet which directs and manages Parliament, the sovereign body; the American can only vote for officers who exercise restricted powers. The American electorate has chosen to exhaust its sovereign acts in the creation

[1] Dicey, *The Law of the Constitution*, Lect. II.

of constitutions which make it impossible for any one person or body except the people to exercise sovereign powers; the English electorate is brought into immediate contact with the agency of sovereign power. Parliament exercises the full sovereignty of the nation.[1] Every governmental act is authorized or permitted by Parliament. According to this view the English Constitution is simplicity itself when compared with our own.

Mr. Bryce, in his *American Commonwealth*, tells us just how many minutes it takes to complete the reading of the Constitution of the United States. But when we have finished this reading there are many state constitutions which call for a reading. Then there are the decisions of the courts, state and federal, in which provisions of the constitutions are subjected to interpretation. One would not proceed far with this task without discovering that our constitutions with the interpretations thereof furnish reading enough for a lifetime. Yet every word is really a part of the Constitution. It is this partitioning of governmental business between two sets of governmental agencies, and still farther the placing of legislative, executive, and judicial business in the hands of independent agencies, which has so complicated and lengthened the literature of the American Constitution. Leave out of the American Constitution this parcelling out and balancing of powers, and nearly all would be left out.

Note then the simplicity of the English Constitution, in which we are relieved from that nice adjusting of powers which has so many times been the despair of our courts. If we adopt to its full extent the now generally accepted theory of the English Constitution, and apply to

[1] "So long, therefore, as the English Constitution lasts, we may venture to affirm that the power of Parliament is absolute and without control." Cooley's *Blackstone*, 1871, Vol. I., p. 161.

it the American method of description, we shall have a constitution very short and very simple. The substance of it may be summed up in the one sentence, "All the powers of government are in the hands of Parliament." It is well for the American student firmly to grasp this simple but complete notion of the English Constitution. If he constantly bears in mind its simplicity, its brevity, and its comprehensiveness, it will be greatly to his advantage. Mr. Bagehot, in a book of three hundred and fifty pages, has given a marvellously accurate picture of the English Constitution. But if we leave out of his book the long arguments in favour of the English Cabinet system as against the American presidential system, the examination of various methods of administration, the lengthy discussion of the relative merits of royal and non-royal Cabinet governments, and retain simply that part of the book which describes what the Constitution is in our sense of the term, it will be found exceedingly brief. Mr. Dicey's book on *The Law of the Constitution* is for the most part occupied with a well-sustained argument in support of the theory of parliamentary supremacy. The part of the book which an American would naturally accept as a description of the Constitution may be read in a few minutes. In one place is found a statement of the customs of the Constitution, and I find that I can read them all in about one minute. The author does not, however, profess to give a full list; yet if all the laws, which we should naturally classify as constitutional in their character, were clearly summarized, and all the customs of the Constitution were clearly stated, the whole could be read in a short time.

The word "constitution," like other words used in political discussion, has a variety of meanings. In the present stage of political science, he who sets a proper

value upon clearness of ideas will not usually attempt a technical definition of the terms used. The student is compelled to struggle for clearness of ideas. To this end he must learn as many definitions as he can, and, above all, he must learn to detect to the extent of his ability the precise meaning of important words in the passages where they are used. We get no full, comprehensive view of the Constitution of the United States until we look beyond the document which bears that name, and include the constitutions of the various states. These taken together may be held to embody our written Constitution. This Constitution, being written, has impressed Englishmen as stiff and rigid. But to see our real Constitution we are compelled to look beyond these documents to their embodiment in our governmental institutions. These are not rigid; they are not unchanging. At scores of points there are observed tendencies to change. Here the executive tends to encroach upon the legislature or upon the judiciary; there a legislature encroaches upon the executive, or strives to keep its acts from being reviewed by the courts; again, the courts are becoming political and are assuming to decide questions which belong to the legislature; or the federal authorities are encroaching upon the states, or the states upon the federal government; or the governmental agencies are encroaching upon the rights of citizens, or the citizens, through unauthorized agencies, are encroaching upon the field of government. The American Constitution is designed to prevent these encroachments, to preserve the rights of citizens, and to outline and harmonize the work of the several departments of government, and define the duties of the governmental agents. In other words, the chief object of the Constitution is to determine the spheres of governmental agencies and to prevent encroachments.

The English have never in cold blood set themselves to

the task of conscious constitution-making, except for a short time under the Commonwealth. Their Constitution comes from certain facts in their history, and especially from certain notions concerning their history which have been promulgated in recent years. Some English writers maintain that the chief features of their Constitution have existed for centuries, yet the consciousness of the possession of an important constitution is of recent date.

The late Edward A. Freeman was wont to take pleasure in tracing the new and liberal developments in the English government to the early institutions of the country. According to his theory the Constitution of to-day is derived by removing the innovations of the Middle Ages. It is a discovery and a restoration of that which existed a thousand years ago. Other authorities are disposed to question any important connection between recent constitutional development and early institutions. These trace the Constitution of to-day to much more recent facts. Yet all agree in deriving it from facts in English history, either ancient or modern. The real American Constitution, as we have seen, is not simply the documents called by the name, but is besides what has been read out of the documents, or read into the documents, and embodied in certain governmental acts. The English Constitution is made up of certain views which have been read out of or read into English history and embodied in certain governmental acts. In each case it is to be noted that the important thing is not the documents or the history, but the views which men have held respecting them. It is not impossible that a constitutional principle as solid as adamant may be derived from an erroneous notion of history.

CHAPTER II

THE HOUSE OF COMMONS AND THE CABINET

THE real English Constitution is less simple than would appear from the previous description. This is true: first, because authorities are not agreed upon the theory that sovereignty is vested in the people, and there are many facts which seem to give support to a different theory; secondly, because Parliament itself, which is represented as the sole agency of sovereign power, is far from being simple. If one will take the trouble to read current political literature attentively, he will soon discover three distinct meanings of the word "Parliament." 1. The word is used when it means simply the House of Commons; thus, "A new Parliament was elected in 1892," *i.e.* a new House of Commons was elected. 2. The word means the House of Commons and the House of Lords. This is also quite a common use, though still not exact. 3. The word means the Crown and the two Houses, as is shown from the following passage from Dicey, "Parliament means, in the mouth of a lawyer (though the word has often a different sense in ordinary conversation), the King, the House of Lords, and the House of Commons; these three bodies acting together may be aptly described as the 'King in Parliament,' and constitute Parliament."[1]

Ordinarily, when Parliament is called the agent of sov-

[1] *The Law of the Constitution*, p. 35.

ereign power, its three constituents are included. Yet there was a time when Parliament declared the throne vacant and proceeded to fill it by electing William and Mary to be King and Queen. This has always been regarded as a sovereign act, and it was performed by the two Houses alone without a king. Ordinarily an act of Parliament, to be of legal force, must have the sanction of the two Houses and the King. The question then arises, How can such an institution be reconciled with the theory that sovereignty belongs primarily to the voters of England, since neither the King nor the members of the House of Lords are chosen by popular election? The older theory was that real sovereignty was vested in him who was called sovereign, and that he called to his aid the chief Lords of the realm, and provided for the periodic election of representatives from counties, towns, and cities, to supplement the work of the King and the Lords. The theory of popular sovereignty takes large account of the fact that since 1688 all the monarchs of England have occupied the throne by parliamentary title. And since 1832 it has been thoroughly established, both in doctrine and in practice, that concerning all important measures which have received the approval of the House of Commons for the second time and are believed to be in accord with the wishes of a considerable majority of the electors, the House of Lords shall yield to the Commons.[1]

The people do not, it is true, vote directly for members of the House of Lords, but so long as they permit the House to exist, which according to the theory under discussion they might abolish at any time, they do in this negative way express approval of its continued existence and of its acts taken as a whole. In like manner kings, while not chosen by direct act of the electors, nevertheless, according to the modern theory, hold their office subject at

[1] Dicey, *The Law of the Constitution*, p. 359.

all times to the will of the people. An act to abolish the House of Lords, or to reorganize it in such a manner as to require the members to be chosen by popular election, would be accounted not an act of revolution, but an act of reform. Likewise, an act to abolish the Crown or to make the occupant of the throne subject to direct election, would be simply a more extensive exercise of the power already exercised by the Act of Settlement. It will be observed that this theory tends strongly to localize supreme power in the House of Commons.

According to a law passed in 1716 a new House of Commons must be elected at least once in seven years. It is estimated that a little more than one-sixth of the entire population have a right to vote for members of Parliament. If there were universal manhood suffrage, the proportion would be larger. If recent tendencies receive no check, it is not at all unlikely that the remaining fraction of adult men who do not now have a right to vote will be enfranchised. There were in the House, in 1896, six hundred and seventy members. With a few exceptions each member represents one district. Parliamentary districts vary in population from fifteen thousand to eighty thousand. Assuming the continuance of democratic tendencies, the districts will in time be made nearly equal, and the House will thus become an agency for the equal representation of all the people, regardless of class or condition. A large proportion of the members of the House do not reside in the districts which they represent. If the Irish leader wished to have an Englishman chosen to represent an Irish district, an Englishman would be chosen. Many Englishmen are elected by Scottish districts, and conversely. This plan makes it more convenient for a man to choose a parliamentary career and follow it for life. If he fails of election in one district, he may find another district willing to elect him. A really influential

man may always be a member of the House. For example, in 1887, Mr. Goschen became a member of the Cabinet. According to an English law a seat in the House of Commons becomes vacant when its occupant becomes a member of the Ministry. Practical convenience also requires that a member of the Ministry shall also be a member of Parliament, otherwise he cannot continue in office. An opposing candidate contested the seat with Mr. Goschen and defeated him. This made it necessary for Mr. Goschen to find a constituency elsewhere, and, having in his favour the influence of the leaders of the Conservative party who wished to retain him in office, he encountered no difficulty in doing so.

The most important and characteristic function of the House of Commons, as set forth by recent writers on the English Constitution, is the choosing of the Executive. By Executive is here meant the chief executive and administrative officers numbering fifteen, more or less, who are individually responsible for the several departments, and collectively responsible for the conduct of the public business. This body is called the Cabinet, and it is often spoken of as a committee of Parliament.[1] With the Cabinet are associated about thirty other executive officers chosen at the same time and in the same way. The term "Ministry" is applied to the Cabinet and the other executive officers taken together. Language is often used which leads the ill-informed to think that the House of Commons elects the members of the Cabinet; but it does nothing of the sort. When one Cabinet resigns office, it is customary for the retiring Prime Minister, who is the head of the Cabinet, to nominate a successor. The Queen sends for the one nominated and asks him to form a new Ministry, and the Queen then fills the offices upon his recommendation. Thus, in form, it is the Queen

[1] Bagehot, *The English Constitution*, p. 79.

who appoints the Ministry: the House takes no direct action in the matter.

The House is said to choose the Cabinet, because it must have the approval of a majority of the House. If at any time a majority of the members of the House become dissatisfied with the Ministry, they may cause it to resign, or appeal to the country, either by a formal vote of censure, or by refusing to support the measures which the Cabinet "deem important." It is in this indirect way that the House may determine who shall hold the executive offices. But when the House fails to give due support to the Cabinet, the latter may, before resigning, dissolve Parliament and appeal to the electors on the matter at issue. If the voters choose a House which is in harmony with the Cabinet, the Ministry do not resign. In this way, it may be said that the electors choose the Cabinet. Again, it may be said that the members of the dominant party choose the Cabinet. For in the selection of party associates the Prime Minister is bound to choose such men as are acceptable to the party. In this sense the party chooses the Executive.

Again, there is a very important sense in which the members of the Cabinet choose themselves. No one can be chosen as party leader who has not commended himself by conspicuous ability or influence to the favourable consideration of his party associates. The leader of the political party is generally the ablest statesman and the most skilful politician of his party. It probably has not happened in recent years that one has become Prime Minister without having, himself, for years, contemplated the possibility of such an event. In America it is said that every boy expects sometime to be President; in England only the few who believe themselves to be endowed with superior ability expect to be Prime Ministers. Yet

there are always a few in each party who do contemplate the possibility, and these school themselves for the position by the devotion of all their powers to the service of the State. Mr. Gladstone and Mr. Disraeli were never at any time men of mere ordinary ability, yet they were for thirty years active members of the House of Commons before they became leaders of their parties and Prime Ministers of England. They were finally chosen leaders because they had made themselves leaders. In answer to the question, Who shall lead the Liberal party in the absence of Mr. Gladstone? a member of the House named an English statesman, and said, "He is leader whether we will or not." Thus the Prime Minister elects himself by making himself leader of his party and winning success at the polls for it. In like manner the other members of the Cabinet choose themselves by commending themselves to their party by their preëminent ability or by making themselves leaders of influential sections of their party. A few years ago three young men in the Tory party became exceedingly troublesome to the Tory Cabinet. The three were finally all taken into the Cabinet at one time. Two of the three have since had the honour of being mentioned as possible Prime Ministers, and one has become the leader of his party in the Commons. These young men elected themselves to Cabinet rank. One of the three has since died; another is choosing himself for the first place in the Cabinet; that is, he is convincing the members of his party that he represents the dominant political force in the party and in the country.

From the foregoing statements it appears that there is no short and easy answer to the question, Who chooses the English Executive? A complete answer to this question involves a description of the most important features of the English Constitution. First, the Queen must appoint. Second, the House of Commons must at the

time tacitly approve the appointment and must continue to support the measures of the Cabinet so long as it remains in office. Third, a Cabinet after losing the confidence of a majority in the House may dissolve Parliament and go to the electors and thus secure the election of a House that will support it. In that case the Cabinet continues in office by the approval of the electors as expressed through the members of the new House. Fourth, each political party selects a leader who is a potential Prime Minister, and it also chooses a leader of debate in the other House. These have much to do in determining who shall be the other members of the Cabinet. Fifth, men secure Cabinet rank by commending themselves to the good opinion of their party. Not one of these five acts or sets of acts can be disregarded in answering the question, How is the English Executive chosen?

It is convenient to say that the House chooses, because the five acts are chiefly explained by what takes place in the House of Commons. It is in the House of Commons rather than anywhere else that a man commends himself to his party for the position of leader. It is especially with reference to the conduct of business in the House that leaders of the parties are selected. The electors can choose a Cabinet only by choosing members of the House. Through the management of the business of the House a Cabinet retains its position. The action of the Queen in appointing the Cabinet is determined on the advice of the retiring Premier by counting the members of the two parties in the House of Commons. As now understood, the action of the Queen is merely formal. She must choose the leader of the party having a majority in the House of Commons. One may say that the Ministry is not chosen at all by any arbitrary or formal act. It is rather evolved by a number of acts which centre in the House of Commons.

One cannot understand the Constitution and the practical working of the House of Commons without a knowledge of the political parties in England; for, in each of the acts which result in the selection of the Executive, party life and party organization are assumed. It is by counting the members of a political party in the House that the information is derived for the guidance of the Queen in the selection of the head of the Cabinet. It is by party votes in the House that the Cabinet is sustained or driven from office. By party votes in the country a new House is chosen. A man is elected to leadership in a party before he is chosen as Prime Minister. It is as members of the political parties that men of ability secure for themselves Cabinet rank. Hence, what we now know as the English Constitution rests upon the assumption that the voters and the members of Parliament will continue to act in two organic political parties. A change in this respect would necessitate essential changes in the Constitution.

Some events in recent history may serve to illustrate this. In 1885, an election occurred which gave to the House of Commons three hundred and thirty-four Liberals, two hundred and fifty Conservatives, and eighty-six Parnellites. There were thus three parties, neither of which commanded a majority of the votes. The Conservatives, who at the time held the executive offices, resigned them to the Liberals. If all the Irish members had united with the Conservatives, the Liberals could have been driven from office. The Irish demanded, as a condition of alliance with either party, that a law should be passed, giving to Ireland a separate legislature having jurisdiction over local affairs. Mr. Gladstone and a portion of the Liberal party, having decided to accede to the demands of the Irish members, brought in a bill for Home Rule in Ireland. All the Irish members voted with Mr. Glad-

stone, but an equal number of the Liberals voted against him on the question of Home Rule, and thus secured his defeat. The adoption of the Home Rule issue thus led to a division in the Liberal party. The Liberals who refused to support the Home Rule policy of the party were known as Liberal Unionists, and for a time they were not identified with either party. They still sat with the Liberals in Parliament, but refused to support the party in its chief issue. There thus appeared two minor parties, four parties in all, and the minor parties included so many members of Parliament that it seemed impossible for either of the older parties to secure its necessary majority. After his defeat on the Home Rule Bill Mr. Gladstone dissolved Parliament and appealed to the country on the question at issue. As a result of this election, the Conservatives had three hundred and sixteen members, the Liberals one hundred and ninety-two, the Parnellites eighty-six, and the Liberal Unionists, who opposed Mr. Gladstone's bill, seventy-six. There were thus four parties, no one of which commanded a majority of the House. It was now understood that the Parnellites would vote with Mr. Gladstone, but this would still leave him less than a majority. On the main question at issue the Liberal Unionists were in accord with the Conservatives. A majority was made up and a Cabinet was formed, the Liberal Unionists agreeing to vote with the Conservatives. In this way the four parties, so far as the practical working of the House of Commons was concerned, were reduced to two, and the Government proceeded in a regular and constitutional way.

This division into two parties extends beyond Parliament to the constituencies. In the period referred to, but two candidates appeared in most of the districts. If a Conservative was nominated, the Liberal Unionists of the district voted for him. If a Liberal Unionist was nominated, the Conservatives supported him. In like manner

a Liberal and a Parnellite did not stand as candidates in the same district. In 1892 another election occurred. At this time Conservatives and Liberal Unionists had become practically fused into one party. The Liberals, with the support of the Irish members, had a majority in the House of Commons. Mr. Gladstone was thus able to form a government. A second Home Rule Bill was introduced and carried through the House of Commons, but was rejected by the House of Lords. Another election occurred in 1895, which resulted in the triumph of the Conservative Unionist party. The various parties are again practically reduced to two, and this feature of the Constitution remains unchanged.

We have thus seen how the House of Commons performs one of its functions, that of choosing the Executive. But when the Cabinet is chosen, the House is by no means rid of it. Some members of the Cabinet are always members of the House of Lords, but the most important business of the Cabinet is in the Commons, and the most efficient members are members of the Commons. In an important sense the Cabinet for the time being is master of the House. Its members who are members of the House sit on the front bench to the right of the Speaker. This is called the Government Bench, and the Cabinet is called the Government. The members of the political party that supports the Cabinet occupy the other benches on the right of the Speaker. Across the table, facing the Government, is what is called "The Front Opposition Bench." This bench is occupied by the men who expect to form a Cabinet as soon as they can persuade a majority of the House or a majority of the constituencies to vote against the ruling Cabinet. These are called "Leaders of the Opposition." The other benches to the left of the Speaker are occupied by the members of the party that votes against the Government. Irish

Nationalist members of the House, however, continue to sit on the Opposition side whatever the Government in power. When a Cabinet is driven from office and a new one is formed, the parties change sides on the floor of the House. Thus the members always sit facing their political opponents.

Law-making in the House is divided into two classes, — Cabinet and non-Cabinet legislation. Cabinet bills are the result of the deliberations of the Cabinet. They are usually the more important bills, and are those of chief political interest. Every member of the Cabinet is bound to vote for all the measures of which the Cabinet assumes the responsibility. However the members of the Government may differ in their secret Cabinet meetings, before Parliament and before the country they stand as a unit. When a Government bill is introduced by a member of the Cabinet, the chief speeches in its favour are made by members of the Cabinet, and the chief speeches by way of criticism are usually made by the leaders of the Opposition. As a result of discussion and criticism the Cabinet may be induced to accept amendments to their bills. If an important amendment is offered by a member of the Opposition, it is the policy of the Government, if they fear that the amendment will be carried, to forestall defeat by accepting the amendment. Yet even after an amendment has been carried against them, the Government may rule that it is not vital to the bill as a whole, and refuse to resign. Every defeat of this sort, however, tends to weaken and discredit the Cabinet. Members of the Opposition and the Opposition press are sure to claim at such a time that the Government is violating the Constitution by clinging to office after being defeated.

Of course the Government would not at any time be defeated on any measure or vote if the entire party were always at hand and all the members of it voted with the

Cabinet. It often happens that members of the party are greatly opposed to some features of the Government policy, and feel strongly inclined to abstain from voting or to vote with the Opposition. This they can often do and still not endanger the life of the Cabinet. But such action always annoys the Cabinet. The Government has one pretty effectual way of bringing to its support the membership of its party. It may definitely give notice that the particular measure which is in hand is "deemed important" and that the Government proposes to stand or fall with it. This is a notice to the members of the party that if they do not vote with the Cabinet, they will have to incur the expense and the inconvenience of a reëlection to Parliament; and all who represent districts having small party majorities are confronted with the prospect of possible or probable defeat. By this and other means a skilful Cabinet musters the forces of the party to support its measures. By parliamentary custom Wednesday of each week is devoted to the uses of private members and for bills introduced by non-Cabinet members: the Cabinet assumes no responsibility. Many of these bills, however, involve legislation of great importance. They come from either side of the House, and in respect to such bills the members of the Cabinet are generally free to take any position they please. Yet if a private member should introduce a bill the subject-matter of which trenched upon some measure for which the Government held itself responsible, then the Cabinet would either adopt the measure as its own, or would insist upon amending it in such a manner as to harmonize it with its own policy, or would unite in using its majority to defeat the bill.

It thus appears that in a certain sense the Cabinet is responsible for the entire business of the House. It determines what shall be accounted Government business

and what shall be left to private members. At any time the Government may determine to assume the responsibility for a private bill, or to use its majority to destroy it. Or the Government may decide to take for its own measures the time ordinarily allotted to private members. In thus partitioning the business between itself and private members the Cabinet is guided by the state of political debate among the electors. For example, a bill may be regarded as in itself of the utmost consequence, yet if there is little interest manifested in the measure, it is likely to be left to take its chances as a private bill. On the other hand, a measure in itself trivial may have attracted such an amount of public attention as to induce the Government to adopt it. Yet in general it is true that the measures of greatest popular interest are those of greatest importance. Hence the Government bills are usually those of chief importance.

From the foregoing description of the law-making functions of the House of Commons it appears that the members of the English Executive are not only members of the legislature, but, for the time being, are masters of the power of legislation. There are thus united in the same hands the powers of responsible administration and of legislation. When an English Cabinet loses its power to control legislation, it resigns the executive offices, and they are placed in the hands of a Government which can control legislation. It is an important feature of the English Constitution that the control of administration and the control of legislation shall be in the same hands.

Financiering is conveniently discussed as a separate and important function of the House of Commons. Much of the discussion of this subject belongs rather to the science of administration than to the harmonizing and balancing of the separate agencies which we in America call the Constitution. But one feature of financiering

is full of constitutional interest. It is when the Cabinet is securing a vote of supplies to meet the expenses of the Government that the various departments of the Executive come regularly before the House of Commons for criticism. It is the business of the Opposition to call attention to every weak point in the conduct of the Executive and to persuade the House not to vote supplies except upon condition of improvement in administration. I have said that in the matter of law-making the Cabinet is master of the House of Commons. It may easily be shown that, in a certain sense, the House is master of the Cabinet. The Opposition in the House is constantly forcing the Government to modify its administrative policy; and never does a Cabinet succeed in getting its Budget through the House without being compelled by adverse criticism to make many changes and concessions. The Budget often contains some new feature of taxation in which an influential class of taxpayers is interested; and the Opposition in the House is reinforced by an agitation among the electors. In 1888 the Budget contained a provision for taxing vehicles, called "The wheel and van tax." There was an agitation throughout the country against this tax, terminating in a grand demonstration in Hyde Park, and the Government receded from its position. In 1890 the Budget contained a provision that a portion of the license fees collected from dealers in alcoholic liquors should be set aside to be used in giving compensation to dealers whose business should be destroyed by the refusal of county boards to renew licenses. This led to such an agitation in the House and in the country as induced the Cabinet to abandon the measure. It should not be understood that it is only in respect to financial bills that the habit of overawing the Cabinet prevails. Any bill which the Government introduces is liable to contain provisions which elicit such a formidable

opposition as to induce the Cabinet to yield. The Cabinet retains its mastery of the House by yielding to the wishes of the House, by being ever sensitive to the scourge of public opinion, by avoiding scandal in the conduct of public business; in a word, by representing the judgment of the country.

Another feature of the business of the House has some constitutional importance. That is the daily questionings to which the Government members are subjected. Any member has a right to ask any question he pleases concerning the conduct of public business. These questions are printed on the paper containing the order of business for the day, and they are addressed to that member of the Government who is deemed chiefly responsible for the business which is made the subject of inquiry. That is, if it pertains to the government of Ireland, it is addressed to the Chief Secretary for Ireland; or, if the intention or conduct of the Cabinet as a whole is made the subject of inquiry, the question is directed to the Leader of the House. By this arrangement every member of the Cabinet and of the Ministry in the House of Commons lives in the daily prospect of being called to account before the country for any misconduct in his department. If a policeman has unduly interfered with the rights of a citizen, the Home Secretary may be asked to explain. If a postmaster has neglected his duty, the Postmaster-General may be called to an account for it. In this way the public is informed from original sources of the conduct of public business. The public is thus brought into very close relations with the powers of government. Many of the questions are asked for the purpose of calling attention to some weak point in the policy of the Government. Yet it sometimes happens that a member of the Cabinet wishes to have an opportunity of explaining some matter connected with his department. In such a case he may

induce a personal or party friend to ask him a question in the House and thus furnish him the desired opportunity. The constitutional importance of the Question is found in the fact that it is a channel of influence connecting the Cabinet with the House and both with the public.

CHAPTER III

CHECKS AND BALANCES

BEFORE proceeding to discuss the House of Lords, the Crown, and the less important parts of the English government, it is well to get as clear a view as possible of the Constitution on the assumption that the House of Commons stands alone, *i.e.* that the less important parts do not exist. This is the more important because it is coming more and more to be the habit of English writers to discuss the Constitution on the basis of such an assumption. In the *Edinburgh Review* for July, 1890, there is an article entitled "The House of Commons Foiled." It is a criticism on the current obstructive policy of the Opposition in the House of Commons. But it is also a grave constitutional discussion, and there is in it little to suggest that there exists any constitutional force outside of the House of Commons. In nearly every sentence where the word "Parliament" occurs "House of Commons" may be substituted without changing the meaning. The Duke of Devonshire is quoted as saying, "A manifest determination to destroy and to cripple parliamentary institutions would be as clearly rebellion against our Constitution as open resistance to the Crown." The writer of the article continues, "Parliament is king; it is the modern embodiment of the power of the nation; internal attempts to deprive it of its strength are aimed against that very sovereignty of the people which it is the boast of our reformers to have

established on a truly democratic basis." It seems evident that in the thought of the writer the House of Commons is king.

Now upon the assumption that the House of Commons embodies all constitutional power, what sort of Constitution does England possess? As stated in a former chapter, if in such a case the House acted together as one undivided body or committee, it would be difficult for an American to discover anything which he could call a constitution. A constitution, as the word is used in America, assumes the division of powers and the balancing of one power against another. But the House of Commons does not act together as a committee. There are the two political parties which face each other on the floor of the House. Each of these parties is subdivided into the leaders and the led. One set of these leaders fills the chief executive offices and is called the Government. Outside of the House is a body of electors whose political activity often determines the policy of the Government, and who may at any time be called upon to arbitrate between the contending parties in the House.

These, then, are so many diverse sources of power and influence. Yet we seek in vain for an explicit legal recognition of these sources of power.[1] No English law recognizes the division of the House into parties. No law takes any account of the subdivision of each party into leaders and non-leaders. The executive offices which the members of the Cabinet fill are the creation of law, but the Cabinet itself has no legal recognition. The body of electors is a creature of law, yet their important constitutional function as arbiter between the parties is unknown to the law.

That feature of the American Constitution which parcels out power to separate, legally established govern-

[1] Professor Hearn, *The Government of England*, p. 124.

mental agencies may not be discovered in the political forces centring in the House of Commons. The prevention of encroachments and the harmonizing of governmental agencies has been set forth as the main object of the American Constitution. It is possible to apply this form of words to the different agencies in the House of Commons and the electorate. There is in these separate governmental agencies an extensive system of checks and balances. The party of the Opposition checks and modifies in many ways the action of the party of the Government. The Cabinet is checked and restrained by the membership of its own party in the House outside the Cabinet. The rank and file of the party in the House are restrained by the attitude of the Cabinet. The electors are ready at any time to rebuke the Cabinet or to rebuke the Opposition if a policy is adopted which they seriously disapprove. In America the essence of the Constitution is found in a vast system of legally established checks and balances; in England the essence of the Constitution is found in a limited system of checks and balances which, though they are without legal recognition, rest upon certain habits and understandings which are not easily defined, and cannot be enforced in any way other than by an appeal to public opinion.

That these understandings in accordance with which the agencies of government are balanced and harmonized are fundamental in the English Constitution may be seen by carefully marking the language of the best expositors. It has already been shown how the present Constitution is destroyed by assuming the non-existence of the division into two parties. In this I have followed Bagehot, who is accepted as one of the very highest authorities.[1] The meaning here is that if we cannot have one party pitted against the other, the English Constitution cannot exist:

[1] *English Constitution*, p. 209.

the balance of forces would be destroyed. In the article in the *Edinburgh Review* from which I have quoted, the House of Commons is criticised for undertaking to control too minutely the action of the Executive. "Such a body," says the writer, "can only judge satisfactorily of broad lines of policy, or of cases of flagrant mismanagement."[1] It is argued that it is a violation of the Constitution for the House, as a whole, to encroach upon the field of the Executive. If this is carried too far, executive responsibility will end, and the Constitution will thus be destroyed. By the same line of reasoning it may be shown that the Constitution would be impaired if the electors should encroach too much upon the business of the House. Or, if a Cabinet should dominate the House and the constituencies, the balance of forces would be destroyed, and an oligarchy would ensue. The Constitution then, viewed simply as a combination of the forces which centre in the House of Commons, consists of certain habits, customs, and understandings in accordance with which the separate parts are harmonized and prevented from mutual encroachments.

It is natural for an American to ask, How are the provisions of the English Constitution enforced? or, is there any way to prevent encroachment? In America, when the Constitution is violated, the law is violated, and there is at hand a court and a sheriff to right the wrong. In respect to all these constitutional understandings which cluster around the House of Commons, not one of them admits of enforcement in the American sense of the word. The Englishman must trust simply and solely to the state of mind of the various persons who exercise the functions of government.[2] It would be intolerable for an American

[1] See also Mill, *Representative Government*, pp. 114–118, and Sidgwick, *Elements of Politics*, pp. 406–409.

[2] Mr. Gladstone says of the British Constitution, "It presumes more

to be compelled to commit his fortune and his family to the protection of such a Constitution. The American has never put such confidence in man. He has placed over his head a good deal of governmental architecture. He would not easily be persuaded to trust his all to the ability of a few groups of men to preserve perpetually a balance of forces so delicate that they do not admit of intelligent definition. The English have never deliberately committed themselves to such a constitution. It has come to them as a result of forces which they could not or did not choose to control. The English are as courageous under their Constitution as are Americans under theirs, yet they are obliged to put confidence in men as the Americans do not. I once tried to point out to a Birmingham Radical the perils of the English Constitution. He replied that every Englishman was at heart Conservative; that this was as true of the labouring man as of the nobility. The checks which the American expects to enforce by judicial process the Englishman expects to maintain by the state of mind of the citizen.

The thing that I wish to make clear in this discussion is that both in English and American Constitutions are found systems of checks and balances. When Mr. Bagehot argues that the English Constitution is without checks and balances, he means that it is without legal and authoritative checks. Yet no writer has more clearly set forth those modifying influences which I have here called checks than Mr. Bagehot. Mr. Hearn attaches a great deal of importance to parliamentary practice as a constitutional factor. It is important because it has served as a check upon hasty legislation.[1] Mr. Hearn quotes Bentham as calling this "the original seed-plot of

boldly than any other upon the good sense and good faith of those who work it." *Gleanings*, 1, p. 245, quoted by Hearn, *The English Government*, p. 190.

[1] *The Government of England*, p. 556.

English liberty." Yet, since Hearn's book was written this important constitutional barrier has been much weakened. The rules of the House formerly gave unlimited time for debate ; they protected each member in his right to take part in the business. But this is so no longer. It would be difficult to find a better illustration of the fact that the English Constitution rests for its support simply upon the state of mind of the men who govern, than may be found in the recent history of parliamentary practice. About 1878 a few Irish members determined that they would prevent legislation for other parts of the United Kingdom till certain measures were carried for Ireland. The rules of the House made it possible for them to carry their plans into effect. This was the beginning of that sort of obstruction which the Duke of Devonshire, in a sentence already quoted, calls "rebellion against our Constitution." The rules of the House could stand unchanged so long as all the members of the House maintained a reasonable degree of consideration for the wishes of their associates. By their obstructive policy the Irish compelled attention, and forced from the majority many concessions. But this is legislation by minorities, or it is legislation by physical force, and the policy has resulted in the destruction of that feature of the Constitution which formerly served as a check against the too hasty action of the majority. The rules of the House have now been changed so as to give to the majority the power to close debate.

The Irish members resisted the first amendments to the rules. These required the Speaker to first express the opinion that the majority of the House wished to close debate. Then two hundred members must vote with the majority for closure. But when in 1888 the Conservative Government introduced a proposition to amend the rules so that without the initiative of the

Speaker the majority, supported by only one hundred votes, could close debate, the Irish leaders supported the measure. One of them, Mr. Dillon, expressed surprise that such a proposition should come from a Tory Government. He had supposed that the Tories were opposed to hasty and radical changes in the English Constitution. Mr. Dillon declared himself in favour of the measure because he was in favour of speedy and radical changes. He referred to the policy of Home Rule which the Liberal party at that time had espoused. Obstruction served the purposes of the Irish members when they stood alone, but with the prospect of having a majority of the House to support their policy it was equally to their advantage to have the power to prevent delay. With this change in the rules an ancient barrier to hasty legislation disappears. From what has been said and from what remains to be stated, it will be seen that in so far as the English Constitution is democratic it is without legal checks. The checks and balances which belong to the new Constitution arise from habits, and customs, and understandings. The legal checks which remain are not, in form at least, democratic. They are survivals of the earlier Constitution.

CHAPTER IV

THE HOUSE OF LORDS

THIS discussion of the English Constitution has hitherto proceeded upon the assumption that all powers rest with the Commons, and almost wholly ignoring, for the time being, the existence of the House of Lords. That body is now to be considered.

The membership of the House of Lords is more complex than is that of the House of Commons. There are, first, Lords Spiritual and Lords Temporal. The Lords Spiritual consist of the Archbishop of Canterbury, the Archbishop of York, the Bishops of London, Durham, and Winchester, and twenty-one senior Bishops of the Church of England. These all become members of the House of Lords by virtue of occupying a church office or appointment to one. Appointment to any one of the five chief bishoprics confers the privilege of a seat in the House of Lords. Of the remaining twenty-one, those who have longest held a bishopric are entitled to seats. When one of the twenty-one dies or retires, the bishop who has been longest in office succeeds to the privilege. According to an ancient theory of the Constitution, all the people of England belong to the one Established Church, and, in harmony with this theory, the Bishops in the Upper House are held to represent the moral and religious interests of the people. They also directly represent the clerical estates of the realm. In Scotland the laws recognize one of the Presbyterian

Churches as the Established Church, and in Ireland, where a majority of the people are Roman Catholics, no church has been recognized by law since 1869 as forming a part of the government. From Scotland and Ireland, therefore, there are no Spiritual Peers.

The Temporal Peers include four hundred and ninety-six Peers of England and of Great Britain (there are besides fourteen peers who are minors, and not yet entitled to seats in the House), sixteen Scottish Peers, twenty-six Irish Peers (the legal number of Irish Peers is twenty-eight, but at the date of writing, 1896, two of the number had been created Peers of Great Britain), and four Lords of Appeal, often called the Law Peers. The four Law Peers are appointed for life, and they, together with the Lord Chancellor, who is the presiding officer, and the ex-Lord Chancellors attend to the judicial business of the House. The sixteen Scottish Peers are chosen by the entire body of the Scottish peerage from among their own number, and hold office during one term of Parliament; that is, the term of a Scottish member corresponds to that of a member of the House of Commons. The Irish members are likewise elected by all the Irish Peers from among their own number, but they hold office for life. An election occurs only in case of vacancy caused by death. Scotch and Irish Dukes, Marquises, and Earls usually sit nominally as Barons or Viscounts, etc., in the Peerage of Great Britain or England. The entire English Peerage and the Peerage of Great Britain are members of the House of Lords. Of these there were, in 1896, five Princes of the Blood, twenty-one Dukes, twenty-two Marquises, one hundred and eighteen Earls, twenty-seven Viscounts, and three hundred and three Barons: in all, four hundred and ninety-six. Baronets are not regarded as nobles, and have only the title "Sir." Thus, in general, those who in their own right belong to the titled

nobility are members of the House of Lords and constitute the Peerage.

One who is by right a Peer cannot hold a seat in the House of Commons. But there are many members of the Commons who are called Lords. This arises from the fact that sons of Peers above the degree of a baron commonly enjoy the use of a title by courtesy. If the Marquis of Hartington had been a marquis in his own right, he would have had a seat with the Peers, and would have been disqualified from holding a seat in the Commons. Being the oldest son of the Duke of Devonshire and heir to the dukedom, he enjoyed by courtesy his father's second title of Marquis. But when he became the Duke of Devonshire, upon the death of his father, he could no longer hold a seat in the House of Commons.

A peerage is created by letters patent issued by the Crown, conferring upon a man the rank and title of Baron, or one of the superior titles. When the peerage is once created, it cannot be destroyed by any definite process known to English law. The rank and the title descend perpetually to the oldest son of the ennobled man. The bestowing of a peerage in ordinary form involves making the recipient a member of the House of Lords during his lifetime, and his oldest son after him perpetually. But the heir of the deceased Peer does not have a right to a seat in the House of Lords until he has reached the age of one-and-twenty. The oldest existing peerage was created in 1264. Only nine have a date earlier than the fifteenth century, while a large majority of them have been created since 1800.[1]

From the foregoing description it is evident that there is nothing democratic about the composition of the House

[1] For further details as to conditions of membership in the House of Lords, see Anson, *Law and Custom of the Constitution*, Vol. I., Chap. VI.

of Lords. The Bishops are members by virtue of appointment to a bishopric, and the tenure is for life. The Scottish Peers, it is true, are newly elected whenever the House of Commons is dissolved; but only the few who hold the rank of Scottish Peers have a voice in the election, and they may choose only from their own number. The Irish members are elected in the same way, but the election is for life. Four-fifths of the entire body hold office by the favour of the Crown, or by reason of the fact that they are the oldest sons of Peers. The only way in which the House of Lords may rationally be claimed to represent the masses of the people, is by disregarding entirely the composition of the House, and by showing that, as a matter of fact, it performs a function which the masses of the people approve. The Upper House is often described as representing the Hereditary Nobility, the Landed Aristocracy, the Clergy of the Established Church, and the high official class in the Army and the Diplomatic Service. In the curt phrase of recent English political debate this House represents "the Classes."

Of the five hundred and fifty members of the House of Lords, from twenty to thirty habitually attend its sittings. On rare occasions, when a vote of unusual importance is to be had, the party whips succeed in drumming up an attendance of two hundred. Against Mr. Gladstone's Home Rule Bill, in 1893, there was in the House of Lords the phenomenal vote of 419 to 41. Three members constitute a quorum for doing business. A large majority of the members are almost never seen in the House. The House of Lords holds sessions five days in a week, and these are usually less than two hours in length. It will be seen as this discussion proceeds that this comparative freedom from legislative duties is a matter of great convenience to those members of the Cabinet belonging to the Upper House as affording leisure for other

important labours, and the exemption is of especial value to the Premier who chances to be a Peer.

There is a striking contrast between the usual apathy in the House of Lords and the spirit and life of the House of Commons. Nearly every member of the Commons habitually attends its sittings. On important divisions each of the two parties musters nearly all its force. The House sits five days in a week, and from six to nine hours a session.

The plan of the room in which the Lords meet resembles that of the Commons. The presiding officer is called the Lord Chancellor. He is a member of the Cabinet, selected as are other Cabinet officers, and is usually a lawyer of high rank. After he is elected, if not already a Peer, he is usually made a Peer by the Monarch. His seat is in front of the throne, and is called the "Woolsack." As in the Commons, the Cabinet officers occupy the front bench to the right of the presiding officer. The members of the Opposition are on the left. When a Conservative Cabinet is in office, the benches on the left are mostly vacant. The great body of the Lords are Conservatives, but it has always been possible, thus far, for the Liberals to find enough Lords to vote with them to maintain in the Lords a show of opposition to the measures of a Tory Cabinet, and to furnish a few Cabinet officers when the Liberals are in office. However, as at present constituted the House of Lords belongs mainly to one political party, and, as compared with the House of Commons, it is a dull and uninteresting place. It is said that many of the more active and ambitious Lords would prefer to be members of the Commons. There is a certain seat in the gallery of the House of Commons that has gained the name of "Earl —— Seat." The Earl often sits there and listens to the proceedings of the Commons. He gets as nearly into the House where England is governed

as the law will allow, and there he sits like a caged lion, regretting, as many believe, the fortune which has cut him off from active participation in the labours of the sovereign branch of Parliament.

In the account of those governmental agencies which centre in the House of Commons an extensive system of checks and balances has been described, not one of which is recognized by law. But the House of Lords is a legal check upon the Commons. No legislative act of the Commons will be recognized and enforced by the English courts which has not also received the sanction of the Lords. This is a fact of great constitutional importance.

Suppose we concede for the time being that the Lords have no power to resist or reject a measure passed by the Commons, yet the mere fact that they must review the acts of the Commons and may propose amendments is a thing in itself important. The Lords at least give to the Commons the opportunity of reviewing their own acts, and thus exercise an important constitutional function. It is the need of such a function which is the basis of the bicameral system of legislative bodies. Those philosophers are wide of the mark who seek to account for the existence of the bicameral system by the accident of two houses in the English Parliament. It would be more rational to account for this theory of the philosophers by the accident of the peculiar organization of one house in the English Parliament. The Cabinet and the House of Commons are so related as to meet in a measure the needs of a double chamber. First, a measure is discussed in secret Cabinet meetings and gotten into form for presentation to the House. Then the Cabinet has an opportunity to review its own action while its measure is being debated in the House. It is on account of this peculiar structure and method of the House of Commons that to those familiar with its action a second chamber should

seem superfluous. But from its own nature a legislative chamber is in need of an opportunity to review its acts, and the simplest constitutional machinery for effecting this is to place two chambers side by side, and to require the acts of each to be passed upon by the other.

The House of Lords does more than fulfil this simplest and most elementary function of a second chamber. The business of the House of Commons was found to be divided into two classes, Cabinet and non-Cabinet measures. The Cabinet measures are those in which the public is most interested. Many of these are bones of contention between the two parties. There is also a large amount of legislation which, while receiving little public attention, is nevertheless of great importance to the people. In this field of legislation the House of Lords has a free hand: it may reject at will any non-Cabinet measure which the Commons passes. For more than fifty years there have been members of the Commons who have believed that a law ought to be passed which would permit a citizen to marry his deceased wife's sister. Such a bill has passed the Commons many times, and as many times has been rejected by the Lords. So long as this measure appears and is passed through the Commons as a private bill, the only way in which it can be made into a law is by convincing a majority of the voting Lords that they ought to vote for it. One of the wits of the day has explained the oft-repeated rejection of this bill in the House of Lords by the statement that there has not been a time during the last fifty years when a majority of the English voters really wanted to marry their deceased wives' sisters. If this bill should be introduced by a Cabinet which enjoyed the confidence of the House of Commons, and if the majority in the Commons enjoyed the confidence of a majority of the voters, then the House of Lords would

cease to have a free hand. In that case the Constitution requires the Lords to pass the bill or to allow it to pass, without regard to the individual opinions of the members.[1] It thus appears that in respect to a large and important branch of legislation the House of Lords has equal and coördinate powers. It may initiate important legislation by introducing bills; it may prevent legislation by rejecting bills passed by the Commons.

Of the fourteen prescriptions, customs, or rules of the English Constitution which Mr. Dicey gives, the eleventh is thus stated: "If there is a difference of opinion between the House of Lords and the House of Commons, the House of Lords ought, at some point (not definitely fixed) to give way; and should the Peers not yield, and the House of Commons continue to enjoy the confidence of the country, it becomes the duty of the Crown, or of its responsible advisers, to create or threaten to create enough new Peers to override the opposition of the House of Lords and thus restore harmony between the two branches of the legislature."[2] If previous statements in this chapter are correct, this applies only to what has been called Cabinet legislation, and cannot apply to non-Cabinet measures. Of the constitutional relation of the House of Lords to the Cabinet legislation of the Commons it would be difficult to find a more clear, concise, and correct statement than Mr. Dicey has given. From the very form of the statement it is evident that we are dealing with mere understandings rather than with laws.

A bill passed by the Commons must also pass the Lords before it becomes a law. This is not simply an understanding; it is law. The courts do not recognize as law acts of the Commons alone. In this sense the House of Lords is a legal check upon the Commons. Under cer-

[1] See Dicey, *Law of the Constitution*, p. 384 *et seq.*

[2] *Ibid.*, p. 346.

tain conditions the Lords must vote for the measures of the Commons whether they approve of them or not. This is not law, for no English court has recognized it as law. It depends for its observance upon the state of mind of those who govern.

To understand more fully the relation of the House of Lords to Cabinet legislation it is well to remember the constitution of the House of Commons and all the governmental forces which centre in it. It will be observed that Cabinet legislation is party legislation. And since, as we have seen, the House of Lords is at present composed chiefly of one political party, it naturally holds a different relation to the Cabinets of the two parties. When the Conservatives are in power, the two Houses are harmonious, and, in the case of a newly elected Conservative House, all the chief parts of the Constitution are in political harmony. A bill introduced by a Conservative Cabinet is in the hands of its friends during all its stages while passing through both branches of the legislature. If it is amended, the work is done in a friendly spirit. The House of Lords would not throw out a Conservative bill unless the dominant element in the party was ready to reject it. The Lords would not go to the extreme limit of forcing a Conservative Cabinet to appeal to the constituents on one of its measures. Such an appeal would be absurd and unintelligible. It would be one part of a political party appealing to the voters against another part of the same party. It would demoralize the party and paralyze the Constitution. The only constitutional way in which the Lords could force the Conservative Government to dissolve Parliament would be by a majority of the Lords joining the Liberal party and then forcing an appeal with the intention of electing a Liberal Cabinet.

With a Conservative Cabinet, the House of Lords is a

friendly advisory body. The Cabinet bills are received after they have passed the Commons. The Cabinet members, who sit at the right of the Lord Chancellor, support the measures. They have at their back a large majority to ratify every proposition. The few Liberal leaders who occupy the Opposition bench do not ordinarily think it worth while seriously to resist. A diminished majority in the Commons is often attended with serious consequences. Such a vote in the House of Lords is generally without consequence. To a Conservative Cabinet, then, the only point of serious resistance is in the House of Commons. From this it will seem that the Liberals are under a stronger temptation to use obstructive methods in the House of Commons than are the Conservatives. A Conservative Cabinet may legislate for seven years with little regard for the wishes of the nation. A law compels an appeal to the nation at the end of seven years; but if the majority in the House of Commons proves steadfast, there is no power to force an earlier appeal.

With a Liberal Cabinet the case is different. The Cabinet officers in the Lords are confronted by a large Opposition majority. These may not only propose amendments for the sake of criticism; they may also carry amendments. These amendments being made by the Opposition party are sure to be regarded as unfriendly. The Liberals are often compelled to accept amendments or to incur a troublesome alternative. A Liberal Cabinet is thus required to face two serious oppositions, while a Conservative Cabinet faces only one. The Conservative Opposition in the House of Lords may destroy by amending or may reject entire a bill passed by a Liberal House of Commons. When they reject a Cabinet bill, it means that they are ready to appeal to the English voters on the matter at issue, and in case of such an appeal the burden falls upon the Commons rather than upon the Lords.

In quoting from Mr. Dicey the passage given above, attention is called to the words, "should the Peers not yield, and should the House of Commons continue to enjoy the confidence of the country, it becomes the duty of the Crown," etc. This implies that the House of Lords may refuse to yield, and may thus force the Commons to test the question whether they continue to enjoy the confidence of the country.[1] A Liberal Cabinet may have a large and constant majority in the House of Commons, and may nevertheless be forced by the attitude of the House of Lords to hold an election.[2] It is not maintained by any authority on the English Constitution that the extreme measure may be taken to compel the Lords to yield to the Commons unless it has been made evident that the Commons themselves are in accord with the nation on the matter in dispute. The House of Lords is thus in some sort an arbiter between the Liberal Cabinet and the electorate. This is a position of great constitutional importance. As is natural, there is a considerable amount of hostility to the House of Lords in the Liberal party on account of this inequality of conditions between the two Cabinets. It may well happen, however, that a Conservative Democracy may come to feel that the Liberal party, or the party of change, is in need of more effectual checks than is the Conservative party. It may be well to maintain an institution which may at any time compel a direct appeal to the English Democracy before some of the measures of the Radical party receive the sanction of law.[3]

Another clause in Professor Dicey's list of customs of the Constitution may call for some exposition,—that which

[1] Resignation of the Ministry does not always follow. See Hearn, *The Government of England*, p. 169 *et seq.*

[2] Anson, *Law and Custom of the Constitution*, Part I., p. 251.

[3] See Sidgwick, *Elements of Politics*, p. 444.

mentions the duty of the Crown, or of the Ministers of the day, to force the Lords to yield. Of course it is understood that this is not law; it is theory; it is an understanding. Let it be observed that in the use of the word "Crown" and the phrase "its responsible advisers," Mr. Dicey means one and the same thing. As will be explained farther on, the Crown and the Ministry, or the Cabinet, as the terms are now used, are often identical in meaning. The case under discussion supposes that the Lords have rejected a Cabinet measure, that an appeal has been made to the constituents, and a new House of Commons has been chosen which gives its confidence to the Cabinet; that the same measure is again sent to the Lords, and that they still refuse their assent. This is a clear case of lack of harmony in the Constitution; the sovereign power — that is, the power of the nation — is arrested. Harmony is restored by an appeal to the Executive to overcome the obstruction.

Two facts in the past history of England are cited as indicating the method of securing harmony. The first belongs to a time long before the theory of the subordination of the House of Lords had been developed, and at a time when the personal will of the Monarch was a much larger factor in the Executive than it is to-day. Queen Anne, in 1711, created twelve new Peers in order to secure the passage of a bill through the House of Lords. But the case which is chiefly relied upon in support of this method is that of 1832. The Reform Bill having passed through all the various stages which have been outlined, and the Peers still refusing to yield, the King gave to the Prime Minister a written statement that in case the Lords still remained obdurate he would create enough new Peers to secure the passage of the bill. In view of this threat the Peers yielded and passed the bill. It is out of this case especially that the

theory of the subordination of the House of Lords has been developed. The Lords have in general accepted this position. No case has since occurred where it has been found necessary to put forth a formal threat of packing the House of Lords. When Mr. Gladstone, in 1885, introduced a Reform Bill to which he expected the opposition of the Lords, he used language which would bear the interpretation of a threat. He said that he intended to use all the power which the Constitution of England furnished in order to carry his bill to its final passage. He was understood to mean that if need be he would force the Lords to pass it.

There are strong reasons why the Peers should object to the execution of a threat to pack the House. First, by reference to previous descriptions, it will be seen that such a proceeding would naturally have the effect of changing the politics of the House of Lords. The House would become Liberal in politics. Again, the new peerages would be as permanent as the old; for, as the result of a contest between the Crown and the House of Lords in 1856, an understanding was reached that the Executive may not now create life Peers, but only hereditary peerages. Moreover, the multiplication of peerages for such a purpose would have a manifest tendency to degrade the order. Finally, if the Lords should make such an increase necessary for the purpose under discussion, it would indicate the existence of a revolutionary state of mind in the ruling classes.

The creation of new Peers to overcome resistance in the House of Lords has received much attention in political discussion,[1] because it furnishes to the mind a definite,

[1] For diverse views see Sidgwick, *Elements of Politics*, p. 609; Medley, *English Constitutional History*, p. 258; May, *Constitutional History of England*, Vol. I., p. 253 *et seq.*; Anson, *Law and Custom of the Constitution*, Part I., p. 248; Hearn, *The Government of England*, p. 178

tangible method of meeting a difficulty. Yet the act itself is so extreme, so revolutionary in its nature, that it is no longer seriously contemplated. The Lords are induced to yield through motives less easily defined; through respect for public opinion, through fear of confusion and anarchy resulting from a paralysis in the Government. In practice it would be much easier for a Liberal Government to conquer the resistance of the Lords by cutting off supplies, and holding them responsible before the country for the consequences. There is, however, one possible measure for the passage of which the actual packing of the House of Lords might be rationally contemplated, and that is a bill to reconstruct or to abolish the House of Lords itself.

From what has been said it will be inferred that all Cabinet bills of first rate political importance must originate in the House of Commons. As a matter of fact they do so originate. A bill originating in the House of Lords may, however, when it reaches the House of Commons, be adopted by the Cabinet and thus be assisted on its passage. Such, however, is not the usual course. The House of Lords is not expected to originate bills in that field of governmental business covered by the bills of the Cabinet. In current constitutional discussion, the House of Lords is assumed to be a revisory, or second chamber, and the House of Commons is assumed to be the first, or initiative chamber. According to the older theory of the Constitution the House of Lords has a right to initiate legislation on all subjects except taxation. It is one of the most thoroughly established principles of the Constitution that bills for raising revenue must originate in the House of Commons. It is also understood that the House of Lords has not the power of proposing amend-

et seq.; Pike, *Constitutional History of the House of Lords*, p. 335; Dicey, *The Law of the Constitution*, p. 384.

ments to a money bill. In former generations this understanding was used as a weapon for forcing the Lords to pass obnoxious measures, which were tacked to money bills, and the Lords thus constrained to vote for them. This method has long since fallen out of use, and some authorities affirm that it would now be unconstitutional for the Commons to use such a method of compulsion.[1] Yet a writer in the *Westminster Review* (1889)[2] advocates the employment of this method of forcing the hand of the Lords.

The House of Lords has now come to be pretty generally looked upon as the "Sick Man" of the English Constitution. The doctors are numerous, and they are liberal in their offers of prescriptions. It is comparatively easy to outline a course of conduct for the House as it is now constituted, which would make it a most healthful and useful organ of the body politic. The following are presented as examples of current prescriptions: First, let the Lords lose no time and spare no pains in winning the confidence of the Conservative Democracy of England. The surest way to win confidence is to give confidence. Intelligent confidence is based upon a knowledge of the better self of those in whom confidence is placed. Second, let the Lords fully appreciate the fact that their position as members of one party has *prima facie* the appearance of unfairness to the other party. The ideal which naturally fills the minds of men is that the two political parties should be in all respects in a position of substantial equality. Third, a proper appreciation of this apparent unfairness would tend to induce such conduct as to convince the public that there is no real unfairness. That is, the Lords should be conspicuously faithful in the structural revision of bills from the Liberal Cabinet, because this is

[1] Hearn, *The Government of England*, p. 193.
[2] Vol. 131, p. 227.

a sort of revision which all parties approve. They should be as conspicuously careful not to introduce amendments which would admit of a construction hostile to the spirit and intention of the bill. Few laws were ever passed which did not disappoint a large proportion of those who desired their passage. If the Lords make any amendment of the sort suggested, it is likely to bring upon their heads the odium which comes from the failure of the law to fulfil all expectations. Then, having won the confidence of the Conservative Democracy, having established a reputation for fair dealing with the bills of the Liberal Cabinet, the House of Lords would be in a position to fulfil its supreme constitutional function of securing an appeal to the constituencies on important changes, proposed by the party of change. Finally, in order that this plan should work, it is desirable that the Conservative party should leave to the party of change the task of formulating all radical legislation.

CHAPTER V

THE CROWN

IN a former chapter attention was called to the fact that authorities have not always agreed as to the democratic character of the English Constitution. Some have held that sovereign power rests with the Monarch, that the entire Constitution is built up around the throne, that he who is called sovereign is sovereign. Those who hold this view find strong support in the forms of English law. Behind the Woolsack in the House of Lords, upon which the Lord Chancellor presides, is a throne. This reminds one of a time when the Monarch was an actual and integral part of this most ancient branch of Parliament, and it helps to explain the legal fiction that the Monarch is still a part of Parliament. According to the forms of law it is the Queen who summons, dismisses, and dissolves Parliament. The two Houses are the Queen's High Court for deliberation and legislation. The Queen's speech outlines the business of Parliament. It is the Queen who appoints and dismisses the Ministers who make up the Cabinet. The Cabinet asks supplies for the Queen's Government, and, in the accepted phrase of the day, it is the Queen's Opposition who sit on the benches across the way and criticise the doings of the Cabinet. Parliament is the Queen's agent for making laws and for voting supplies. The courts of law are her agents for deciding cases at law. Judicial processes are all in the Queen's name.

A passage from Mr. Bagehot's *English Constitution* puts in strong light the legal relation of the Queen to the Executive business of the realm. "When the Queen abolished Purchase in the Army by an act of prerogative (after the Lords had rejected the bill for doing so), there was a great and general astonishment. But this is nothing to what the Queen can by law do without consulting Parliament. Not to mention other things, she could disband the army (by law she cannot engage more than a certain number of men, but she is not obliged to engage any men); she could dismiss all the officers, from the General Commanding-in-Chief downwards; she could dismiss all the sailors too; she could sell off all our ships of war and all our naval stores; she could make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. She could make every citizen in the United Kingdom, male or female, a Peer; she could make every parish in the United Kingdom a "University"; she could dismiss most of the civil servants; she could pardon all offenders. In a word, the Queen could by prerogative upset all the action of civil government within the government, could disgrace the nation by a bad war or peace, and could, by disbanding our forces, whether by land or sea, leave us defenceless against foreign nations."[1]

All this is exceedingly puzzling to a matter-of-fact American. In former chapters the English Constitution is described as centring in the House of Commons, and it is found to be thoroughly democratic. When compared with our own government, it seems to us perilously democratic, — a democracy lacking nearly all the legal checks and balances which our own constitution-makers have devised for the purpose of restraining a rampant or ill-advised democracy. This democratic view of the Constitution is also seen to be the correct one as set forth by the

[1] *English Constitution*, p. 32, Introduction to second edition.

highest English authorities. But here is another view of the Constitution, or laws, in which the Queen is made the source and centre of power and authority. It is natural that an American should ask for an explanation.

In the first place, it should be observed that the Queen is not said to exercise these powers, or to be entitled to do so by the Constitution; they merely belong to her according to the *forms of law*. It is not the Constitution, but the forms of law, by which such power is attributed to her. In America we arraign a criminal in the name of the state, or in the name of the people of the state in which the crime was committed, but the people of the state have no direct share in his trial; the criminal has to do with a judge and a jury. The fact that in England the name of the Queen takes the place of "people" in the legal formula gives her no judicial power. No one claims that the Monarch has any direct share in judicial business. So in respect to all the forms which connect the name of the Queen with the acts of Parliament; they are merely forms. The Ministers write the Queen's speech. Parliament determines its own sittings. An act which has passed the two Houses of Parliament requires the Queen's signature before it is completed, yet Mr. Bagehot, from whom I have quoted the declarations respecting the high prerogatives of the Queen, is most emphatic in his denial of the Queen's constitutional power to withhold her signature.[1] The signing is merely a form. Indeed, so far as judicial and legislative business is concerned, the Crown is almost without power.

The case of the Executive is different. All admit that the Monarch does have some share in executive business, and through the relation of the Crown to the Cabinet, the Monarch may affect the Parliament. If she has any influence upon the judiciary, it is through the executive act of

[1] Bagehot, *English Constitution*, p. 125.

appointing judges; but in that matter she is bound to be guided by the advice of the Lord Chancellor. All that is important in the constitutional position of the Crown is found in the Executive.

There are five terms used in the discussion of the English Constitution the meaning of which should be carefully noted. These are the Crown, the Executive, the Ministry, the Cabinet, and the Government. As the words are sometimes used they all have the same meaning. They mean the body of high officials who are responsible for the public business. It is often said that the Crown does a thing, or the Queen does it, when the meaning is that the Ministers do it. As now understood, the Constitution does not permit the Queen, by her own will and on her own responsibility, to perform any executive act. What the Queen does must be done through her Ministers. Yet the term "Crown" is often applied to the personal influence of the Monarch upon the Ministers. "Executive" is a comprehensive term applicable to the Crown and the Ministers together. The "Ministry," as the term is sometimes used, differs from the "Cabinet" in that it includes a larger number of officers. The Cabinet is composed of fifteen, more or less, of the chief executive officers. The Ministry includes additional high officials. When a Cabinet resigns, and a new one is formed, it involves a change of three times as many officers as are in the Cabinet. As the terms are generally used, however, they have the same meaning. "Government" is a frequent substitute for "Cabinet." The Opposition criticise the Government, the Cabinet, the Ministry, and sometimes the Executive. But when the Executive is made the subject of hostile criticism, the term is used as synonymous with the other three. The Crown is not usually made the subject of hostile criticism, nor is the Executive criticised when the term is intended to include the Monarch.

The key to the reconciliation of the conflicting theories of the Constitution is found in the statement already made, that the Queen cannot on her own responsibility perform any executive act. She is not made the subject of criticism, nor is there any way known to the Constitution whereby the Monarch may be punished for wrong-doing. She may not be sued, she may not be impeached. But the Ministers of the Crown may be sued, they may be impeached, and, as we have seen, they may be driven from office for official wrong-doing. In order that some one may be held amenable to the laws and to public criticism, it is understood that for every executive act there must intervene an executive agent who may be publicly arraigned for the act, criticised, and, if need be, punished.

This is not a mere understanding; it is law. Read again the list of high-handed acts which, as Mr. Bagehot has told us, the Queen may perform by her sole prerogative without consulting Parliament. Notice that we are not told that the Queen can do those things on her own responsibility. Not one of those things can she do except through a public official, and the public and the courts of law hold the Minister answerable for the act. As thus construed the prerogative of the Crown means certain acts which may be done by the Executive without consulting Parliament. For all these acts the Cabinet is called to an account in the House of Commons. Every day the Ministers are questioned about their conduct of public business, and their acts are thus brought to the light of day. If those acts are not satisfactory to the people's representatives, the Ministers are driven from office, and others are chosen who will do the business as the people want it done.

This point may be illustrated by the following passage from Mr. Dicey: "The survival of the prerogative, conferring as it does wide discretionary authority upon the

Cabinet [note here the substitution of the word "Cabinet" for the word "Crown"], involves a consequence which constantly escapes attention. It immensely increases the authority of the House of Commons, and ultimately the constituencies by which the House is returned. Ministers must in the exercise of all discretionary powers inevitably obey the predominant authority in the state. When the King was the chief member of the sovereign body, Ministers were in fact, no less than in name, the King's servants. At periods of our history when the Peers were the most influential body in the country, the conduct of the Ministry represented with more or less fidelity the wishes of the Peerage. Now that the House of Commons has become by far the most important part of the sovereign body, the Ministry in all matters of discretion carry out, or tend to carry out, the will of the House. . . . The prerogatives of the Crown have become the privileges of the people, and any one who wants to see how widely these privileges may conceivably be stretched as the House of Commons becomes more and more the direct representative of the true sovereign, should weigh well the words in which Bagehot describes the powers which can still legally be exercised by the Crown without consulting Parliament; and remember that these powers can now be exercised by a Cabinet who are really servants, not of the Crown, but of a representative chamber which in its turn obeys the behests of the electors."[1] Then follows in Mr. Dicey's book the quotation from Bagehot which I have given. If we now read the passage from Mr. Bagehot, and substitute throughout the word "Cabinet" in the place of the word "Queen," we may perceive how prerogative may be reconciled with a democratic Constitution.

The House of Lords is not democratic in its structure, nor has it thus far been democratic in its practical work-

[1] *The Law of the Constitution*, p. 392.

ing. The Lords may furnish a good deal of resistance to the measures of the Commons, and when they do resist, there is no way to overcome their opposition but by a process almost revolutionary in its character; that is, by filling the House with new members or by withholding necessary supplies. We now reach the conclusion, upon the high authority of Mr. Dicey, that through the conferring of many high prerogatives upon the Crown by the form of English law, the English Democracy are provided with an additional means of making the government still more democratic. The Cabinet has a sort of two-edged weapon. The edge for daily use is Parliament. Yet, if the Upper House of Parliament become obstructive, a democratic Cabinet may resort to the use of prerogative, and thus accomplish its end without reference to the will of the aristocratic House.

Mr. Dicey does not rest his case upon a mere theory; he gives an actual instance. In the conduct of executive business there had long existed the custom of purchasing the salaried offices in the Army. In 1871 a Liberal Cabinet passed a bill through the House of Commons to abolish Purchase in the Army. The Lords refused to pass the bill. The Cabinet immediately removed the abuse by using the prerogative of the Crown. Mr. Dicey thinks that had it not been for this second weapon in the hands of the Cabinet the practice of Army Purchase might have continued to the present day.[1] This may be reconciled with former statements as to the power of the Commons over the Lords by the reflection that while theoretically the Cabinet has the power to force the hand of the Lords, it is in fact inconvenient and sometimes impossible for it to do so. In respect to all that branch of business which is covered by the prerogative of the Crown the thing desired may be done without consult-

[1] Dicey, *The Law of the Constitution*, p. 393.

ing the Lords. The especial force of Mr. Dicey's contention is seen in the reflection that not only is royal prerogative democratic in its character, but it is more democratic than is the power not covered by the royal prerogative, in that it may be exercised without the check of the House of Lords.

No better illustration can be found of the teaching that the English Constitution rests upon theory. Royal prerogative strengthens the Democracy only upon the theory that the English voters, through the choice of members of the House of Commons, govern England. The theory assumes that the Cabinet is at all times responsive to the wishes of the House and that the House is at all times responsive to the will of the nation. Royal prerogative is democratic only when it is used to overcome the resistance of an undemocratic House of Lords. There have been in the past kings and cabinets who used royal prerogative to overcome resistance in the House of Commons and to rule without reference to the will of the nation. Circumstances might arise in which the same thing would happen again. In that case royal prerogative would be anything but democratic. What Mr. Dicey says of prerogative is true so long as a certain theory of the Constitution works in a certain way. His contention is that royal prerogative strengthens the leading factor in the nation. At a time when kings were dominant, prerogative strengthened the Crown. When the nobles held the chief power, prerogative strengthened the House of Lords, and as the Commons and the voting constituencies gain the leading place, prerogative gives additional force to the Democracy.

We are now prepared to reconcile the English Constitution as seen from the standpoint of English law with the same Constitution as seen from the standpoint of the facts of government, and we do this by saying that the

forms of law require a series of statements which at the present time are not true. Yet it would be a great mistake to suppose that because the forms of law are in conflict with the actual facts of the Constitution, these forms have therefore no effect upon the actual Constitution. One very marked effect is the tendency which is thus produced to prevent the real Constitution from being reduced to definite written form. When one law contradicts another, it is not possible, or at least it would not be convenient, to put them both into definite written and authoritative form. So long as the forms of law represent the Queen as summoning, directing, dismissing or dissolving the action of Parliament, it would appear inconsistent were there enacted a definite and explicit law placing the management and direction of Parliament in the hands of a legally constituted Cabinet. But so long as these forms are traversed by a series of mere understandings which have never found expression in any official or authoritative way, the inconsistency is not so troublesome. It would make sad havoc with many legal customs and forms of English law if the real Constitution were put into definite and authoritative form; and the English Constitution reduced to definite and authoritative form would really be a very different Constitution from what it now is. A constitution which is made by gradually coming, through contention and conflict, to understandings which contradict the forms of law, is unique in its character. If you reduce such a constitution to writing, you destroy its essential character and put an entirely different one in its place.

The startling character of the English democratic Constitution as compared with the cautiously constructed American Constitution is noticed in a preceding chapter, and the statement is there made that the English themselves never deliberately formed such a constitution. We

have now reached the most important fact in explanation. The ancient theory of the Constitution made the Monarch the centre of power and authority. Around the Monarch all the high governmental agencies, executive, legislative, and judicial, were grouped. The forms of law are still in accord with this ancient monarchical Constitution. The modern democratic Constitution has been formed by a series of acts and understandings which have, in the main, left the ancient forms unchanged. Before the English can have effective legal checks in their democratic Constitution they will be compelled to recognize in their forms of law the fact that such a thing as a Democracy exists. A habit, or an understanding, may be a satisfactory or an effectual check, but it is not a legal check. It is exceedingly difficult to conduct a protracted discussion upon the English Constitution without making statements which appear contradictory. The statement just made seems to imply that the present English Constitution is without legal checks; yet I have several times stated that the House of Lords is one such check upon the House of Commons. As regards non-Cabinet legislative business, the Lords have a free hand, and are often an effectual check upon the Commons.

These contradictions inhere in the nature of the English Constitution. Its legal checks contradict the democratic theory. Hence we are driven to maintain that the checks do not exist, or that the Constitution lacks so much of being democratic, or that the people have approved of a thing about which they have never been consulted.

For the sake of illustration by contrast let us notice the corresponding institutions in the United States. The Senate is a legal check upon the House of Representatives, and these are both agencies of the sovereign people. By the creation of these agencies the people have deliber-

ately put a check upon themselves. They have done it by clearly expressed constitutional law. It is difficult to see how they could have done it by a mere understanding. We will suppose now that the people wish to do something in respect to which the Senate stands in their way. For the time being they are not only checked, but they are checkmated. They cannot change the Constitution without the consent of the Senate. They must bide their time and depend upon the slow method of getting new senators by an indirect process. The people here recognize themselves as sovereign, and have checked themselves in such a multitude of ways as almost to destroy all ideas of sovereignty. The English have clung to the forms of law which made the Monarch sovereign, while they have formed a democratic government which is almost entirely devoid of legal checks; and the highest reach of the unchecked Democracy is shown in the attainment by a democratic Cabinet of a wide range of power which bears the name "Royal Prerogative."

We have now to consider what are the relations of the Monarch to the conduct of governmental business. It would be looked upon as highly improper and unconstitutional for the Queen to attempt to influence the judges in the decision of cases at law. It has come to be quite out of harmony with the Constitution for the Queen to attempt directly to influence the action of Parliament. Parliament, as we have seen, is a place for party strife, and the Queen is not expected to be a partisan. But it is not in conflict with the Constitution for the Queen to attempt to influence the Ministers in matters of administration. As has already been explained, the dominant element in the Executive is the Cabinet, and the Queen is not a member of the Cabinet, though she holds a close official relation to the chief Ministerial officers who compose it. "To state the matter shortly,"

says Mr. Bagehot, "the Sovereign has, under a constitutional monarchy such as ours, three rights, — the right to be consulted, the right to encourage, the right to warn. And a king of great sense and sagacity would want no others. He would find that his having no others would enable him to use these with a singular effect. He would say to his minister: 'The responsibility of these measures is upon you. Whatever you think best must be done. Whatever you think best shall have my full and effectual support. *But* you will observe that for this reason and that reason what you propose to do is bad; for this reason and that reason what you do not propose to do is better. I do not oppose, it is my duty not to oppose; but observe that I *warn*.' Suppose the King be right, and to have what kings often have, the gift of effectual expression, he could not help moving his Minister. He might not always turn his course, but he would always trouble his mind."[1] It is not safe to accept this description as setting forth the style of intercourse which actually takes place between the Monarch and the Minister without considerable modification, but it indicates what is deemed fit in the attitude of the Monarch towards the Minister.

Notice again how at variance are the forms of law and the requirements of the Constitution. According to the forms of law the Monarch is the executive, the Ministers are simply his advisers. According to the Constitution the Ministers are the responsible Executive, while the Monarch has simply the right to be informed as to what they intend to do, and to give advice. It is not necessary that the Ministers should follow his advice. In one respect the Sovereign's case is not different from that of other citizens. It is regarded as the especial business of the Opposition in the House of Commons to warn and

[1] *The English Constitution*, p. 143.

to discourage the Queen's Ministers. Through the daily questioning of the Ministers in the House of Commons the right of the nation to be informed as to the intentions of the Ministers is asserted and maintained. And being informed, the nation, through the press, through public meetings, and in many other ways, exercises the privilege of warning or encouraging. Time and again a hundred thousand people have assembled in Hyde Park, London, for the express purpose of warning the Ministers that a proposed action would not be for the good of the country, and a Ministry which may perchance have been deaf to the warnings of the Monarch has heeded the warnings of the multitude. But the Monarch has a right to be informed of the intentions of the Ministers before they are made public. In reply to questions in the House of Commons a Minister sometimes says that the state of public business is such that he thinks it best to withhold the information requested. It is understood, however, that the Ministers have no right to withhold information from the Queen on the ground of the exigencies of public business. In 1851 Lord Palmerston was dismissed from the office of Secretary for Foreign Affairs, partly because he neglected to give to the Queen the information which was her due, and partly because he neglected to give due information to his associates in the Cabinet. It is the duty of the Foreign Secretary to keep the Queen duly informed as to all matters pertaining to foreign relations, and it is the duty of the Prime Minister to keep her informed as to the purposes and plans of the Cabinet in general. As will be explained below, the Prime Minister exercises important powers apart from the Cabinet as a whole. So also each member of the Cabinet as the head of an administrative department has a measure of independent power. Mr. John Morley mentions as a practical power still left to the Crown that the Sovereign may

demand the opinion of the Cabinet as a court of appeal against the Minister.[1] This, as will be seen, is a limitation upon the independent power of the Prime Minister. It does not, in theory at least, limit the power of the Cabinet as a whole.

The Queen being placed in possession of the secrets of the Government, is bound not to use her knowledge in any way to thwart the plans of the Ministers. Early in the reign of the present Monarch Sir Robert Peel, as the head of the Ministry, insisted upon the right of changing the ladies of the Queen's household because the places were held by the wives of his political opponents, and he suspected that through them the Opposition was apprised of the secrets of the Government. The Sovereign may warn his Ministers, he may try to dissuade them; he may not betray them; it is his duty loyally to support them in the policy which they finally adopt, however much it may be opposed to his personal views.

It is understood that the relation of the Monarch to the conduct of Foreign Affairs is a little more close and intimate than his relation to other business. The Queen writes personal letters to other monarchs. Americans will recall the letters written by her to Mrs. Lincoln and to Mrs. Garfield. She was by common consent regarded as the fit person to express the sympathy of the English people with our great national sorrows. The Queen personates the people as does no other official. In matters which are simply personal, matters which are in no way connected with the policy of the Government, the Queen enjoys something like the same freedom in her correspondence which others enjoy. Yet it is found difficult, in practice, for the Queen to correspond with the monarchs of the European Continent without being suspected of interference in matters of state. The monarchs of

[1] *Walpole*, p. 159.

Continental Europe personally attend to important matters of international relations; the English Constitution denies to the Queen any interference in such affairs. Hence complaints have, in recent years, found expression in the public press to the effect that the Queen's private correspondence with European monarchs had tended to complicate the business of English diplomacy. The Constitution requires the Ministers to inform the Queen of their plans before they are fully matured, and it seems to be equally clear that the Constitution requires the Queen to inform the Ministers of all intended personal communications which may be suspected of having an influence upon matters of state.

It is not an easy matter clearly to understand just how much the Monarch does influence the action of the Executive. Not many writers have attempted to analyze carefully, and to separate the personal factor of the Monarchy from the Ministry. Mr. Bagehot leaves nothing to be desired so far as analysis is concerned. He makes clear enough a theoretical distinction between the Monarch and the Cabinet. He gives many facts about the doings of former monarchs at a time when the Constitution was not what it is to-day. He is remarkably explicit and detailed in his information as to what an ideal Monarch might do with a Cabinet under the Constitution as it is to-day. Having convinced us that he, above all others who have attempted to write upon the subject, was capable of illuminating the whole line of contact between the actual Monarch and the actual Constitution, he contents himself with a rather vague remark to the effect that "*we* shall never know, but when history is written, our children may know, what we owe to the Queen and Prince Albert." Mr. Bagehot is definitely opposed to letting the light shine upon certain parts of the Constitution. He says: "Above all things our royalty is to

be reverenced, and if you begin to poke about it, you cannot reverence it. When there is a select committee on the Queen, the charm of royalty will be gone. Its mystery is its life. We must not let in daylight upon magic."[1] This passage from Mr. Bagehot seems eminently fitted to do the very thing which he says ought not to be done; that is, to destroy reverence for monarchy. His book was written more than a quarter of a century ago. In its tendency to destroy superstition and reverence for the persons of monarchs it has been equal to a good many parliamentary committees. The thing that Mr. Bagehot was especially discussing in the passage quoted was royal prerogative. And Mr. Dicey has shed a flood of daylight upon this subject. The matter which is still left in doubt is the amount and the kind of influence which the Queen exerts over the acts of the Executive.

When we think of the habit, in the political life of England, of carefully weighing and discussing every important force, and observe the infrequency of any allusion to the Queen as a political force, we should naturally conclude that she exerts little influence of any kind. Yet if it be true that before the Ministry commit themselves to an important line of administrative policy they must get their plans into definite shape and present them to the Queen, that method alone would have no small influence over the executive policy. Even if the Queen at such times gives none of the wise advice which Mr. Bagehot supposes, the fact that the Ministers explain their policy to such a personage cannot be without influence upon the policy. In like manner, if the Ministry explain in advance their legislative programme, the mere fact of having thus to explain must have an influence upon the programme. In this way, while the Queen has lost every trace of direct

[1] *The English Constitution*, pp. 127–128.

legislative power, yet, in consequence of this connection with the Executive, there may remain to the Crown more than a trace of legislative influence. In the making of appointments to office the current phrase of the day is that the Queen appoints, or that the Cabinet appoints. Now if the Ministers consult the Queen in the matter of appointments, that course alone would exert an influence upon appointments. In a former chapter the Queen's share in the making up of a new Ministry has been explained. In ordinary times the Queen's share is mainly formal and unimportant. The impression, however, prevails that the preferences of the Royal Family do influence the appointment of Ministers. If the Queen did not go through with the form of appointing the Ministers, then some other form would have to be invented, and a change of form would be likely to result in some change in the character of the business. Mr. Bagehot discusses certain conditions under which it may be possible for the Monarch to exercise a real choice in naming the Prime Minister. Parties may be equally divided, or there may be more than two parties, no one of them commanding a majority in the House of Commons. At such a time the Monarch may let the party leaders solve the difficulty as best they can; or, if the Monarch be exceeding wise, he may aid in solving the problem by divining the men best fitted to unite the less partisan elements from different parties. But Mr. Bagehot is careful to explain that at such a time the Monarch is likely to do more harm than good, and that in nearly all cases the wisdom of the Monarch will manifest itself by leaving the party leaders to get out of the difficulty as best they can. So in the matter of driving a Ministry from office, it is still theoretically possible that the balance of other political forces may be such that the will of the Monarch may be a determining factor in a change of the Cabinet. Here again a truly

wise Monarch will almost never think it best to put to the test this theoretic power.

From these statements, it would seem that the power of the Crown as represented in the person of the Monarch is not great, though his influence may be much more than that of an ordinary citizen. The mere fact that the Cabinet is required to inform the Queen of its intended action, may serve greatly to modify that action. As the fact of the continuance of the forms of law which represent the Monarch as the source of power, has tended to the development of an unchecked Democracy, so it is not unlikely that the habit of exempting the doings of the Sovereign from political discussion, is now tending to destroy the political influence of the Crown. As the consciousness of the democratic character of the Constitution becomes more general, it is natural that every important political factor shall become the subject of political debate. To keep the Queen out of the field of debate, it is likely to be more and more necessary to minimize her political influence. It has been possible for an alert ear, at any time in recent years, to catch the sound of an implied censure of the Queen, in that she is believed to have been more loyal to the Government when Lord Beaconsfield or Lord Salisbury was at the head of the Cabinet, than she has been when Mr. Gladstone was Prime Minister. Probably no one is in a condition to say positively that the Queen has been more loyal to one Ministry than to another, yet the vague belief that it is so has tended to develop a spirit of unfriendly criticism. The area of debate is sure to extend with the consciousness of democracy. There is likely to be forced upon the Monarch more and more directly the alternative of being shorn of political influence, or of being brought into political debate. Circumstances might easily arise in which the fact or the suspicion that the Monarch favoured a certain policy, would of itself be a

positive force against the policy. A secret society has not a fair chance in a successful democracy; it is almost sure to be suspected of being worse than it really is. If mysterious influences associated with the Monarch cannot be explained and defended in public debate, they are likely to be misrepresented and turned to a bad account.

At the tomb of Washington the guide is accustomed to say to the visiting pilgrims that during the Civil War the soldiers of both armies visited the grounds, and that it was their custom whenever they met at this spot to lay down their arms and shake hands as friends. Americans cannot be enemies at the tomb of Washington. To the American, Washington personates the deepest feelings of patriotism. In England, the Queen is the sentimental head of the nation, and conveniently personates the feeling of patriotism. I can easily believe that the sentiments that gather about the Monarch are a force of some consequence in the English Government. Mr. Bagehot has taken large account of these sentiments. He represents the chief function of the Crown to be that of deluding the masses of the people into the belief that they are really governed by a monarch, thus preventing them from injurious meddling with the real Government. I do not believe the English people ever were deluded upon this question to the extent that Mr. Bagehot assumes. I am sure they are not so deluded now. I can more easily believe that the few who have felt that their personal interests lay in the perpetuation of the high prerogatives of the Crown have been deluded into the notion that it was to their advantage to maintain all the forms of royal power, and that they have not perceived that they were thus contributing to the formation of the most absolutely democratic Constitution that has yet been attempted in any country. I can understand how an instructed Democracy may insist on perpetuating these

forms which no longer delude for the sake of perpetuating this free and unchecked democratic government.

From this description it is evident that the thing of chief constitutional importance about the Crown is the fact that it is made the centre of certain legal forms and certain formal executive acts which have tended to the development of an extreme and unchecked Democracy. These forms, while nominally in conflict with the Constitution, are in their practical working in entire accord with it. Circumstances might arise in which some of these forms might be vitalized into organs of positive power. Mr. Dicey has suggested a plan by which the Crown may be brought into positive touch with the democratic Constitution. He proposes that it shall be made the duty of the Queen, in the case of laws or parliamentary acts which are deemed to be of unusual importance, to commit such acts to a vote of the people before they shall go into effect. That is, the Queen shall have the power of a discretionary *referendum*. The Cabinet, when balked in the House of Commons, may dissolve Parliament and appeal to the people on the matter at issue. The case of Mr. Gladstone's appeal to the people on his first bill to secure an Irish Parliament is in point. This is like the *referendum*, in that the people, in voting for members of Parliament, are indirectly giving expression on the chief measure in debate at the time.

Again, we have discussed the possibility of the House of Lords fulfilling the function of securing an appeal to the people on important measures which have passed the Commons; as in the case of Mr. Gladstone's second Home Rule Bill. This also is indirect. The obnoxious measure can only be defeated by choosing a majority of the opposite political party. But Mr. Dicey proposes that the Monarch shall have power to secure a direct *referendum*. In that case the people will vote for or against the law

itself. It might readily happen that the people would at the same time defeat a measure which a party has passed and elect a majority of the same party to the House of Commons. In such a case it would be the duty of the party to modify its policy so as to be in accord with the mandate of the sovereign people. It is possible to conceive of this proposed scheme as a sort of revitalization of the now defunct power of royal veto. The Monarch instead of exercising the power in person passes it on to the real sovereign, the people. Certainly, there can be no objection to this proposed revival of royal power on account of its lack of harmony with the democratic Constitution.

CHAPTER VI

THE MINISTRY

AS has already been shown, the Cabinet holds important relations to the House of Commons, the House of Lords, and to the Crown. Indeed, the Cabinet is the very core of the Constitution. It gathers to itself the control of both legislative and executive business.

The following were the members of the Cabinet in 1896: 1. Marquis of Salisbury, Prime Minister and Secretary of State for Foreign Affairs. 2. Lord Halsbury, Lord High Chancellor. 3. Duke of Devonshire, Lord President of Council. 4. Viscount Cadogan, Lord Privy Seal. 5. Sir Michael E. Hicks-Beach, Chancellor of the Exchequer. 6. Sir Matthew White Ridley, Bt., Secretary of State for the Home Department. 7. Mr. Joseph Chamberlain, Secretary of State, Colonial Department. 8. Marquis of Lansdowne, Secretary of State, War Department. 9. Lord George Francis Hamilton, Secretary of State, Indian Department. 10. Mr. George Joachim Goschen, First Lord of the Admiralty. 11. Mr. Arthur James Balfour, First Lord of the Treasury and Leader of the Government in the House of Commons. 12. Lord Ashbourne, Lord Chancellor of Ireland. 13. Earl Cadogan, Lord Lieutenant of Ireland. 14. Mr. Charles Thompson Ritchie, President of the Board of Trade. 15. Mr. Walter Hume Long, President of the Board of Agriculture. 16. Lord James, Q. C., Chancellor of the Duchy of Lancaster. 17. Mr. Henry Chaplin, President

of the Local Government Board. 18. Lord Balfour of Burleigh, Secretary for Scotland. 19. Mr. Aretas Akers-Douglas, Work and Public Buildings.

In addition to these there were about thirty-seven other high offices whose occupants were in the Ministry, but were not members of the Cabinet. The line between the Cabinet and the non-Cabinet Ministers is not definitely fixed. There are about ten offices whose holders are always in the Cabinet, and about as many more whose occupants may be in the Cabinet. The chief factor in determining whether a particular office shall be represented in the Cabinet is the will of the Prime Minister and those most intimately associated with him. When the old Cabinet has been defeated, and the Queen sends for the leader of the victorious party, everybody understands that he is to be the new Prime Minister. The Prime Minister consults with the leaders of his party nearest to him in rank, and they parcel out among themselves the chief offices. They decide what members of the party shall be invited to fill the non-Cabinet offices in the Ministry, and what places shall be regarded for the time as of Cabinet rank. That is, among the list of doubtfuls, they determine what officers shall be invited into the Cabinet. In Lord Salisbury's second Ministry, 1886–1892, Mr. Arthur Balfour was Chief Secretary for Ireland, and not in the Cabinet. Later he held the same office, and was a member of the Cabinet; while in Lord Salisbury's third Ministry the office was held by a Minister not of Cabinet rank. In the second Salisbury Ministry the Chief Secretary for Scotland was at first a member of the Cabinet, and later that office was filled by a non-Cabinet Minister.

Sir Michael Hicks-Beach was a member of the Cabinet in 1888, and was without office. This was unusual. Ordinarily only those who hold important offices in the

Ministry are members of the Cabinet. All the Ministers and all the members of the Cabinet are members of one of the Houses of Parliament. Sir Michael was of course a member of the House of Commons. The peculiarity in his case was that he was in the Cabinet without at the same time holding an office. There are in all about sixty executive offices whose occupants must have a seat in Parliament. Here again the line is not sharply drawn. There are offices which may, by law, be represented in Parliament, but which are not thus represented. For instance, there were in the second Salisbury Ministry forty non-Cabinet Ministers. Only those executive officers who are in Parliament are looked upon as belonging to the Ministry. In the efforts to reform the civil service in the United States a good deal of difficulty has been encountered in the effort to draw the line between the political and the non-political offices. In England so far as home offices are concerned this question is determined by the fact of membership in Parliament. Those are the political offices which the Cabinet determine to fill with members of Parliament. As already intimated, the laws do not permit the filling thus of more than about sixty offices. A smaller number is usually chosen.

A change of Ministry involves a change of the political officers only. The great body of the public servants remain in office. This permanent and non-political administrative force exercises an important influence over the political officers. Were it not for the permanent force, it would not be possible for the Ministry to change so frequently without bringing chaos. With the trained officials at hand the new Minister may carry on the business, and at the same time devote a large share of his time and attention to legislative and other political duties.[1]

The executive officers other than the Monarch may be

[1] See Sidgwick, *Elements of Politics*, Chap. XXI.

conveniently divided into four classes. 1. The Prime Minister. 2. The other Cabinet officers. 3. The Ministers not in the Cabinet. 4. The great body of non-political administrative officers.

As early as 1787 Gouverneur Morris in the convention which framed our federal Constitution spoke of the Prime Minister as the real King of England.[1] Mr. Morris's statement may have been a slight exaggeration at the time it was made, but there can be no doubt of the substantial accuracy of the idea expressed as applied to the Constitution of to-day. The Prime Minister may be fitly characterized as an absolute democratic Monarch. Such an expression seems absurd, but, as has been already intimated, a real understanding of the English Constitution involves the acceptance of a good many logical absurdities. An absolute Monarch would call to his aid a few trusted and secret advisers, and these together would proceed to govern the realm. That is, they would control legislative, executive, and judicial business. Now we have seen in former chapters that the Prime Minister and his associates control legislative and executive business. Through the power of legislation and the power of appointments they likewise exercise a general control over the judiciary. It should be observed, however, that the Prime Minister does not *personate* supreme power; he *exercises* supreme power. The Sovereign is the personification of power. The Prime Minister personifies politics. The reality of his power is greater than are the notions of power which men are likely to associate with the office. This power is democratic because, as formerly shown, forces are constantly at work which make it possible at any time for the Democracy of England to replace the one absolute ruler by another just as absolute. The Prime Minister holds his office, not simply in theory but in fact,

[1] *Madison Papers*, p. 361.

by the will of the people. It would seem that the English Constitution has gone as far as possible in the direction of combining an unchecked Democracy with nearly all that is substantial in an absolute Monarchy. After what has already been said it seems scarcely necessary to state that the office of Prime Minister is unknown to English law. According to the forms of law the Monarch holds the place here attributed to the Prime Minister. Both the office and its distinctive duties belong to the understandings and customs of the Constitution. It would require a bold constitution-maker to write down in black and white the work of the Prime Minister. It would doubtless be impossible to reduce the Constitution to written authoritative form without diminishing his power. Moreover, there being no such office in law, of course no one is ever, in form, appointed to the office. It is customary, though not invariably so, for the Minister who is made First Lord of the Treasury to be the Prime Minister. As the holder of the legal office the position of the Prime Minister does not differ from that of other members of the Cabinet. Among his peculiar duties as Prime Minister are the following: 1. He forms the Cabinet and administers discipline to refractory members of the Ministry; for it is understood that the will of the Prime Minister is a large factor in determining the tenure of office in the Ministry. 2. He is the channel of communication between the Cabinet and the Queen. 3. If he is a Commoner, he is Leader of the House of Commons. The highest reach of power and influence is not attained for the office of Prime Minister unless the holder of the office is a member of the House of Commons. In that case he is the Leader of the House, and has thus centred in himself all the dominant forces of the empire. If the Prime Minister is a Lord, then the office is divided, and the leadership of the House goes to another member of the Cabinet.

While the Prime Minister has much of the substance of absolute power, he is not an autocrat; his power is not self-derived nor can it be self-centred. The Prime Minister usually becomes such because he sees more clearly and expresses more perfectly than do other men the dominant forces at work in the mind of the nation. His personal power is greater in proportion as he succeeds in losing himself and bringing his faculties into harmonious action with the forces which exist independently of himself.

The Prime Minister has some duties independent of the other members of the Cabinet, though the other members of the Cabinet, as such, have no duties independent of the Prime Minister. The Cabinet stands together as a unit. Its meetings are secret; no record is made of its proceedings; the only way by which the public is apprised of its action is by noticing what the Government does. Mr. Bagehot gives an account of a meeting of the Cabinet at which the members were divided in their opinions as to what the probable effect of a proposed duty on corn would be upon the price of corn. Half of them thought that it would increase the price, while the others thought it would diminish it. The Prime Minister put his back to the door, and said, "Now is it to lower the price of corn, or isn't it? It is not much matter which we say, but mind, we must all say *the same*."[1] It matters not how greatly the Ministers may differ in their views in their secret meetings, in the Parliament and before the country, so far as possible, they are expected to speak as the voice of one man.[2] If a particular Minister finds that his conscience will not permit him to support a particular measure of the Cabinet, it is his duty to resign his office in order that one may be chosen who

[1] *The English Constitution*, p. 82.

[2] Anson, *Law and Custom of the Constitution*, Part II., pp. 119–120.

can work in harmony with the Government. When Mr. Gladstone's Government began the war in Egypt, in 1882, Mr. Bright resigned his office and left the Cabinet because his peace principles would not permit him to give his support to a war policy. This exemplifies the principle that each member of the Ministry, so long as he consents to remain in office, is bound loyally to support the Government.

The Cabinet formulates the policy of the Government, both legislative and executive. It then becomes the duty of all the Ministers to seek to carry the policy agreed upon into successful operation. On the other hand, the Cabinet and the Ministers in general are under obligation to render support to each Minister in matters peculiar to his office. It is the aim of the Opposition to find out all the weak points in the administration. If the subject under criticism is a matter of executive policy, it is, in nearly all cases, a particular Minister who receives the brunt of the attack, and it is then the duty of all the members of the Government to shield and defend him as best they can. In Lord Salisbury's first Ministry it was Mr. Balfour, the Irish Secretary, who was especially attacked when the policy of the Government in Ireland was made the subject of criticism, yet it was expected that all the Ministers would defend Mr. Balfour so long as he continued to be an approved Cabinet officer. As a general rule, the entire Cabinet stands or falls together. If a particular Minister, especially if a Minister of Cabinet rank, becomes so unpopular that he cannot remain in office, the entire Ministry resigns.

In discussing this subject Mr. Hearn draws a pretty clear line of demarcation between the legislative and the executive duties of the Cabinet, and he maintains that it is the administrative functions rather than the legislative which should in the main determine the life of a Minis-

try.[1] According to his view the Ministers ought not to resign simply because a legislative measure which they have favoured is defeated, unless the measure proposed is in their judgment essential to their administrative policy. This distinction, however, seems to be little recognized in practice. It was the administrative policy of Mr. Gladstone's Government, as shown in the management of affairs in Egypt, which led to its overthrow in 1885. In the same year a member of the Liberal party proposed and carried an amendment to a bill introduced by the Tory Government which favoured the policy of granting allotments of land to agricultural labourers. This was accepted as a vote of censure, and Lord Salisbury's Government resigned. The next year it was the defeat of Mr. Gladstone's measure for the establishment of an Irish Parliament which led to his resignation. Later, Lord Rosebery's Cabinet resigned because of an adverse rôle against an administration officer. In these cases there appears to be no tendency to discriminate between legislative and administrative policy in determining the life of a Ministry. The Ministers stand or fall together on their policy as a whole. The Opposition are naturally inclined to assail the policy at its weakest point, which may be a defect in administration, or a failure in legislation, or it may be such a combination of the two as to elude strict analysis.

The point to be specially noted here is the principle which makes all the Ministers mutually responsible for each other. In matters of administration they are all equally interested in avoiding scandal, because a scandal which arises from the fault of one may result in driving all from office. The non-Cabinet Ministers may have no share in formulating the legislative policy of the Government; yet it is the duty of each Minister to give his sup-

[1] *The Government of England*, p. 241 *et seq.*

port to the measures which the Cabinet brings forth. These non-Cabinet Ministers are chosen by the Prime Minister with the avowed object, among others, of securing their loyal support both in Parliament and before the country. If a Minister cannot be thus loyal, it is his duty to give place to one who can.

The Prime Minister, the other members of the Cabinet, and the non-Cabinet Ministers are all members of the same political party, and are compelled by virtue of their position to take a partisan view of politics. They are the party in power. A sharp line of distinction is drawn when we pass from the Ministry to those who act under their direction in the administration of the laws. These are compelled by virtue of their position to take a non-partisan view of politics, or, at least, they are required to conduct themselves in office as if they were equally loyal to each political party. They are not members of Parliament. They have nothing to do with the business of outlining policies. It is their duty to render their best service in carrying into effect the policy which others adopt. This is, at least, their theoretic position. Mr. Bagehot intimates that the permanent Under-Secretary who stands next to the responsible Minister does, as a matter of fact, exert an important modifying influence over the policy adopted: yet he cannot be a partisan. His great influence arises from the fact that he is not a partisan. He becomes an expert in the art of reconciling impossible partisan pledges which a Minister has made with an actual policy which will not injure the service. To do this work well he must be without partisan bias. He must have equal sympathy with the Radical and the Tory, and render equally loyal service in helping each out of difficulties which have arisen from ill-advised partisan pledges. The Under-Secretary is the connecting link between the partisan Min-

ister and the army of non-partisan officers in the civil service.

The non-ministerial officers in the service are entirely relieved from all party duties. They neither support nor oppose the party in power. They devote themselves entirely to the task of carrying into effect the policy adopted by the responsible Ministers. They may vote at elections as do other citizens, but they may not take an active public part in political meetings.

The Privy Council. — The Cabinet being a body wholly unknown to English law cannot as a Cabinet give advice to the Queen. The laws assume that the Monarch acts upon the advice of individual Ministers, or upon the advice of the Privy Council. So, according to law, the Privy Council is the source of responsible administration. But the members of the Cabinet are always members of the Privy Council. On its executive side the Cabinet is a committee of the Privy Council,[1] whose business it transacts; while on its political or legislative side, the Cabinet is often called a Committee of the House of Commons.[2] Besides the members of the Cabinet of the day, the Privy Council consists of all who have ever been Cabinet officers, with certain other high officials and the dignitaries of the Queen's household, altogether numbering at present two hundred and twenty. As will be shown in another place, the Privy Council still has some judicial business, but it has lost nearly all its functions in the business of administration.

The history of the Cabinet is the history of the encroachment of a secret body unknown to the law upon the legally constituted executive body. To-day if Parliament wishes to commit any administrative business to

[1] Hearn, *The Government of England*, p. 197; Anson, *Law and Custom of the Constitution*, Part II., Chap. III., Sec. III.

[2] Sidgwick, *Elements of Politics*, p. 386.

an executive body, it must create a body for the purpose, or it may commit the matter to the Privy Council or to one of the established departments. Several of the existing administrative departments were in former times connected with the Privy Council. The Board of Trade was for a time a committee of the Privy Council, called a "Committee of Council for Trade." It is now a department of administration, and is represented in the Cabinet. By an act of 1858 the Privy Council was required to supervise local authorities in the execution of certain laws for the preservation of health. Later, in 1871, these functions were transferred to the Local Government Board and were thus taken out of the hands of the Privy Council. The Council is still charged with the duty of executing certain laws for the protection of domestic animals from contagious diseases. For example, it is still possible for the ports of England to be closed against American cattle by "Orders in Council."

By far the most important duties of administration left in the hands of the ancient Council are those which pertain to the execution of the laws for public education. This important business is not, however, committed to the Council as a whole, but to a committee consisting of the Lord President of the Council, a Vice-President with a staff of clerks. The President of the Council is a member of the Cabinet by virtue of his office. The other members of the Committee are usually members of the Ministry by virtue of other administrative offices which they hold. That is, the Committee is made up by appointing to the various offices persons of ministerial rank. It will be seen from this description that the administration of the various educational acts, while in form placed in the hands of a committee of the Privy Council, is in fact under the control of the Cabinet.

The Privy Council is a survival in the English Consti-

tution. No one thinks of it as at present a source of independent power or influence. The Cabinet is the real Privy Council. Whenever business is to be transacted which the forms of law require to receive the sanction of the body of the Queen's responsible advisers, a few members of the Privy Council are summoned to meet the Queen, and the business is transacted. This is called a meeting of the Privy Council, though it may be attended by fewer Ministers than an ordinary Cabinet meeting. It may even consist of a single Minister in attendance upon the Queen.

CHAPTER VII

THE COURTS

IN the American Constitution the courts of law hold an important place. We proceed upon the theory that our Constitution is written; and in our written constitutions, state and national, we have provided courts for the purpose of passing upon the laws enacted by the legislatures and determining their constitutionality. We do not know, therefore, whether a governmental act is valid or not until a court of competent jurisdiction has passed upon it. We depend upon our courts to tell us what our Constitution means. Our real constitutions are thus found not wholly in the written documents bearing the name, but in the decisions of the Supreme Court of the United States and in those of the highest courts in the various states. The study of the American Constitution is in large part, from beginning to end, a study of judicial decisions. One who begins his study of constitutions with that of the United States is surprised at the omission of the courts in the brief descriptions of the English Constitution. If it were not for this peculiarity whereby the courts are empowered to make void a legislative act, the courts would not be made so prominent in the study of the American Constitution.

In order to get a clear view of the constitutional position of the English courts, it is well to inquire what would be the relation of our courts to the working of our Constitution if they were stripped of the peculiar

power of balking the legislatures. They would still be prominent agents in the administration of the law, and as such would have an important modifying influence upon the working of the constitutions. The lower administrative officers in the English civil service exert an important modifying influence upon the working of the Constitution of England, but it is not easy to explain in detail just what that influence is. In like manner the spoils system as it formerly existed in our civil service has been recognized as a noteworthy factor in the working of our Constitution; yet in a brief treatise upon our Constitution little attention is given to these lower administrative officers. Clearness of ideas seems to require that the details of administration should be separated from a comprehensive view of the Constitution.

The Constitution has to do chiefly with the balancing of the dominant forces of government. In the general government of the United States the power of administration is centred in the President, who is made by the Constitution the responsible head of the Executive. It is easy enough to say in general terms that the form of organization of the various administrative departments does effectually modify the action of the President. Yet if one should undertake to state in detail just how a particular subordinate officer or a particular policy determines the action of the President, he would probably state things that are not true, or at least things that would not be believed. Hence it has come to pass that writers on both the English and the American Constitutions have either omitted from the discussion detailed treatment of the departments of administration, or they have not attempted to trace their connection with the working of the Constitution. To discuss the details of administration in a description of the Constitution as ordinarily defined is to introduce matter which appears foreign to the sub-

ject. In a detailed consideration of the methods of administration, the question of primary interest is seldom a constitutional one. This analysis is given for the purpose of making the American student understand how it is that, but for the fact that American courts can make void legislative acts, their constitutional importance would in large part drop out of sight.

In all the lines of action in which the courts are now in conflict with the legislatures, they would in the case supposed become agents for carrying into effect the acts of the legislature. From the standpoint of the Constitution the courts would be analogous to subordinate agents in the Executive. All would concede that the courts thus viewed were important constitutional agents, but a few vague generalities would exhaust the subject. It would, however, be a great error to suppose that this analogy between the courts and the subordinate administrative offices exhausts the case of the relation of the courts to the Constitution either in England or in America.

Judicial business should be sharply distinguished from ordinary administration, even in those lines of action in which the resemblance is strongest. The administrative officer applies the law to the business in hand, and incidentally he is required to interpret the law. Yet it is not his *business* to interpret law; it is his business to do the things which the law enjoins. Courts are provided for the express purpose of interpreting law. If a citizen objects to the application of the law as interpreted by the administrative officer, he may bring an action in the courts to protect himself from such wrong interpretation. The highest court, having jurisdiction in a given case arising under the law, is, therefore, the final interpreter of the law. In this way the courts, even though they have not under the Constitution any power to traverse the action of the legislature, may give to a law a different

meaning from the one originally intended. Judges who should deliberately use this power to overrule the legislature would be subject to censure, and presumably they might be impeached for it. Yet no fact is better attested than that courts of law, through the process of interpreting and applying the laws, are constantly, although usually unconsciously, modifying laws; and that in course of time they may change their meaning. It may be said that administrative officers, by the process of applying a law to the changing circumstances which arise, likewise modify it and give new meaning to its provisions. But there is this difference: an administrative interpretation may be taken to a court and changed, and if an administrative officer does not follow the direction of the court in the matter he may be arraigned and punished. Yet judicial officers may not be punished for a given mode of applying the law, except by the almost unused process of impeachment.

Theoretically, a legislature which is under no constitutional limitations may always change the law if an unacceptable interpretation be given its acts; yet it is not practically possible for the legislature to provide explicitly for the infinite details of administration. From the nature of the case a wide field must be left for discretionary action. In this field the courts rather than the officers of administration are the final determiners of the specific meaning or intention of the law-makers. If the administrative officers refuse to carry into effect the law as interpreted by the courts, these, under certain conditions, issue orders to the officers and compel them to administer it. If the administrative officer attempts to apply the law in a manner contrary to judicial interpretation, the courts may be used to protect the subject from his action. From this it appears that the courts, without the American peculiarity, serve as a check or modifying

influence upon the legislature and upon the administrative officers, and that they are, therefore, more important constitutional factors than are the lower administrative officers.

But there is a large department of judicial action in England, in which the courts do not profess to be controlled by the action of the legislature. They apply rules and principles which are believed to have had no distinctively legislative origin, but which have arisen from custom and judicial action. Modern legislatures, English and American, simply assume the existence of a common law and leave to the courts the task of determining what it is, and of applying it to ever-changing conditions. It is true that by specific act the legislature may change or supplant the common law; yet here again habit and necessity are a stubborn barrier against change. It is still true, notwithstanding many statutory modifications and reforms, that the courts both in England and America are in possession of large and important powers derived simply from ancient custom and from the necessities of government. As these powers have never been clearly defined, and have seldom been made a subject of constitutional debate, little can be done except to recognize their existence and to classify them as ill-defined influences affecting the Constitution.

While one of the most striking differences between the English Constitution and the American is found in that judicial function whereby an American court may make void a legislative act, the most striking similarities of the two constitutions are found in the organization of the courts in the two countries and in their ordinary judicial functions. In all our constitutions, state and federal, are found clauses affirming in general terms certain inviolable rights of the citizen. In America the courts are accustomed to protect the citizen in the enjoyment of the rights thus enumerated, by restraining both the Legislature and

the Executive. The Bills of Rights in American constitutions contain enumerations of all the clearly definable personal rights named in Magna Charta, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights, and many others not found in any of those documents.

The courts of England perform the same function of protecting the citizen against violations of the provisions of these laws on the part of the Executive, but they are powerless to protect the citizen against violations of Magna Charta or any English law by the Legislature. Parliament might at any time amend or abolish Magna Charta, and the courts could not protect the citizen from the parliamentary act. The personal rights which the citizens of England and America enjoy are almost identical. The citizen of either country is accustomed to look to his Constitution as the source and the guaranty of his rights, but in America a much larger proportion of these rights is explicitly enumerated in the constitutions and the laws. Some of the state constitutions provide that the enumeration of certain rights in the Constitution shall not be so construed as to impair other rights, not there named, which the people enjoy. Yet nearly all rights which are liable to be drawn into controversy are enumerated in the Constitution and the laws. In England this is not the case. Many of the most commonly controverted rights enumerated in all American constitutions, state and federal, are not mentioned in Magna Charta, or in any of the statutes of England. A good illustration of this may be found in the right of freedom of speech. No law or constitutional provision secures to the Englishman any such right; yet the Englishman is as secure in its possession as is the American. The English courts protect the citizen in the right to speak and publish because there is no law against it.[1]

[1] Dicey, *The Law of the Constitution*, p. 251.

There are two fundamental principles in the English Constitution out of which has come a large measure of personal freedom. These are, first, the principle of equality before the law; and second, that the presumptions of law should be in favour of the liberty of the subject. These principles are derived from no written document, but they have a judicial origin. From them are derived the right of free discussion, the right of public meeting, and a multitude of rights and privileges enumerated in our state constitutions. It will be seen from this that the English courts have an even more conspicuous share in making that part of the Constitution which secures to the citizen his personal rights than have the American courts. Our American courts make constitutional provisions under the guise of efforts to give meaning to a written document. The English courts make important constitutional provisions by the application of principles which the court itself is the first to enunciate. In America the courts protect the citizen against the action of legislatures. In England it is the Executive alone which the courts restrain. From the courts of England has come the doctrine that all officers are subject to the law, that the Monarch himself has no power to do violence to the law of the land; that a citizen who suffers injury at the hands of an officer may recover damages in an ordinary court.

The famous documents which are regarded as part of the Constitution of England had their origin in conflicts with tyrannical kings, and mark important stages in the progress of liberty. But the citizen of England searches those documents in vain for a complete statement of the many rights which he knows himself to enjoy under the English Constitution. By far the larger part of these are specified in judicial acts restraining the hand of the Executive. It is possible, also, to find in the action of

English courts a foreshadowing of that transcendent judicial function of making void a legislative act which has been embodied in the American constitutions. While English courts have always bowed to the will of the high court of Parliament, it has ever been their custom to nullify the acts of inferior legislative bodies when they deemed those acts to be inconsistent with the statutes of Parliament or not in harmony with the law of the land. English courts have not hesitated to nullify acts of town councils, and this power to revise or set aside by-laws extends to those passed by colonial legislatures. When the Thirteen Colonies of America, having declared themselves independent of the English government, adopted constitutions which gave to courts of their own the power to nullify acts of the legislature, they but transferred to these courts a power which had been exercised over the colonial legislatures by English courts. When, a few years later, delegates from the states framed a Constitution for the federal government, they extended this function to the Supreme Court of the United States.

The judicial business in England is in the hands of the several following judicial bodies. In the first place, the House of Lords is the court of final appeal for cases arising in the United Kingdom. According to law all the Lords have a right to participate in the judicial business of the House; but it has now come to be one of the well-settled understandings of the Constitution that the judicial business is, in fact, confined to a few members. These are: first, the Lord High Chancellor; second, Lords of Appeal in Ordinary; third, such other Lords as are holding, or have held, high judicial offices. The Lords of Appeal are four in number and are appointed for the express purpose of furnishing to the House high judicial ability to perform this highest judicial function. Much of the judicial business is transacted by the Lord High

Chancellor and the four Lords of Appeal. These are regarded as preëminently the Law Lords, and are life members of the House of Lords. They may participate in all the non-judicial as well as the judicial business of that chamber. They differ, however, from other Lords in that the Peerage does not descend to their oldest sons. When a vacancy occurs, an eminent jurist is appointed by the Crown to fill it. It will be observed that the Lord High Chancellor, who is the presiding officer of the House of Lords and the chief of the Law Lords, is at the same time a member of the Cabinet. It is as if the Chief Justice of the United States presided over the Senate and was at the same time a member of the President's Cabinet. The English Cabinet is an intensely partisan body. The court of last appeal is, according to wisest tradition, furthest removed from partisan politics. Yet the Lord Chancellor is a member of both.

We are accustomed to think of the House of Lords as a branch of the legislature; yet, as explained in the previous paragraph, the House, acting through a few of its members, is the highest court of appeal for the United Kingdom of Great Britain and Ireland. The Privy Council we are accustomed to regard as an executive body, but the Privy Council is also a court of last appeal for cases arising outside of the United Kingdom, in India and in the Colonies. The Privy Council also, in conjunction with certain ecclesiastical officers, hears appeals from ecclesiastical courts. The judicial business of the Council is performed through a committee, known as the Judicial Committee of the Privy Council. This Committee is composed of the Lord President, the Lord Chancellor, the Lords of Appeal, and other high officials who are members of the Privy Council. It will be observed that the Committee is composed in large part of the men who are Law Lords. The Lord Chancellor and the Lords of Appeal

are thus active members in each court. The Lord President of the Council is a Cabinet officer, and is also usually a Peer. Though a member of the Judicial Committee, he is not in all cases a lawyer. The House of Lords and the Privy Council are thus both courts of final appeal, the division of business between them being in the main geographical. The Privy Council is of especial interest to Americans, because it is with this part of the government that the Colonies had most to do; and it was the action of the Council in nullifying acts of colonial legislatures which furnished a sort of precedent for conferring this high function upon American courts.

When the House of Lords acts as a court, the form of procedure is the same as in case of legislative business. Speeches are made for and against the measure. A vote is taken, and a decision is reached in accordance with the vote of the majority. The Law Lords are not distinguished, as a body, from other Lords by any formal act. That is, they are not in form a committee of the House. It is by mere understanding that the Law Lords are relieved from the interference of other members, and that, while thus acting alone, they represent the entire House. The Law Lords are accustomed to hold sessions while Parliament is not in session.

The judicial officers in the Privy Council are in form, as well as in fact, a committee of the Council. The Council being an executive body in its form of organization, the action of the Judicial Committee assumes the form of an executive act. The Committee deliberates in secret, and their decision takes the form of a statement of reasons why the Committee advises the Queen to affirm or reverse the decision in question. Only the opinion of the majority is given in case of a decision by the Committee. In case of a decision by the Lords, the opinion of all who take part in the discussion which precedes the vote is made a matter of record.

Next to the House of Lords and the Judicial Committee of the Privy Council stands the Supreme Court of Judicature. Yet under this title the Court performs no judicial acts, its judicial business being transacted through its two divisions, the Court of Appeal and the High Court of Justice. The Supreme Court as a whole may, however, draw up rules for the guidance of these divisions. The High Court of Justice has three divisions, viz.: 1. The Chancery Division. 2. The Queen's Bench. 3. The Probate, Divorce, and Admiralty Division. There are thus in what is called the Supreme Court, four separate courts. The Court of Appeal is composed of nine judges, three of whom are presidents of the three divisions of the High Court of Justice. From each of the three divisions of the High Court, appeal may be taken to the Court of Appeal, and from the Court of Appeal to the House of Lords. The Chancery Division is composed of five justices besides the Lord High Chancellor, who presides. In the Queen's Bench Division are fifteen justices, one of whom is the Lord Chief Justice. In the Probate Division are two justices. If we add these to the nine judges of the Court of Appeal, we get the number thirty-two, yet there are in the Supreme Court only twenty-nine. The discrepancy arises from the fact that in a few instances the same individuals are members of more than one division. The Lord High Chancellor is not only a Law Lord and a member of the Judicial Committee of the Privy Council, but he is also a member *ex officio* of the Court of Appeal, and is President of the Chancery Division of the High Court of Justice. Likewise the Lord Chief Justice, in addition to his membership in the two courts of final appeal, is a member *ex officio* of the Court of Appeal, and a member of the Queen's Bench Division of the High Court. The justices of the High Court hold sittings in various parts of England.

That branch of the Supreme Court which bears the name Court of Appeal holds its sittings only in London. It is composed of the Master of the Rolls and five Lords Justices, and it usually sits in two divisions, three Lords Justices sitting together, though for certain purposes two are sufficient. In this way its capacity for transacting business is doubled. Each branch is treated as the full Court of Appeal, and the appeal from its decisions is to the House of Lords. The other branch of the Supreme Court, which bears the name High Court of Justice, also through its three divisions, the Court of Chancery, the King's Bench, and the Probate Court, holds sittings in London; and it also, through its justices, holds sittings in the various shires and assize towns in England, with two or more justices sitting together, or, in an assize town, with only one justice. Each of these is a session of the High Court of Justice, and an appeal from its decisions goes to the Court of Appeal. It is by this subdivision into many coördinate parts that the High Court of Justice is enabled greatly to increase its capacity for transacting business.

The various divisions of the High Court of Justice have original jurisdiction in all sorts of cases at law, but the number of judges is not adequate for the trial of all cases. A large part of the judicial business is therefore performed by County Courts established in 1846. England and Wales are divided into about five hundred districts, and these districts are grouped into fifty circuits. A county judge is appointed for each circuit, who holds a court in each of the districts of his circuit. In the making of these districts and circuits, no attention is paid to county lines. Ordinary civil cases involving £50 or less may be tried in this court. Certain other cases, as an action for the partition of an estate or for the winding up of a partnership, may be tried in this court even

though the amount involved is £500. If a case which may by law be tried in this court be taken by the plaintiff to the High Court, the judge may order it back to the county court, or he may refuse to allow the plaintiff a larger sum for the costs of the suit than would have been allowed in the county court. For these reasons the county courts do nearly all the business permitted by law.

The court whose jurisdiction corresponds to the county area is the old court of Quarter Sessions. This court has four regular meetings annually. It is usually attended by a number of the justices of the peace, and it requires two or more of the justices sitting together to constitute a court. It has jurisdiction over a great variety of crimes. The laws specify a few of the higher crimes which this court may not try, but it may try all others. By various special acts, two or more of the justices are empowered to hold courts of equal grade with the court of Quarter Sessions. There are also many petty offences which may be tried in a summary way by one justice of the peace. This is called a court of Petty Sessions.

Until 1888, when the County Councils were created, the justices of the peace in the court of Quarter Sessions attended to a great variety of county business of administrative and legislative character. It still has power to license the sale of liquor.

The courts, for the most part, are free from partisan strife. Their position is clearly defined, and the question of encroachment upon other governmental powers is seldom raised. It will be seen, however, when we trace the development of the Constitution, that this was not always the case, that in the earlier time the courts were eminently political, that they were an important factor in determining the relations of the Crown, the Church, the Parliament, and other governmental agencies to each other.

It will be seen that in still earlier times there existed no separate judiciary in the modern sense, judicial business being not distinguished from other governmental business. There are, indeed, certain features of the present organization which are explained by reference to the ancient union of all governmental functions in one assembly. It is thus that we account for the existence of the judicial business in the House of Lords and the Privy Council. Both of those bodies are derived from the ancient assembly, the Wetan, and later the *Commune Concilium*, in which subsisted all governmental functions.

CHAPTER VIII

THE CHURCH

IN a history of the Constitution of England the Church holds a prominent place; but in the description of the Constitution as it exists to-day it may be passed over almost without notice. Twenty-six bishops of the Established Church are members of the House of Lords, and this fact has something to do with that balancing of political forces which conditions the working of the Constitution. But it is not easy to say just what difference the presence of the bishops makes. They are nearly all Conservatives in politics, as are the other members of that House. If a bill were introduced to exclude the bishops from the House of Lords, the plea would undoubtedly be urged by those who opposed it that such an act is unconstitutional, that by ancient custom the bishops have a right to the privilege. This is certainly true. Yet if such an act were to be passed in the regular constitutional way, by a majority in the House of Commons, supported by a majority of the voters of the nation, in whom the sovereign power of the British government is now held to reside, the Constitution would be thereby changed, or, as Americans would say, amended, and the ancient, constitutional right of the bishops to sit in the House of Lords would become unconstitutional and void.

England is divided into ecclesiastical parishes;[1] and, according to the ancient legal theory of the Constitution, all baptized persons who live in a parish or extra-parochial liberty are members of the Church. As one consequence of this theory the qualified voters of the parish have still a share in the election of Church wardens, part of whose duties are ecclesiastical. The time was when all the people were subject to the rule of the one Church; when Church officers and Church courts attended to a large share of the business now transacted by the civil authorities. As late as 1857 the Archbishop's Court had jurisdiction in questions of marriage and divorce. By act of Parliament this business was afterwards transferred to the civil courts. The Established Church still maintains its ancient forms for legislation, and still has a system of Church Courts; but these governmental agencies are now chiefly exercised on behalf, not of the entire population, but simply of those who profess membership in the state Church. Practically they deal only with the clergy. A dissenting church in England adopts its own form of church government and discipline, and if it does not infringe upon any civil right, it may do anything it pleases with its own members. The Established Church cannot do this. The legislative bodies of the Established Church must secure for their acts the ratification of Parliament before they can be made effective in matters of discipline. Parliament has, however, by special acts, given to the Established Church almost the same powers of discipline which dissenting churches enjoy. These disciplinary powers are enforced by legally established Church courts with an appeal from the Archbishop's Court to the Queen in Council; that is, the judicial committee of the Privy Council. These courts being legal, disregard of their orders may be punished by imprison-

[1] There are certain districts outside of any parish, called extra-parochial liberties, such as Westminster Abbey and Lincoln's Inn.

ment. While a court in a dissenting church cannot punish for contempt, the same practical result may yet be secured by taking the case into an ordinary court, and if the church is found to be within the law, the court will enforce its act of discipline on the ground of a contract between its members to abide by the rules duly authorized.

This ancient organization, which at times has been a dominant factor in the English government, is thus seen to be in many respects scarcely distinguishable from other religious bodies having no connection with the government. The Established Church could be disestablished without the knowledge of the ordinary citizen, if it were not for the existence of Church property. The dissenting bodies, on the one side, claim that a large part of the property now in the hands of the Established Church belongs of right to the nation at large. The members of the state Church, on the other side, claim a right to all the property now used for its support. This is, in the main, a legal and a political question based upon a variety of facts in past history, and such a question cannot fail to disturb the practical working of the Constitution. One political party tends to support the policy of disestablishment, the other favours the view of the Established Church. The Church thus becomes a considerable factor in politics.

In America, if the government should propose to take property from a church or an individual, there would instantly be raised the constitutional objection that private property cannot be taken for other than a public use, and that it cannot be taken for a public use without just compensation. In America, then, if ownership were legally established, the Constitution would secure to the Church all its property, or, at least, just compensation for any property taken. Now there is undoubtedly in England a widespread feeling, or understanding, that the

right of property is sacred and inviolable. There are those who even regard this feeling, or understanding, as a part of the English Constitution; but this feeling, or understanding, cannot prevent Parliament from taking from the Church the property which it claims as its own, if Parliament and the nation should so will.

CHAPTER IX

SOURCES OF THE CONSTITUTION

TO sum up the foregoing chapters: The English Constitution is a body of rules and understandings more or less clearly defined, in accordance with which the various governmental agencies are kept in harmonious action. The greater part of these are not laws at all, but are mere understandings based upon custom, or growing out of the necessities of government. Yet, if we apply the American analogy to the English Constitution, we find that a part of it is actual law. In the chapter on the courts the fact has been pointed out that some of the most important rules of the Constitution have had a judicial origin. The rule that the Monarch can do no wrong, or that the King cannot be accused in a court of law, is a rule of the courts. Likewise, the rule that the official acts of the King must be done through a Minister who is legally responsible for them, was made by the courts. So also was the rule that all officers, military and civil, may be punished in the ordinary courts for violating the law. In this way the Executive is constantly checked by the courts of law. In America, for example, we secure the right of petition, the right to freedom of speech, the right of public meetings, the right to bear arms, the right of trial by jury, by clauses which we have inserted in our state and United States constitutions. In England these rights are secured mainly by the rulings of courts.

It will be observed that these rules are not mere understandings; they are laws, and laws enforced by the courts. That is, they are a part of the common law. Again, a part of what we should call constitutional law is, in England, enacted by Parliament. Certainly, a statute which declares the throne vacant and then proceeds to provide for the filling of it in a certain way would, according to American analogy, be a part of the Constitution. We enjoy the benefits of the writ of *habeas corpus* by virtue of provisions in our constitutions. In England the same right is secured by a statute. Besides Magna Charta, the Petition of Right, the Habeas Corpus Act, and the Bill of Rights, there are many other acts of the English Parliament which, with us, hold a place in our written constitutions.

This analysis gives us three distinct sources of constitutional rules. There are, first, understandings which are not recognized as laws; second, rules of common law made by the courts and enforced by them; and third, acts of Parliament. It is nevertheless true that no part of the English Constitution has been constructed by a deliberate act of constitution-making in the American sense. Neither the courts nor Parliament ever sat down to construct a fundamental law which has for its object the distribution of powers and the securing of their harmonious exercise. It is doubtful whether the English themselves would ever have thought of calling these rulings of courts, and these statutes, a part of their Constitution, except for the American analogy. I am unable to find a word in Blackstone to suggest the notion that there was such a thing as constitutional law. To his mind the contents of the Constitution were the understandings by which the high powers of state were balanced and kept in harmony. But for the American analogy, the Constitution would probably have remained distinct from the law and en-

tirely made up of the unwritten and the extra-legal parts. According to this definition, there would be a sort of perpetual warfare between the Constitution and the law. One or another of these understandings of the Constitution would tend to encroach upon some law. As a result of this a contest would arise. In course of time, the contest would be settled by a new law or a more perfect understanding. If by a new law, then that which was Constitution before would cease to be regarded as a part of the Constitution and would become a law. In the nature of the case, therefore, the understandings of the Constitution are preëminently the contentious part of the government.

The chief object of a constitution is to prevent the encroachment of the several departments upon each other and to secure harmonious action. If there is no tendency in one governmental agency to encroach upon another, if there is no contention, then what use for the word? In these constitutional contentions the claim is always made that some proposed action is in violation of the Constitution. It is assumed in opposition to the measure that the Constitution is inviolable and unchangeable. If, however, in the face of such a contention the measure is adopted and a new policy is inaugurated, a change is thus effected in the Constitution.

Previous to 1832 the House of Lords claimed to be an equal and coördinate branch of the legislature. The Lords first met the proposition to force them to pass the Reform Bill with the plea that such an act would be a flagrant violation of the Constitution. The Duke of Wellington, himself, who, a few years later, took a leading part in persuading the Lords to accept an inferior place in the government, was at first strong in the expression of his conviction that the proposition to deprive them of equal and coördinate power was a violation of the Con-

stitution. But the Lords were forced to pass the bill by the threat of the Executive to create new Lords and thus insure its passage. This act gave rise to a new and important understanding which it took a good many years thoroughly to settle; and so long as it was unsettled it was an object of frequent contention. It has now become an unchangeable and inviolable part of the Constitution, and it would long ago have ceased to be thought of as having any special constitutional importance if it had not recently been made the basis of new contentions. Since the Lords must yield to the Commons, the question arises, When must they yield? How shall they know when to yield? If they accept a bill in the main, may they not introduce some changes? These are questions about which there is still contention; and so long as such contentions exist, that part of the Constitution which requires the Lords to yield to the Commons will continue to be of special interest.

That part of the English law, either common law or statute, which is for the time being in conflict with one of the understandings upon which the stability of the government depends, is of constitutional importance because of the conflict. The perfection of the Constitution will have been reached when all such contention shall cease. When the rights, privileges, and immunities of all classes of the people shall have been determined; when the exact position of the House of Lords and that of the Crown shall have been defined, and the ultimate form of the legislature shall have been determined; when the courts shall know their place, and all disputes be settled as to the relations of legislative and executive agencies,—when these and all other similar questions shall be settled, then the term "Constitution" will have a new meaning in England, or at least an ancient meaning of the word will cease to exist.

We read that the Constitution of England has remained

without essential change for more than a thousand years. The Danes came, but they ruled according to the English Constitution. Even the Normans did not displace the English Constitution. The revolution of 1688 was simply a device for perpetuating the ancient English Constitution. It is not possible to give a precise meaning to the term as used in such expressions, but a sufficient reason for the phraseology may be found in the fact that there has not been a time when the form of the government was not in large part determined by previous history. At every point there has been a conscious reference to the past.

At all times large classes of citizens have been recognized as being in possession of privileges which could not be taken from them. If a particular privilege was removed for a time, the memory of it remained, and in course of time the privilege was often recovered. It is only in comparatively recent times that the term "Constitution" has been used to express the means whereby ancient rights have been preserved and transmitted. It will be observed that it is this use of the term which has given rise to the idea that the Constitution is unchangeable, sacred, and inviolable. Whether the Constitution is really unchanging is a mere matter of definition. If we give a definition which is sufficiently indefinite, we can say with much confidence, "The Constitution of England under Queen Victoria is, indeed, the very Constitution under which the Confessor ruled and which the Conqueror swore to obey."[1] All that is true in such a statement, however, may be found in the words: There are important characteristics of the English government which have continued without change from the Confessor to Victoria.

Whatever definition may be given to the English Constitution, all will agree that it is an outgrowth of English

[1] Hearn, *The Government of England*, p. 4.

history, and in a sense in which the American Constitution is not an outgrowth of history. If our forefathers, when they assumed independence, had not adopted any written constitutions for the government of their states, but had succeeded in governing themselves by self-control, by habits, by customs, and by mutual understandings; and if, when they felt the need of a general government, they had formed one in the same way, we can see that such a government would have been dependent upon its ordinary history for harmony of action in a way in which governments by written constitutions are not dependent. In that case the agencies by which encroachments are prevented and by which harmony of action is secured would be derived from our history. There would have been governors, not because state constitutions provided for their existence, but because experience and the necessities of the case led to their use. There would have arisen a President or a corresponding officer, in the same way. It is quite natural for an American to say that such a supposition is absurd and that the thing is impossible. Yet this is exactly what the English have always been doing.

The Americans, at a certain time, in a certain way, addressed themselves to the task of making constitutions. First, each of the thirteen states framed or adopted a written document which they called a State Constitution, some of them accepting as such the royal charters which had previously been in force. A little later, the people, by means of a constitutional convention, framed a Constitution for the general government. These documents are a part of our written laws. To the courts are given the power and the duty of interpreting and applying these laws which we call Constitutions. Our real Constitution which is in force to-day is made up of what the courts and other officers have held to be the meaning of the

written documents. An instructed American would not say that the Constitution which Washington swore to support is the very Constitution which Mr. Cleveland is now endeavouring to maintain. He knows that important changes have been made by the formal act of amending; and a well-informed American knows that much more important changes have been effected by official acts of interpretation and application. The American Constitution grows by amendments; but it grows much more by official, and especially by judicial, interpretations. A history of the American Constitution is a history of the legislative, executive, and judicial interpretations of the written documents. Our constitutional literature takes the form of a commentary on, or an exposition of, the written documents. Literature on the English Constitution takes the form of a description of the leading governmental agencies and their relations to each other, and an historical account of the manner in which the government came to be what it is. The American Constitution is that which has been read out of, or read into, certain written documents. The English Constitution is that which has been read out of, or read into, certain events in English history. In the place of an exposition of certain documents there is a peculiar reading of certain parts of English history.

Part II

THE GROWTH OF THE CONSTITUTION

CHAPTER X

SOURCES OF POWER AND INFLUENCE IN THE NORMAN PERIOD

THE Norman Conquest furnishes a convenient starting-point for the study of the early English government. It should be noticed, in the first place, that the word "constitution" was not then in use and that the idea now usually expressed by it was not current. There was a King having more or less clearly understood functions; there was a body of noblemen holding certain relations to the King and exercising a good deal of influence over him; there was a body of clergymen having a share in the government; there were the common people accustomed to certain ways of living. But none of these classes thought of themselves as living under a constitution which guaranteed to them clearly defined rights, privileges, and powers. Each individual claimed his right or his privilege because he had won it with his sword, or because his father had enjoyed it before him, or because he had received it from a superior who had inherited it, or won it by the sword, or simply because he wanted it. As it was with the individual so it was with each class. Not until the century of the American Revolution were Englishmen generally conscious of the possession of a constitution securing to them important rights and privileges. It is, however, an easy matter to find among the institutions of the Norman kings that which corresponds exter-

nally to the various parts of the English government of to-day. For example, the Crown represents the Crown of to-day; in the place of the House of Lords there was an ill-defined body of prelates and great lords who had a share in the King's government. There was no House of Commons, it is true, made up, as in later times, of representatives from towns and counties; but in every county there was a county court through whose agency money was secured for the King's government; and there were various towns and cities from which money was received for the King. These local governments performed in some respects the functions assumed in after ages by the House of Commons. In the place of the modern Ministry were certain hereditary officers and others chosen by the King as his assistants. Besides, the Church then held a high position in power and influence. It had its own laws and its own courts, and controlled much of the soil. But while these various parts of the government existed, what we now understand as the constitutional relations of each to the others did not then exist. The English Constitution of to-day is based upon the will of the nation as expressed through the House of Commons; but such a constitution would have been wholly unintelligible to the men of those early times.

During the Norman period the Crown overshadowed every other governmental institution. It had come into being during the centuries preceding the Conquest in connection with continued wars. The Germanic tribes were for generations occupied in driving native Britons, or Welshmen, to the west side of the island. Then the petty chiefs or kings contended for centuries against each other for supremacy. For two hundred years a more or less united England had resisted the invasions of the Danes from the east; yet early in the century of the Conquest, England had submitted to the rule of a Danish

king. Later, the English had been again united for a time under their own Edward the Confessor. The necessities of war and the conscious need of a strong hand to preserve order had served to strengthen the Crown. The brief intervals during those centuries of violence in which the people generally enjoyed the blessings of peace and order, had left in their minds a memory of the good laws of the good kings. The blessings of the past came to be associated with certain good kings (as the great Alfred), and this served to strengthen the position of any king. Canute, the Danish king, sought to win the affections of the people and to rule as an English monarch. The Conqueror claimed the Crown as the heir of Edward the Confessor, and sought every advantage which belonged of right to an English king.

It was because the Conqueror was not allowed to come peaceably into the possession of the English Crown, that he came with an army of Normans. As soon as the opposing army was vanquished, and his rival slain, he was crowned according to English custom, and thus came into possession of the usual powers of the English sovereigns. He was, hence, enabled to reap many of the advantages flowing from the prejudices of the English people in favour of their own kings. William also enjoyed some advantages from the fact that he was a conqueror. A large portion of the English lords championed the cause of Harold and participated in the rebellions which arose against William in the early years of his reign. This furnished the latter with a pretext for confiscating a large part of the lands of the realm, which he distributed to his Norman soldiers in a way which tended to strengthen his military power.[1]

Great as was the power of the King, he was nevertheless conditioned in his action by the existence of influ-

[1] Freeman, *Norman Conquest*, Vol. IV., p. 22 *et seq.*

ential classes. On the Continent kings were at that time comparatively weak, owing to the restraining influence of the feudal system. Effective power was vested in the lords and their immediate followers. Kings of France had power only as they were feudal lords, with tenants bound to them by feudal law. When the Normans came into England, the feudal system had not there gained the footing which it had in France. English kings had succeeded in retaining a large measure of power. William kept for himself all the power which belonged to an English king, while he also took care that feudal lords should not gain power in England as they had done in France. In the first place, he abolished the great earldoms of the Saxon period, so that the feudal lords should not have leaders who could conveniently muster their forces and make war upon the King. Next, in giving out the land to his earls and barons he saw to it that the estates of each should be so distributed in different parts of the country that it would be inconvenient for him to collect his forces. In this way the King had in all parts of the country Norman forces which could be relied upon to put down a rising of the English people, while at the same time it was not easy for this Norman feudal body to gather a hostile army against the King. Again, the King saw to it that those who received lands from a lord, and took the oath of allegiance to him, should recognize superior allegiance to the King.[1] Finally, in a great meeting of feudal lords at Salisbury, "a statute was passed that every freeman in the realm should take the oath of fealty to King William."[2] In these and other

[1] Stubbs, *Select Charters*, p. 80.

[2] Freeman, *Norman Conquest*, Vol. IV., p. 472. See the subject fully treated by Stubbs, *Constitutional History of England*, Vol. I., Chaps. IX. and XI. Freeman, *Norman Conquest*, IV., p. 471 *et seq.*, and V., p. 257. Green, *History of the English People*, Vol. I., Book II., Chap. I.

ways the King curbed the power of the lords, while he did not destroy it; it was still possible for them to make war upon him. These Norman lords were acquainted with the feudal system as it existed in France, and were at all times disposed to assert their power and to resist the hand of their royal master. A weak king would have been powerless to restrain them. It was, therefore, fortunate for the Crown that the first three kings were men of unusual ability. As soon as a weak king did appear, in the person of Stephen, the power of the feudal lords ran riot in the land. Yet all the while the consciousness of the existence of this jealous feudal nobility constantly conditioned the action of the King.

The power of the Crown was still farther modified by the Church. Centuries before the Conquest a national Church had been established in England. There was a united Church before there was a united kingdom. Indeed, the national Church did much to prepare the way for national government. The clergy, being the only educated class, became the ministers of the early kings; and because there was a system of canon, or Church, laws for all England, administered by the clergy in all parts of the land, it seemed the more natural that all the laws of common concern should have the same uniform authority and uniform administration. When the Conquerer came, the Church and the State had been already, in a measure, fused into one government. Bishops and other high Church dignitaries sat with King and Wise Men as they deliberated on all matters sacred and secular. The local bishop sat with the ealdorman and the sheriff in the county court, and together they transacted business both sacred and secular.[1] The clergy had likewise a share in the courts of the hundred.

William resolved to separate the clergy from the secu-

[1] Stubbs, *Constitutional History of England*, Vol. I., p. 113.

lar government. A system of independent Church courts was, therefore, set up, which were empowered to punish violations of the sacred or canon laws; yet William took care that his own tenants, or the earls and barons who held lands directly from him, should not be punished in a Church court without his consent. Moreover, he did not allow a Church officer to receive either the Pope's legate or letters from the Pope without his consent;[1] and he did not allow the assembly of the clergy to adopt any rules which had not received his approval. William intended that this separate Church government should be kept in such subjection to his personal will that it should strengthen the power of the Crown. Yet the fact that such a clerical power existed was always a source of influence upon the action of the kings.

The fourth source of power and influence in the government is by no means so easily described. Historians by general agreement attribute to the English people the determining forces of the English Constitution. More than the King, more than the nobility, more than the Church, the English people are the source of the English Constitution. But how could a people who were doubly enslaved give to a country a free constitution? The relation of the people to the Constitution may perhaps be illustrated by an example drawn from a line of experience far removed from that under consideration.

A noted American hunter and buffalo-tamer has found that his powers are sharply limited in his dealing with the wild buffalo. If he takes an animal that has passed the age of six months, the animal dies in a few days. On the side of force his power over the buffalo is practically without limit; but if he wants to have the animal live and thrive, he must respect its nature.

[1] Stubbs, *Constitutional History of England*, Vol. I., p. 285.

Now the ancestors of the English had certain social habits which they could not be induced to change suddenly. They could be conquered and could be induced to accept a lord and master, but if they went on living at all, they must act as they had been wont to act. Only the lord who had respect to the local habits of his servants was enabled to maintain his place against his rivals. The English were powerful in servitude, while within certain limits they had their own way. It seems reasonable to believe that the English were somewhat peculiar in the intensity with which they clung to their ancient customs, but there is no reason to believe that this arose from superior intelligence, or from a higher sense of the value of liberty. More probably it arose from a blind, unreasoning instinct. The English were apparently more stupid than the Gauls. We, no doubt, owe more than we should like to confess to the downright stupidity of our ancestors. They could be easily induced to believe all manner of errors about themselves; but they could not readily be taught to act in a new way. But while stupidity may account for much, it does not account for everything. There is a considerable amount of evidence that the early English possessed a faculty much resembling a long memory. When they had been led to deviate in any respect from the old way, they afterwards showed a strong disposition to revert to the former customs.

When the Normans came, the English people had been subject for generations to the rule of kings and lords and priests; yet a large proportion of the people who were neither kings, lords, nor priests were accustomed to have a part in local government. There were courts on the lords' estates in which the tenantry had a share.[1] Much of the government was in the hands of county courts and the courts held in the hundreds, in which many of the

[1] Medley, *English Constitutional History*, p. 315.

people had a share.[1] Then there were towns and cities in which citizens were accustomed to exercise important powers of local government.

When we discuss to-day that balancing of forces which conditions the action of sovereign power, we may take little note of local government. No important constitutional question is now involved in local government. But in a study of the time of William the Conqueror, the local governments of England cannot properly be omitted from the list of forces which modified the exercise of the highest powers of government. William could not have destroyed these local governments without weakening or destroying his own government. They were the chief means of keeping in check the power of his barons, which was the force then most dangerous to the Crown; and he wisely determined to use them.

Thus, the four chief sources of power and influence in the government of the Norman period may be briefly described as: first, the Crown; second, the Nobility; third, the Church; fourth, the People. But the subject is by no means so simple as this analysis might seem to indicate. Each of the four parts is complex and often eludes accurate analysis. The most definite of the four is the Crown. The word represents an office filled in a certain way; and at each particular date the office is understood to stand for certain more or less definite powers and duties. Much of the constitutional history of England hinges upon the contention as to who has a right to fill this office. William was king, because he wanted the office, and because he had the power to take it and keep it. The same is true of the four kings who followed him. Each individual king found it to his advantage to assume that certain clearly defined duties and privileges belonged

[1] Medley, *English Constitutional History*, p. 296. Stubbs, *Constitutional History of England*, Vol. I., p. 102.

to the office, but no one except the King and his special friends was accustomed to agree with him in this matter. The term "Crown" sometimes designates the office, at other times it designates the person, and it may also include the group of noblemen which made up the King's party; and these meanings shade into each other in such a way as to defy accurate analysis. It is, however, a convenient word, partly because of its indefiniteness.

The term "Nobility" is still more indefinite. There was never a time in early English history when it was possible to count a definite number of men, and say that these constituted the nobility while all others were not noble. Under the Norman kings there were earls and barons who were accustomed to receive a personal summons to the royal council, while those of lower rank were summoned through the sheriff in the county court. The barons of William's reign were nearly all Normans who had assisted in conquering the country. They had received grants of land from the King, and had taken the feudal oath to serve him, and were therefore called tenants-in-chief of the King; that is, they acknowledged no lord but the King. Yet the King had many other tenants-in-chief who were not earls or barons. Some of these were Normans who had received direct grants of land from him, and some of them were Englishmen whom he had seen fit to favour. The great lords gave lands under feudal oath to minor lords, and these to still lesser ones, until, at the bottom of the scale, there stood the simple free tenant, who was not a lord, and is not thought of as belonging to the nobility. Of the lords who held lands from other lords, there were some who were as significant, who counted for as much, in the class of the nobility, as some of the lesser tenants-in-chief of the King. As some of the King's tenants were English, so many of the

military tenants of the lords were English also. In this way many of the older English nobility held minor places in the new nobility.[1]

The term "Church" is no less indefinite. The Church of the Middle Ages claimed and exercised a large share in the government. It always claimed more, indeed, than the kings would concede. The Church in England was simply a part of the western European Church with the Pope of Rome at its head. William had undertaken the conquest of England with the papal approval. The Roman pontiff always claimed a share in the filling of Church offices and demanded a portion of the ecclesiastical revenues. While all classes in England were disposed to resist the encroachments of the Pope, his interference nevertheless remained an important factor in the balancing of the high powers of State. When, however, we speak of the Church as a factor in the origin of the Constitution, it is the national English Church which should be chiefly borne in mind. "The King and the Archbishop are the two oxen which draw the English plough." That they did not always draw in the same direction will be seen further on; yet, upon the whole, the higher clergy were the most effective supporters of royal power. The bishops, abbots, and priors who made up the hierarchy were usually dependent upon the King for their positions, and usually sided with him in matters of controversy; while the parish priests, the monks, and the members of religious houses were much less directly dependent upon royal favour. It often happened, even, that the lower clergy were politically opposed to their superiors in the Church. Hence, in forming an estimate of the power of the Church as a part of the government of England we are required to consider separately the Pope of Rome, the higher clergy, and the lower

[1] See Medley, *English Constitutional History*, p. 19 *et seq.*, for classification of feudal hierarchy.

clergy. Between these forces there was no natural and constant coherence.

In America the Church is regarded as simply a religious society ; it has no direct connection with the government. Seeing that the Church of the Middle Ages held and administered large estates, and formed an important part of the government, we may be in danger of neglecting to give due weight to its teaching functions. While it is well to distinguish between the two offices of the Church, it is not well to forget that both existed. The religious teaching of the Church has had quite as much to do with the origin of the modern Constitution as has its government. It was the consciousness of a common religion that tended most to efface the distinction between Norman and English. In the twelfth century a national religious revival coincided with the preaching of the monks and the founding of religious houses. In the thirteenth century came the Friars and cast in their lot with lepers and beggars on the outskirts of the cities. These occurrences profoundly affected the religious sentiment of the nation. The charitable feelings of men were stimulated ; hospitals were founded ; and learning was encouraged. The revival of religion and of learning with which the name of Wiclif is connected followed in the fourteenth century. Some of the religious awakenings tended to the purification of the Church, and therefore strengthened it even politically. Others, on the contrary, rather weakened the position of the Church as a part of the government. Especially was this true of that which followed the preaching of Wiclif and the Lollards. In later centuries diversity in religion was a chief factor in the formation of permanent political parties.

If it is difficult to analyze and define the Nobility and the Church, it is much more difficult to analyze or describe the People as a factor in the government apart from

Nobility and Church. Even with the advanced democratic theories which now prevail it is not altogether easy to answer the question, Who are the people? Mr. Burke was quite sure a hundred years ago that *the people* were not the mass of men without distinction of rank, told by the head. The great religious revivals tended to give increased importance to the lowly, yet, at the same time, the most democratic of the religious teachers of the Middle Ages taught that God had set men in society in different ranks and orders. The modern democratic notion was wholly wanting. The Church as a religious institution included all the people; yet the Church as a part of the government included only the clergy. The nobility included only a small fraction of the people, and a large share of their business consisted in war and participation in government. The clergy taught and governed; the nobility defended and governed, and all were assumed to act in harmony, with the King ruling over all.

During the Norman period the great body of the people lived by agriculture. Society and government rested upon the land. Under the fully developed feudal system each individual held some fixed relation to the land. No one was free in the modern sense, and no one was a slave in the sense of individual chattel slavery. Though there were multitudes who were bound to labour on their lords' estates, in all cases mutual rights and obligations existed. If it was difficult to distinguish between higher and lower nobility, it was equally difficult to distinguish the free from the not free. Under the Normans more than half of the people were in some sort of legal and customary thraldom.[1] Four hundred years later thraldom had disappeared, but the change can be attributed to no single act or assigned to any particular time. Varying

[1] Creasy, *The Rise and Progress of the English Constitution*, p. 85.

degrees of freedom and servitude always existed upon the estates of the nobles, but the results of political strife were, on the whole, progressively favourable to freedom.

Great importance is to be attached to the position of the people who lived in towns and cities, and were engaged in other than agricultural pursuits. These were always less dependent than the country folk, and they were a factor to be reckoned with in the contests between kings and lords. The organization of guilds and friendly societies in the towns gave to large classes experience in government. In course of time friendly societies with their educative advantages extended from the towns to the country. As there were higher and lower nobility and clergy, so there were higher and lower freemen in towns and cities; and higher and lower both among the free and the unfree in the country. Wherever a man was placed on the scale, there would be some above him whose favour might be won by furnishing aid in those conflicts and contests from which no rank or class was exempt.

The motive usually attributed to William I. for preserving the local governments of the English in towns, counties, hundreds, and parishes, was that he might the more readily resist the encroachments of feudal lords. It is certain that from these local governments we derive important and characteristic features of the English government. Opinions are in conflict as to the origin of the jury system. Yet whether we say that the system originated in the local governments in England, or that it was imported by William from Normandy, the fact remains, however, that it is only in England that the system became permanently established. And we shall see that out of the same habits and customs which established the jury, representation in Parliament was finally attained. But at all times it was the relation of the local govern-

ments to the royal treasury which was the chief source of the power and influence of the people.

There was another institution which William found among the English people, and which was of much importance in his government. It was the custom of having the able-bodied men in the hundreds learn the use of weapons of war. From time immemorial such persons in each neighbourhood had been accustomed to render military service in times of danger. In places where the feudal system had been fully established this old army, or fyrd, was displaced by a feudal army made up of the lords and their tenants. William was served by such a force, and it has been shown that this feudal army was liable to be used for making war upon the King himself. He therefore took care that the fyrd also should be preserved and strengthened in order that he might have a force to use against his refractory barons.[1] The Norman kings were thus provided with a feudal army to use against the English, and an English army to use, in case of need, against the feudal nobles. We shall see later that the people's army became a leading factor in the origin of the modern Constitution.

From the preceding considerations it appears that the People held an important place in the government of the Norman sovereigns, because of their relations to local government; because of their relation to the jury system and to the financial policy of the King; and because of their relation to the fyrd, or national militia.

It should be observed that while the terms which designate the different sources of power and influence are indefinite in their meanings, they nevertheless truly represent the things they are designed to denote. It is in large part because the Crown, the Nobility, the Church, and the People were not clearly defined, either as to the

[1] See Stubbs, *Constitutional History of England*, Vol. I., p. 268.

persons composing them or as to the limits of their power and influence, that what we now know as the English Constitution has come into existence. The modern Constitution exists as a result of the continuous conflict over the rights and privileges of these respective classes.

In former chapters it has been shown that the balancing of forces which determines the working of the English Constitution of to-day is found to rest in the two political parties. In other words, the political parties are of the very essence of the modern Constitution. But in the time of the Norman kings there were no political parties in the modern sense of the words. The party of recent times is based upon public opinion, and this in turn grows out of the prevalent ideas of national unity. Eight hundred years ago there were class opinions and class interests, but there was no idea of common rights for the whole nation. Even the many Normans who spoke the French language, and were thus readily distinguished from the English, did not form a distinct political party, though they filled the high offices in Church and State and lived on lands taken from the former English owners.

At first there must have been a rather sharp line of distinction between Normans and English; but many of the more important English proprietors were left in circumstances equal or superior to those of the poorer Normans. In the contests which were always being waged between the tenants and their lords, many Norman tenants cast in their lots with the English. Almost from the beginning, the poorer Normans and the richer English found themselves united in a common resistance to the aggressions of the higher nobility. In any case the contests which did arise between Normans and English bore little resemblance to those between modern political parties. We speak of the nobility as a political factor, it is true; but the nobility corresponds in no respect to the modern

party, though in course of time factions arose among the greater nobles in which a trace of party life may be discerned. Again, neither the Church nor any division of the Church resembles a political party. Each class of men, whether lay or clerical, contended for the privileges which it wished to enjoy. They had not in their minds the ideas out of which political parties, as now understood, could be formed. When, however, there arose a long contest concerning the right to the throne, factions appeared among the influential classes which bore some faint resemblance to political parties.

CHAPTER XI

EARLY CONTENTION AND STRIFE

THE modern English Constitution is the result of political contention; its history, therefore, is a history of political warfare. It would be difficult to name all the subjects of strife which have had a share in generating the Constitution, and there has been much political conflict whose relation to the development of the Constitution is not evident. Only those subjects of controversy will here be discussed, whose relations to the balancing of the high powers of State are manifest; for it is this balancing of governmental forces which should be constantly kept in mind in an attempt to trace the origin of the Constitution.

Prominent among these contentions has been the question, who should be king — a question already old before the Conqueror came. The old national assembly, the Witenagemot, or Witan, had always had a share in inducting a new king into office, and well-defined instances may be found in which the assembly elected the new king.[1] There was usage in favour of succession by the oldest son, or, at least, by the oldest son who was able to lead armies. Cases could also be adduced where the reign-

[1] For example, Edgar, 959; Edmund, 1016; Harold, 1066. See Freeman, *Norman Conquest*, Vol. I., p. 72, and notes 2 and 3. Also Stubbs, *Constitutional History*, Vol. I., p. 135. Gneist takes a somewhat different view. See *The English Parliament*, translated by Shee, pp. 29, 30.

ing king made provision for a successor. In the history of this contention, much has been made of the fact that at all times, before the Conquest and after, there has been a national assembly under the name of Witan, Council, or Parliament, which has had a share in inducting the new king into office. It is not necessary for us to believe that this fact in the early history was often of real consequence in determining who should be king. Since there has always existed a national assembly, it has been a matter of necessity that the new king should come into working relations with it.

The two things that should be held in mind as especially significant are, first, that a national assembly always existed; and second, that as the national assembly has always taken a part in inducting the new king into office, it has been easier for modern reformers to make good the claim that Parliament has a right to depose one monarch and enthrone another. The one change in the English government which historians have agreed to call *The Revolution*, is that which occurred when an irregular Parliament, a Parliament whose composition the stickler for legal form would call unconstitutional, voted, while the former sovereign was still alive, that the throne was vacant and that it should be filled by another. A little later, the Parliament provided by elaborate statute for the filling of the office for future generations. All strifes, therefore, pertaining to the vacating or the filling of the throne have a constitutional importance. Much of the peculiar balancing of forces in the government made by the Norman kings is to be explained by the fact that their title to the throne was disputed. It would seem that, but for this fact, these powerful kings might have made themselves absolute, and thus have forestalled the development of what we now know as the Constitution.

Another sort of contention which is of great constitutional importance has been over the question as to how the feudal lords who were tenants-in-chief of the King were bound to serve him. They held the lands under the feudal obligation of service according to the feudal customs of the time. Doubt always existed as to how much and what sort of service should be rendered. The tenants always felt that powerful kings who solved the doubts in their own favour were getting more than their dues. These questions were often subjects of notice in the meetings of the Council. Kings were often guilty of disregarding details in the settlements reached in the meetings of the Council. Contests of this sort had always a tendency to affect the power of the Crown in its relations to the barons and to other classes in the nation.

Closely akin to quarrels between the King and his tenants over feudal dues were those between the lords and their own feudal tenants. Undoubtedly much of the contention between the under-tenantry and their lords went on without exerting any perceptible constitutional influence, but some of this strife did manifestly affect the relative positions of the high powers of State. It was often for the King's interest to favour the claims of the under-tenantry, in order that he might have their sympathy and aid in his own contests with the barons. It would thus come to pass, that while the same feudal law or custom applied to the King's tenants and to the tenants of his barons, in the one case the King was disposed to solve a doubt in favour of the tenant, and in the other in favour of the lord. The lords, too, would wish to act upon the King's interpretation in dealing with their own tenants, and would wish to have the King act upon their tenants' interpretation in dealing with themselves. It thus came about that whenever the great lords secured

a concession from the King, the same favours, so far as the words of the law were concerned, were usually extended to all tenants. The lords would agree to this, hoping that it would influence the King in their favour, expecting to violate or to avoid the provisions in the case of their own tenants. The thing that is here of especial constitutional consequence is the fact that laws were early made, limiting the power of feudal lords. Whether these laws had much effect at the time in improving the condition of the tenants, may be doubted. In later years, the fact that such laws had been passed by the early kings and their councils had a great effect as an educational factor in the contest for liberty.

Besides the revenues which came into the King's hand from his own immediate tenants, there were other sources of income. In each of the shires there were lands known as crown lands, which had not been granted to any feudal tenant. For the use of these the occupant paid a portion of the crop. Afterwards this was commuted to a payment in money,[1] which made up a portion of the King's ordinary revenue, and which it was one of the duties of the sheriffs to collect for him.

Again, in the contests with the Danes, the English kings had fallen into the custom of raising sums of money for bribing those powerful Northmen to leave the country. This was developed into an annual tax of two shillings on every hide (about one hundred and twenty acres) of land, under the name of *Danegeld*. All these methods of raising revenue gave rise to perpetual contention, and nearly all the strife of that sort is of constitutional value. The people did not like to pay the Danegeld when there were no more marauding Danes to bribe, and Edward the Confessor abolished it by law. The Norman kings restored

[1] For account of change to money payment, see Ashley's *English Economic History*, Vol. I., p. 47.

it. Moreover, a powerful king like William I. could arbitrarily levy and collect taxes. At one time he increased the Danegeld to three times the ordinary amount. But, however arbitrary and powerful a king may have felt himself to be, in levying and collecting a tax he was obliged to employ administrative agents. This made it possible for those who came later to contend that these administrative agents, who collected and paid over the King's revenue, gave their consent to the payment on behalf of those from whom it came. The early Kings received large revenues independently of the consent of the people and of the people's representatives; but there were always unsettled questions about those permanent sources of income which kept the powerful classes in a belligerent attitude against the demands of the King. It is not necessary to believe that the modern constitutional principle of taxation by the people's representatives had dawned in any mind so early as the Norman or the Plantagenet period. Such a notion was then wholly incomprehensible. Various ruling classes were contending for their own existence. To secure the effective coöperation of the lower classes, the rulers respected in some measure their habits and prejudices. When the lords and bishops induced a weak or needy king to agree to a rule against levying a new tax without their consent, we need not believe that they intended to vindicate any well-understood right. But the fact that these things were done made it easier for modern statesmen to establish the fundamental principle of taxation by consent.

The revenue of the Church also gave rise to many contentions which have great constitutional value. The Church owned a very large proportion of the best lands in the kingdom, and it was expected that the greater part of the revenues from those lands would go to the support of the clergy. But should those rich estates be exempt

from all the common burdens of the State? The Pope and some of the clergy answered this question in the affirmative, but the English kings and lords would never assent to this conclusion. The Norman kings insisted that the bishops should acknowledge them as feudal superiors and pay into the royal treasury a sum of money in lieu of the military service which the lay lords were required to render. But what the amount of that sum should be was often a matter of dispute. There was always the feeling among the laity that the Church lands were not bearing their full share of the common burden, and we shall see that this feeling gave rise to important constitutional changes. Again, the contention as to how much of the Church revenue should go to the See of Rome often affected the power of the Church as a part of the English government. Then, the question whether the King should leave the Church offices vacant and appropriate their revenues led to occasional contests which modified the power of the King.

Contests arising out of the fact that the kings of England had possessions in France also affected the relative powers of the classes in England. William I., as we have seen, succeeded in so disposing the various forces in his kingdom as to husband and strengthen the powers of the Crown. As soon as William was dead, there arose a conflict which tested his work. Robert, the oldest son of the Conqueror, became Duke of Normandy upon the death of William. Many of the English barons had estates in France as well as in England, and they naturally wished the kingdom of England and the dukedom of Normandy to continue in the hands of the same person; for in case of war between Normans and English, a part, at least, of their estates would be threatened. William, the second son of the Conqueror, hastened to London and secured the crown at the hands

of the Archbishop and a portion of the Council. A number of the barons raised the standard of rebellion, with the intention of deposing William II. and crowning Robert. With the support of the higher clergy William secured efficient aid from the English people. The fyrd, or the national army, hastened to his assistance and enabled him easily to overcome the rebellious barons.

William II. was a man of extraordinary wickedness. He tyrannized over all classes and made himself personally offensive. Yet for all that, he retained a firm hold upon the crown to the day of his death. That such a man should continue in possession of so much power argues much for the strength of the office independently of the person of the Monarch. Yet it should be remembered that if William II. was wicked, he was not weak. He asserted every power which his father had claimed, while he abused every power which he exercised. Still one must not argue from this that the power of the Crown was strong enough permanently to endure the strain of such a personality. After a rule of thirteen years he died, as is believed, at the hands of an assassin.

Certain contests in the reign of William II. well illustrate the balancing of the dominant forces of the government. William showed good judgment when he appealed to the English people for support by promising them better laws. It is not at all unreasonable to suppose that there were probably multitudes among the English people who believed that it would be decidedly to their advantage to have a king who was all their own, and who was not at the same time Duke of Normandy. Hence, faithless as the King was, it was not entirely unwise for the English to continue faithful to him. With the adherence of the English people and the English national army, William II. was able to tyrannize over the feudal nobility, and to exact many extraordinary feudal dues.

He was also able to oppress the Church by compelling the holders of Church lands to assume many of the feudal burdens, and by leaving the Church offices vacant and appropriating the revenue which would otherwise have gone to the Church.

I have not mentioned the Council as a distinct source of power and influence because I do not believe that at this time there resided in the Council, in itself considered, a clearly discernible power which counted for much in the balancing of the dominant forces of the State. The nobility were powerful, not because certain of them were accustomed to meet the King in the Great Council, but because they had bands of soldiers whom they could call to their aid and make war upon the King. The clergy were powerful, not because their bishops and abbots sat in the Council of the King, but because they were an exclusive, educated class; because they held much land; because they were reverenced and respected by many influential persons; because they could lead the people in ways in which laymen could not lead them, and because of their system of Church courts. But in spite of all this it was in the main true, during this period in English history, that when a king summoned his lords and bishops into his presence in the Council, he was able to persuade them to agree to his predetermined policy. The Council existed as a practical agency through which the king could carry his policy into effect. It was not in the modern sense a legislative body having the right to initiate policies.

An incident in the reign of William II. may serve to illustrate the King's relation to the Council, while at the same time it illustrates the sort of contention which has produced the modern Constitution. Anselm, the more than usually faithful Archbishop of Canterbury, was using all his power to restrain the evil courses of the

King and the immorality of the people. The See of Canterbury had been vacant for four years and the King had resisted all entreaties to make an appointment, yet, in 1093, during an illness which he expected would prove fatal, he had almost forced Anselm to assume the duties of the office of archbishop, though the appointment had not received the approval of the Pope. At this time two men claimed the papal chair. Anselm acknowledged Urban as Pope, and wished permission to go to Rome and receive from his hands the symbol of his office. William acknowledged neither contestant, and forbade Anselm to recognize any one as Pope without his consent, pleading in support of this command a law of William I. Anselm desired to secure the support of the Pope in his contest against immorality in England. William wished to be free from all such restraint. Finally Anselm took the bold course of bringing the matter before the Council. We are told that he stated his case moderately but firmly. The barons, pleased to see the King resisted, sided with the Archbishop, while the bishops, being tools of the King appointed from among his clerks, supported their patron. It is mentioned as a remarkable circumstance that Anselm, after daring to oppose the King in the Council, went into a chapel and slept quietly, while the King, not having the support of the barons, did not dare to punish him.[1] To oppose the King in Council was regarded as a capital offence. Anselm, however, though he saved his life on account of the opposition of the barons to the King, did not carry his point. Two years later he fled the country, went to Rome, and left the King to seize his estates.

To omit the Council from the list of the dominant factors in this period of English history would seem to

[1] Gardiner's *Student's History*, p. 118.

many like leaving out of the discussion the Constitution itself, and we must certainly not underrate the fact that there was from the beginning a national assembly which, under various names, has continued to the present day. The mere fact of the uninterrupted existence of such a body has vastly more importance in rationally accounting for the English Constitution than can be properly attached to any special powers which the Council exercised at any one time.[1] The continued weakness of the national assembly during the Middle Ages was a necessary condition to its continued existence, and it was not until the time of Elizabeth and the early Stuarts that Parliament as an institution became a continuous and important check upon the Monarch. When that time came, the fact that a national assembly had at all times existed was of great consequence. If at any much earlier time the Parliament, as an institution, had exercised important powers independently of the will of monarch or armed faction, its existence would not have been continuous. Its perpetual weakness saved it from extinction. But, it may be asked, Did not the great Henry VIII. yield to the demands of the House of Commons? Yes, Henry yielded to the Commons much as the carpenter endures certain inconveniences incident to edged tools. The House of Commons was a tool of the King, and he could afford to humour it in minor matters.

But to return to our discussion: upon the death of William II. there was again a contest for the crown of England. Henry, the youngest son of William the Conqueror, became king. Robert, Duke of Normandy, invaded the country to vindicate his own right to the

[1] See Medley's *English Constitutional History*, p. 78 *et seq.*, for a succinct statement of the development of the several executive and legislative councils.

crown. Henry was strong in the support of the English, and Robert was compelled to surrender his claim. Upon becoming king, Henry issued a charter in which he engaged to remove the abuses suffered under his predecessor. The Church was to be free, and the King was not to take the revenues of the vacant Church offices. He was not to exact from his tenants unlawful dues, neither were the lords to make unlawful exactions. Having married an English wife, and thus increased his favour with his English subjects, Henry recalled Anselm, and gained the loyal support of the Church. He also strengthened many of the towns by granting them charters. So powerfully was he supported by the Church and the English people that he easily overcame and destroyed the hostile barons. By means of the lands taken from the rebellious lords a new nobility was created to whom the King looked for support.

The national assembly of the reign of Henry I. was a body ill-defined both as to the persons composing it and as to the business transacted by them. There was the sanction of usage for its assembling three times each year, upon the occasions of the three great Church festivals, but the practice was by no means uniform. Earls and barons were summoned by the Sovereign's writ, but the number summoned was variable. There was the same uncertainty as to the number of bishops, abbots, and priors called to the assembly. Besides the classes mentioned, the meetings of the Council, or national assembly, were always attended by the high officers of State, a part of whom, though not all, were included in one or another of those classes. Some were hereditary officers in the royal household. Some were holders of offices secured by the payment of money to the King. Some were selected on account of their learning or because of the Monarch's personal favour. Besides the higher nobility, the higher

clergy, and the high officers of State, certain other classes were often summoned to the meetings of the Council by writs addressed to the sheriffs.[1] The business transacted at these meetings was sometimes judicial in character, at other times legislative, financial, or administrative.

The various names given to the early national assembly are drawn from four different languages. From the Saxon are derived *Witan* and *Witenagemote;* from the Latin we have *Magnum Concilium* and *Curia Regis;* from the English, *Great Council*, *Common Council*, and *King's Court;* while from the French comes the word *Parliament.* Even these are by no means all the terms used to designate the national assembly. It is to be borne in mind that these names cannot all be applied at any one time to one and the same institution, yet the variety of names used, and the variety of meanings attached to the various names, fitly represent the indeterminate character of the body which they designate.[2] That body is a thoroughly English institution, and, in a sense, a thoroughly representative institution, because it defies accurate description.

[1] Stubbs, *Constitutional History*, Vol. I., p. 567.

[2] Freeman, *Growth of the English Constitution*, p. 62 *et seq.*

CHAPTER XII

ROYAL RULE BY MEANS OF THE COUNCIL

DURING the reign of Henry I. appear the beginnings of an important change in the national assembly. The business of government had in previous reigns been chiefly in the hands of the great feudal barons of the Conquest. In them Henry saw his most dangerous enemies, for they were continually seeking to depose him, and crown his brother Robert in his stead. In order to make himself more secure upon his throne, he adopted certain measures which had far-reaching consequences. He made Roger, Bishop of Salisbury, his justiciar. Roger did not himself spring from one of the great families, and he chose other men of like condition, many of whom had received grants of land taken from rebellious barons, to assist him in reorganizing the King's government. In counties, hundreds, and towns, the great lords were found to have encroached upon the powers of the courts. The ancient rights and duties of those courts were restored, and sheriffs drawn from the new nobility were charged with the task of guarding the privileges of the local courts. From the newer nobility the high officers of State were also chosen, and that part of the national assembly which they composed was permitted to attain during Henry's reign a new importance. The smaller body, as a matter of fact, gradually assumed the business of the larger assembly, of which it was a part. From the checkered table at which these

high officers of State sat, when attending to the King's financial business, they were called Barons of the Exchequer. The same officers also sat in the highest court of the realm and decided causes in the King's name. Justices from this court visited the county courts in the interest of both the King's treasury and the King's justice.

This compact body of officers attending to the whole range of governmental business is of peculiar interest because of its relation to the development of a separate judiciary in the centuries following. Modern writers on the English Constitution have found it convenient to appropriate the term *Curia Regis* to this smaller body of judicial and administrative officers which Henry I. employed. We shall see later that in the time of Henry II. the name was applied to a similar body with more specific organization, and that later still there were developed from such a body of officers the various high courts of England, which have continued to the present day. While it is certainly convenient to have a specific term for this important body, or institution, it must not be forgotten that historically the designation was less definite in its meaning.

Thomas Jefferson, following a French statistician, observes that the majority of a political generation passes away in twenty years. During twenty years those composing a generation are receiving lasting impressions as children and youth before they become actors in the political arena. A boy, it may be said, begins to receive such impressions at the age of five, and to become an actor at the age of twenty-five. During the same period a majority of those most active in politics have passed away. Jefferson reasons from this, that free constitutions ought to cease to be binding at the close of each period of twenty years, so that each generation should

be permitted to determine for itself its fundamental laws. This particular conclusion may not have in it much wisdom, but it is worth while for the historian to pay attention to the facts upon which the conclusion is based.

When Henry I. died, three political generations of English and Normans had been subjected to the rule of firm and powerful kings. The French, as well as the English, living at that time in England had been born there, and had come to look upon England as their home. There is considerable reason to believe that the tyranny of William II. made it easier for Henry I., who was firm without being tyrannical, to crush the power of the barons, and rule almost as an absolute monarch. In the reign of Stephen, we have an instance of failure in the power of the monarch, and the greater part of a whole political generation is, in consequence, given over to feudal anarchy and brutality. Stephen could not, or he would not, restrain and control his powerful subjects. The dispute as to who should wear the crown continued throughout his reign. The weakness of the Crown served to reveal the power of the Church, which was affected less than other parts of the government by the general anarchy and confusion. Stephen first secured the crown by the favour of the bishops. Later, when the bishops favoured the cause of Matilda, she prevailed over Stephen, and was successful so long as she was heartily supported by the clergy. It was the clergy who finally — and only in the year before the King's death — secured a compromise, whereby Stephen should occupy the throne so long as he lived, and should be succeeded by Henry, Matilda's son.

There is much reason to believe that the final effect of the reign of Stephen was to strengthen the power of the Crown and to weaken that of the feudal lords. Under Henry I. the people had experienced the advan-

tages of having a king who protected them from the lords. Under Stephen they had an experience of the unrestrained violence of the lords. If, under such circumstances, the power of the Crown were to come into the hands of those who were able to make use of favourable conditions for two or three generations, there would result a strong tendency to favour the King as against the feudal lords. For the next thirty-five years, England was governed by a king eminently fitted to restore and strengthen the Crown. Henry II., the grandson of Henry I., had lived in France, where he held extensive feudal possessions, until he became King of England. He was well acquainted with the weakness of the Crown under the fully developed feudal government as it existed in France, and he was likewise well informed as to the strength of the English Crown as it was during the reign of his grandfather. He set himself to restore and to strengthen the power of the Crown, and to that end he took pains to win the favour of all classes of the English people, relying especially upon the newer English nobility created by Henry I. The really dangerous class was made up of the great barons who had built strong castles for themselves during the time of Stephen, and had become a source of terror to all who were less powerful than they. Henry destroyed most of these castles, and occupied with his own forces such as were permitted to remain. He held frequent meetings of the Council, and in this way he accustomed the barons to taking part with himself in the government, thus securing their aid instead of incurring their hostility. He took care also that others of the lesser nobility should attend and take a share in the meetings of his Council. It is evident that Henry looked upon the Great Council not as a source of weakness to the Crown, but as a source of strength.

During the reign of Henry II. much progress was made in the development of a separate judiciary. Henry I. had neglected the Great Council and governed by means of a smaller administrative body. Henry II. kept the higher nobility and clergy under his control throughout his reign by a constant use of the Council, while at the same time he more thoroughly organized the high offices of State whereby the King's government was kept in effective working relations with the local governments in county, hundred, and town. Justices from the King's Court, or *Curia Regis*, visited the county courts as in the time of Henry I. The country was at one time divided into six districts with three justices assigned to each district. Later, twenty-one justices were distributed among four districts. Five justices were delegated to hear claims and plaints of the people, and if questions arose which they could not decide, such questions were to be presented to the King and his wise men. Henry II. cannot be said to have created the independent common law courts, but his organization of the judiciary tended to that end. Two hundred years were needed to complete the separation which finally grew out of his system of courts. There is yet in the judicial functions of the House of Lords and of the Privy Council a remnant of the judicial duties which once belonged to the undivided *Curia Regis*, which was not in its origin distinguishable from the one national assembly.

The ultimate effect of the policy of Henry II. was to secure to himself more complete control of the resources of the nation. By means of his courts he stripped power from the feudal lords; and in later ages, when the common law courts had become separated from the Council, they served not only as courts of common law, but also as an important check upon the power of the Crown.

The Church during the time of Stephen had encroached

upon the King's powers. The clergy now claimed the right to be tried in the Church courts alone, and denied the jurisdiction of the King's courts. As the Church courts could not inflict the death penalty, a clerk, or priest, who had committed a capital offence could not be punished like other men. Henry II. set himself to regain the power thus lost and to secure a uniform administration of his laws. Thomas Becket, who had been a most efficient minister of the King in the adoption and execution of measures tending to restore order and to restrain the violence of the barons, was made Archbishop of Canterbury. As Archbishop, he took an extreme position in favour of maintaining the independent powers of the Church. At a meeting of the Council, in 1163, the King proposed that a certain tax should be made a part of the royal revenue. The Archbishop ventured an objection, and Henry, surprised and enraged, swore a great oath that the thing should be done as he had said. Becket replied as firmly that, so far as the estates of the Church were concerned, the thing should not be done. The records of the period do not make clear the outcome of this quarrel, but it is inferred that the barons supported Becket, and that the King was compelled to recede from his position.[1]

If this were a characteristic meeting of the Great Council, all that has been previously said about its weakness would be disproved; for if the spirit manifested in 1163 had been its usual temper, it must have been, as an institution, an important check upon the power of the King. This case, however, is given as the first recorded instance of open resistance to the King in a meeting of the Council; and, in spite of that action, Henry continued to use the Council for building up his own power. The barons, who in this one instance sided with Becket in a matter of com-

[1] Stubbs, *Constitutional History*, Vol. I., pp. 462, 463.

mon interest, disliked him as much as they feared the King. The King immediately summoned another Council, at which certain barons, in accordance with his request, presented a body of ancient rules to regulate the relations of the Church to the other parts of the government. These rules are known as the *Constitutions of Clarendon.* Becket strenuously opposed the enactments; yet such was the power of the united forces of King and barons in the Council, that the reluctant Archbishop was finally induced to affix his seal to the laws. The measure to which he especially objected, was that requiring appeals from ecclesiastical courts to be made to the King's Court, and to go no farther except by the King's consent. This, in Becket's mind, placed the bishops at the mercy of the King. He preferred to have appeals made from the bishop's court to the see of Rome. The stubborn prelate having repudiated the Constitutions of Clarendon, the King caused him to be summoned to another Council, where charges were brought against him, and he, feeling that his life was in danger, fled into France.

At this point, it seemed that the King's triumph over the Archbishop was complete. A few years later, however, Henry II. was involved in serious difficulty because of his efforts to have his oldest son Henry crowned and accepted as the future king. To assist him in this matter he sought a reconciliation with Becket. The Archbishop returned to England, but he came not as a friend, as the King had hoped. He excommunicated the Archbishop of York and all the other bishops who had sided with the King in the matter of crowning his son, and was preparing fully to vindicate the power of the Church against all the recent innovations. It was at this time that Henry uttered the angry words which caused his too faithful friends to hasten to Canterbury for the murder of Becket. A great revulsion of feeling against the Mon-

arch resulted from that deed, and he was constrained to make friends with the Pope. In doing this, he renounced the Constitutions of Clarendon. Such was the royal power, however, that, notwithstanding the renunciation, the laws in restraint of the Church were for the most part still enforced.

The manner of the death of Becket furnished the occasion for the manifestation of a force which in later years became a dominant element in the Constitution. It was the force of public opinion. The people, who from the time of the Conquest had been more inclined to look to the clergy than to any other class for sympathy, commonly believed the King to be the real author of the murder, and Becket was at once regarded as a martyr and a saint. The King, while he took care not to lose any of the advantages conferred by his laws restraining the Church, was yet led to show great deference to the pious sentiments of the people in honour of their martyred hero.

During the first one hundred years after the Conquest, there was no time when the great lords were not ready to enter upon deeds of violence and rebellion unless restrained by the strong hand of the King. For the first decade of Henry's rule, while Becket was his efficient minister and supporter, the barons were kept in order by the power of the King supported by the Church, the lesser lords, and the people. When, therefore, the Sovereign became involved in a quarrel with the primate, the great barons were eager to destroy the man who had done so much to put restraints upon themselves. When the King had become unpopular on account of the violent death of Becket, and when his power was seriously threatened by an attack of his son Henry supported by the King of France, a portion of the barons raised in England the standard of rebellion.

This barons' war is of more than ordinary constitu-

tional interest. In the first place, it is the last of the wars against the King led by French barons. There were still earls and barons in England who owned possessions in France, and in this revolt, which involved only the French faction of the English nobility, they were the leaders. Next, it is an important fact in constitutional history that when the leader of the King's cause in England was at his wits' end, and knew not what to do, the royal cause was saved by a spontaneous rising of the people in the north of England led by their local leaders.[1] Finally, the King was so strong in his position after his double triumph over the French king and his own rebellious lords that he did not deem it necessary to punish the rebels in any other way than by still farther stripping them of power, and by strengthening the administrative policy whereby that power was permanently restrained.

A view of the government of England at the close of the reign of the first Plantagenet king gives us almost nothing to suggest the present English Constitution which did not also exist at the close of the reign of the first Norman king. In other words, the characteristic features of the Constitution of to-day were still absent from the government of England. For example, political parties in the modern sense of the term did not exist. In their place were political classes contending for class privileges. There had been manifestations of public opinion strong enough to influence the policy of the government, — notably in the case of the martyrdom of Becket, — but public opinion had then no organ of expression. The appearance of earls and barons with sympathies distinctly English, pitted against earls and barons whose sympathies were still French, has suggested the possibility that class faction might lead to party divisions. But the fact that needs emphasis at this point is the complete

[1] Stubbs, *Constitutional History*, Vol. I., p. 480.

non-existence of political parties. Let it be specially remembered, also, that there did not exist any national representative institution according to the modern use of the words. The Great Council may, indeed, be called in some sense a national institution. But the modern representative idea is based upon the conscious right of the people to be represented, and representation in this sense cannot exist before public opinion becomes influential. Undoubtedly there were dignitaries in both Church and State who felt that a slight had been put upon them if they were not summoned in the ordinary way to the meetings of the Great Council. Such a slight, however, was viewed as a violation of privilege, rather than as a violation of a fundamental principle of the Constitution. The Great Council simply furnished a practical way for doing a thing which had to be done. The King was obliged to come into working relations with the organs of the government, and the Great Council was an agency for effecting this.

It is easy to find in the body of administrative and judicial officers created by Henry I., and more fully organized by Henry II., a suggestion of a modern Ministry. The justiciar who acted as regent during the time when the King was absent upon the Continent, and who presided both at the council table of the Exchequer and at the meetings of the same high officers when they sat as a supreme court, may suggest a modern prime minister; but there is in reality little resemblance between the two. As the judicial functions of the Council were the first to be specialized, the justiciar became in time the Chief Justice, and was thus removed from the field of administration. The distinctively administrative offices grew up finally around the treasury. Much progress had therefore been made by the time of the death of Henry II., in 1187, in respect to the development of permanent judicial and administrative institutions, and those

institutions became themselves important factors in the further development of the modern Constitution.

Some positive resemblance to the later Constitution may be found in the fact that the dominant forces of the government were divided and balanced one against another. No one of the four great political powers was permitted to be crushed out. Each was needed as a protection against the encroachments of the others. Thus, while there was little in the actual government of Henry II. which answers directly to the modern Constitution, there were certain features of his policy which had much to do with its development. A brief review of these may be helpful.

The narrative of the resistance to the King on the part of Thomas Becket, supported by the barons, in a matter of taxation, is of interest simply as an early instance of a kind of contention which in later times had much to do with constitutional development. Henry instituted a sort of tax which had a more immediate effect upon the dominant powers of the government. It was called the scutage, or shield money. This was a payment to the King of a sum of money in lieu of the personal service which the lords were bound to render the King in time of war.[1] Henry often waged war upon the Continent to defend his feudal possessions, and his English vassals did not like to go abroad for such a purpose. They agreed, therefore, to pay money instead; and the King could use the money to employ mercenaries for his continental enterprises. This policy, begun by Henry II., was continued by other sovereigns, and tended to make them less dependent upon the feudal lords.

Again, Henry made provision for more thoroughly arming and drilling the fyrd, or national army, under officers appointed by the King. We have seen that this

[1] Stubbs, *Constitutional History*, Vol. I., pp. 454, 456.

army had been of great value to the kings in their contests with the barons. Many times the prompt action of the English army under their local leaders had been the determining factor in securing a royal triumph over turbulent barons. Henry recognized this force, and made it still more effective.

Further, the sending of justices from his *Curia Regis* to hold courts in the counties[1] did much to consolidate the entire government, and cause the local governments to contribute to the support of the Crown. At one time the King summarily removed all the sheriffs, and required them to place their accounts in the hands of his Council, requiring the members of the Council to administer for a time the offices of the sheriffs in all the counties. When he suspected that the members of the Council might be open to charges of irregularity, he required them to surrender their accounts to a special commission of barons appointed for the purpose. There is no doubt that this thorough-going administrative system did much to convince the barons that it was useless to contend against the King unless they could first win the support of the people.

Finally, no one king did more than Henry II. to insure the continuity of those customs which resulted in the establishment of the jury system.[2] It is probable that something of the representative idea was always associated with the ancient customs from which the jury is derived. When the jury accused a person of a crime, there was probably associated with the act the notion that through and by means of it the community itself was speaking. When a dispute was settled by the witness of chosen men, the decision presumably carried with it the notion that

[1] Gneist, *The English Parliament*, p. 72.

[2] See discussion of the jury by Stubbs, *Constitutional History*, Vol. I., p. 609 *et seq.*; by Medley, *English Constitutional History*, p. 321 *et seq.*

the witnesses voiced the sentiment of the disturbed community. When an inquest of twelve made a valuation of property which should serve as the basis for the assessment and the payment of taxes, there was associated with the act the notion that the community was bound by it. Henry's judicial and fiscal policy involved an extended use of these juries as spokesmen of the communities.

Immediately after the death of Henry II. his administrative policy was subjected to a severe test. Richard I. and John were both thoroughly bad and tyrannical kings. Nevertheless it required over twenty years of tyranny to stir up enough opposition really to threaten the hold of the Crown upon the administrative agencies which their predecessor had established. Certain enactments which bear the date of 1194, five years after Henry's death, belong in fact to his policy, since they were adopted by statesmen trained in his school, and were strictly in line with the work already done. By these the justices from the *Curia Regis* were required to take an oath of the peace from all the people who attended the local courts, and to appoint conservators of the peace whose duty it was to keep the peace in the King's name. At the same time, the relations of the juries to the county court were more clearly defined. The constitutional importance of these measures may be seen in their tendency to harmonize the King's courts and the local courts, and thus to strengthen the power of the Crown. In course of time these conservators of the peace, under the name of Justices of the Peace, came to exercise many of the judicial and administrative functions which had previously belonged to the local and more popular courts, thus giving still more emphasis to the jury system as the sole representative institution which brought the people into direct contact with important governmental business.

CHAPTER XIII

MAGNA CHARTA

THE next great landmark in the development of the English government, after the completion of the administrative system of Henry II. was the signing of Magna Charta. It is not an easy matter to read Magna Charta or any other ancient law with true historical circumspection. It is well known that Mr. Freeman was wont to criticise the historical work of lawyers. But historians who cannot be convicted of any of the lawyer's bias are not themselves agreed in the adjustment of ancient laws to their historical relations. There is a strong probability that lawyers and historians alike, as well as laymen of every class, are very commonly the victims of erroneous theories in their interpretations of ancient laws.

No attempt is here made to give to Magna Charta its true historical setting. The task undertaken is simply that of showing very briefly how the contests connected with the Charter changed the relative positions of the dominant classes in England.

Weighty evidence may be adduced to prove that laws usually contain much that is controversial in its nature. Even in the most settled governments of modern times many laws indicate a striving rather than an attainment. If the United States should be blotted out of existence, and if a thousand years from now the volumes containing the state and federal constitutions should be

recovered as a sole relic, it would appear that the southern states were conspicuous in their opposition to duelling, because in their constitutions are found most numerous restrictions upon that crime. It would also appear that the eleven southern states which formed the Confederacy were conspicuous opponents of the doctrine of the right of secession, because in the constitutions of those states alone is found explicit denial of the right of a state to secede from the Union. If these things can be justly said of the settled governments of to-day, it is not unreasonable to suppose that the laws of the Middle Ages contained much that was controversial; much that expressed a hope rather than an attainment; much that was intended to deceive and outwit the ignorant and the helpless; much that at the time was in appearance a treaty of peace when it was in reality intended as a basis for war. Magna Charta has certainly the appearance of a treaty of peace; but upon closer study evidence appears that it was at the time intended as a basis of war.

It should be borne in mind that the Charter was signed after ten years of earnest strife during which time John had incurred the enmity and the distrust of all classes in his kingdom. After the defeat of the barons in the time of Henry II. they had come to realize that a contest against the King was hopeless so long as he had the loyal support of the trained English soldiers; and there is much reason to believe that they had learned to appreciate the necessity of winning for themselves the favour of the people. Early in John's reign he had been driven from France by the French king, and his French possessions had been seized. This had the effect still further to impress upon the barons the importance of making peace with the ruling powers in England. If any were disposed to contend for their French possessions, they could do so only at the cost of imperilling their possessions in

England. John was as bad a king as could well be. He had, moreover, the faculty of impressing all classes with the belief that he was a thoroughly dangerous man.

The contest which resulted in the Charter began with the Church. The Archbishop of Canterbury died in 1205, and the younger monks of the cathedral secretly elected a successor, whom they sent abroad to receive the badge of office from the Pope. When this became known, the elder monks, in alarm, reported the matter to the King, and he ordered them to elect in his presence an archbishop who was at once invested with the temporalities of the office, while a statement of what had been done was sent to the Pope. Then the bishops, who had been denied their customary share in the selection of the primate, appealed to the Pope to vindicate their right. There thus appeared before the Pope three parties: first, the younger monks with their nominee; second, the elder monks who had at the command of the King selected his nominee; third, the bishops of the province, who claimed the right of nomination. The Pope, having a plan of his own, decided that the elder monks had the right to nominate, but that their first action was irregular. He therefore ordered the monks who were present in Rome then and there to name Stephen Langton as Archbishop of Canterbury. Stephen was thus chosen, and was at once consecrated by the Pope to the office.

John was in a rage at what was done, and wreaked his vengeance upon the monks. The Pope placed the land under an interdict, and John took vengeance upon the bishops who published the Pope's decree, driving them out of the land and seizing their estates.

The barons could look on with equanimity while they saw their old enemies the bishops being stripped of their possessions, but John did not limit his attacks to any class. Upon one pretext and another he seized the estates

of the barons as well. The Pope, following the course of events in England, in due time excommunicated John. In 1211 he threatened to depose him, and appointed Philip of France as the executor of the edict. John, finding that he could rely upon no class in England, hastened to make his peace with the Pope. Stephen Langton was acknowledged as Archbishop, and John yielded to all the papal demands, even to surrendering his crown and receiving it back as the Pope's vassal. His intention was to use the power of the Pope in enabling him to triumph over his enemies in England and France. In England those enemies were all classes of the English people. Stephen Langton and the clergy made common cause with the barons, the lesser nobility, and all those who had influence in towns, cities, counties, hundreds, and parishes, to restrain the action of the King. In 1213 a meeting of the Council was held at St. Albans attended by representatives from the townships on the royal estates. These were called to act as a jury to assess certain damages which the King had agreed to pay to the bishops. At this meeting were formulated measures of reform to be demanded of the King. In the same year, at a meeting of barons and clergy held in St. Paul's Church, in London, Stephen Langton presented a copy of the charter of Henry I., which was accepted as the basis of the demands to be made upon the King. A year now intervened, during which time the King was engaged in an unsuccessful war against the King of France.

In June, 1215, the King's situation had become desperate. He was threatened with an invasion by the King of France. The barons, backed by an army of determined Englishmen, had openly defied him. Archbishop Langton had threatened to excommunicate any baron who should take part with the King in opposition to the nobles. The city of London had received the army of the barons. Nothing

was left for John but to surrender or be conquered. A meeting was arranged for the King with his army, and the barons with their army, on the plains of Runnymede, to agree upon the terms of the surrender. The terms agreed upon are preserved in Magna Charta. By the signing of the Charter, John escaped personal violence for the time. His enemies could not have foreseen that he would die soon after that act. There is no reason to believe, or rather there are the best of reasons for not believing, that the barons expected this treaty to relieve them from the duty of fighting against the King. They all knew that the signing of the Charter would not make John trustworthy. The naming of twenty-five of their members, of whom the mayor of London was one, to make war upon the King and compel him to observe the Charter, was by no means a mere form. More probably this expressed their immediate expectation. The Charter would but make the grounds of warfare a little more definite.

If a constitution has for its chief object the prevention of encroachments and the harmonizing of governmental institutions, Magna Charta answers to that description, at least in part. It was certainly intended to harmonize for the time being the greater and the lesser nobility, the clergy, and the influential classes among the English people. For a hundred and fifty years these classes had been jealous of each other. Kings good and bad had been able to play one class against another, and thus to shield themselves and to increase their power at the expense of others. The Charter was evidently designed to secure greater harmony between the three classes, the clergy, the nobility, and the people, who were traditionally jealous and hostile, and it could do this only by conveying the idea that encroachments upon their privileges were to be prevented. But was the Charter intended to harmonize the Crown with the other agencies of government? This

question is already answered. It is only by what would seem to be a strained interpretation of the word "harmony" that the Charter can be said to harmonize the Crown and the nation. Making war upon the King does not, to the view of a modern citizen, seem to be a legitimate and constitutional method of harmonizing governmental agencies. It will help us to understand the facts of the period if we see clearly that to the mind of the subject in the time of John this appeared altogether different. Making war upon the King was then looked upon as the customary, the regular, the orderly, and according to the Charter it became, the legal way of restraining the King. In that sense the Charter did provide in express terms for harmonizing the Crown and the nation by the only method known at the time. That is, it named those who should lead the nation in a war upon the King in case he violated the terms of the agreement. Yet it is more conformable to modern usage to say that, so far as the King is concerned, the Charter was intended to limit his power and to prevent him from making encroachments.

Stephen Langton is by common consent the hero of this period. Magna Charta was two years or more in preparation, and there were doubtless frequent consultations with representatives of the various classes affected. It is probable that every sentence in the charter touches some sore spot in the working of the government, and was designed to conciliate an influential class. There is no evidence that any one who had anything to do with the formulation of the document was a victim of any general theory of the rights of man, or any general theory as to how a government ought to be organized and administered. From beginning to end the Charter is a catalogue of promises that specific injurious practices should cease, and that older and better ways should be followed.

The Great Charter expressly confirmed all the privi-

leges granted in a charter which the Church had previously received. The King's feudal tenants had suffered divers abuses and hardships. These and the corresponding abuses suffered by the tenants of the lords were to cease. The Great Council, as the older administrative agency for apportioning taxes and collecting them, had been displaced in the time of Richard and John by new administrative agents. Hence we have the statement that taxes were hereafter to be voted in full Council. The lesser baronage and the freemen had much reason to fear that if the government came into the hands of lords and bishops they would be deprived of the judicial and administrative favours which they had enjoyed under the system of Henry II. Much of the Charter is fitted to remove this fear. The King's courts and the various uses of the juries were to be continued. The city of London and other towns and cities were to continue in possession of their accustomed privileges. The hand of the King had been heavy in the execution of forest regulations, and these laws are modified.

Viewed in one way, the document is eminently practical. Each sentence had in view the immediate practical object of securing the coöperation of some particular influential class with the several other aggrieved classes in opposition to the King. For such a purpose the document must be brief and void of detail. The classes who must needs work together had habitually been at enmity. If they were now to work in harmony, troublesome details must be left out of account. Like the platforms of a modern political party, Magna Charta of necessity ignored many important subjects, and fastened attention only upon objects of common antipathy and desire. It is this brevity, this absence of detail, this indefiniteness in some of the terms used, and especially the indefiniteness of some of the classes to which the terms refer, that has made it

easy to read out of or to read into Magna Charta all the ideal principles of government which have been discovered in the succeeding centuries.[1] The Charter appears in its terms to be made for freemen. Yet it is probable that half of the English people of that day were not freemen.[2] It is also probable that no man living at the time understood the word "freeman" as it is used in recent times. There were probably a large number of persons who could not be classified either as free or not free. Freedom has grown by solving doubts in favour of freedom. The amplification of rights has coincided with an amplified interpretation of the charter.

It requires a peculiar construction to get out of the Charter the advanced principles of taxation by the representatives of those who pay the taxes. Yet this has been done. Henry II. constantly used the Great Council to form and publish his policies and to adopt the means of carrying them into effect. Richard and John had frequently used other agencies. The Charter is understood to state that the method of Henry II. should be followed. In after centuries the Council became a truly representative body, and the interpretation of the Charter has naturally enough followed the changing facts.

The Charter makes frequent use of the word "liberty," which meant in these early days merely the privilege of a certain class, or of certain classes; while, as used in modern times, the word expressly denies privileges or exemptions to any class, and affirms the common rights of all men. Mr. Gardiner quotes a passage in which this contrast of meanings is emphasized. A town was

[1] "The whole of the constitutional history of England is a commentary on this charter." Stubbs, *Select Charters*, p. 296.

[2] The condition of the people is fully treated by Ashley, *Economic History*, Bk. I., Chap. I., and Medley, *English Constitutional History*, Chap. I.

anxious to preserve its ancient *liberty* to put culprits into the stocks. Along with the broadening of the term "freeman" so as to make it include all the people, has come the imperceptible elimination of the idea of privilege from the word "liberty." In this way Magna Charta being in its origin a charter of privileges, has become the Great Charter of Liberty.

It is impossible to determine all that the makers of Magna Charta intended to accomplish. The document was especially noteworthy in that it set forth in order so complete a catalogue of the ills of government and the grievances of the governed. As the people of the present day cherish an exaggerated notion of the immediate effects of novelties in legislation, it is not unreasonable to suppose that some of the makers of the Charter may have actually entertained the absurd notion that the adoption of it would result in harmonizing the various classes who had been at enmity. They may even have thought that when the King had been sufficiently coerced by the barons appointed for the purpose, he would become transformed in character, and thus all the agencies of government would be harmonized. Of course, any such result was out of the question. The conflicting interests were not changed. The Church still had occasion to be jealous of the barons. The interests of the lesser nobility were often at variance still with those of the higher nobility. The privileges of towns and cities could be maintained only by constant conflict. The masses of the people, although they were the creators of the wealth upon which the warring classes subsisted, and furnished the brute force which was a determining factor in the strife of the warring classes, were not yet regarded as dangerous. It was difficult to make the ignorant populace change their customs at all; but if they did change, the conditions were such that the change was almost

invariably in the direction of their own interests. They would work best and fight hardest for those who treated them best. Those who gained the support of the masses prospered in their contests until such a time as the masses themselves got a mind of their own and came to be recognized as dangerous to the ruling classes.

It does not follow that, because the immediate purpose of the makers of the Charter was impossible of accomplishment, the effect of the act was therefore not great, immediate, and permanent. It is because men have ever been found who were willing resolutely to set themselves to the accomplishment of that which, for the time being, was impossible, that progress in human liberty has been made possible. It was fortunate that John died before he had time to break the league with his subjects. It was fortunate that Stephen Langton lived for more than half a political generation after the death of John, and that he succeeded in making peace with the Pope, so that the undivided forces of the Church could, under the Archbishop's wise direction, be used in the effort to harmonize the working of the league of the citizens against the Crown. It was fortunate that during the whole of Langton's life after the death of John, England had a boy for a king, and that the government was in the hands of a regency. For the first time since the Conquest the people enjoyed an orderly, customary administration of the laws at the hands of others than the King.

The question may be asked, If the Charter could successfully regulate the working of the government for fifteen years, why was it impossible as a permanent scheme of government? The answer is, Simply because, in the natural course of events, so many fortunate circumstances do not often coincide. So soon as the people were permitted again to feel the hand of a king, they experienced a less orderly and a more tyrannical and irregular govern-

ment than that of the regency. And yet, looking back down the long vista of history, it may even be seen that this too was among the favouring circumstances which have together accelerated the growth of English liberties; that it was well for England that the first sovereign to make his hand felt by his subjects after the establishment of the famous compact between the classes, was a tyrant with foreign notions and sympathies, estranged from his own people.

CHAPTER XIV

THE POWER OF THE CROWN REGAINED BY MEANS OF PARLIAMENT

HENRY III. declared himself of age in 1227. During the five years following, the King and the upholders of the Great Charter were at strife. In 1232 Henry put himself into the hands of foreigners, and for twenty-six years a tyranny was maintained. At the end of this time the opposition to the Monarch had become again so consolidated as to be able successfully to withstand him for a few years. But he again prevailed over his enemies, and closed his reign in triumph in 1272.

During the years of tyranny the King was supported by the Pope. After the death of Stephen Langton a compact, or conspiracy, against the English tax-payers was formed on the part of the King and the Pope. The laity were able successfully to resist some of the exactions which resulted; but the clergy, not having the support of the King or of the barons, were powerless against the Roman pontiff. After a few years, in 1237, a special legate was sent from Rome to extort money from the English people. The clergy allowed their old jealousy to deter them from giving effective support to the barons. It was not until the clergy had been made to suffer many things at the hands of King and Pope, that they were again induced to make common cause with the barons in opposition to their sovereign.

The great difficulty in the way of those who would restrain the King was to compel him to observe the laws. The various charters, and especially the Great Charter, were understood to require good government, yet the King appointed both those who administered the laws and those who decided cases arising under the laws. The provision of the Charter appointing twenty-five barons to make war upon the King in case he refused to observe the Charter, was omitted from the document as it was ratified and published by Henry III. The popes, ever opposed to the Charter, were ready to relieve the King from the oath requiring its observance. It was found to be comparatively easy to persuade the King to promise to obey the charters, but it was exceedingly difficult to get him to keep the promise. After many years of tyranny the barons and the clergy in the Great Council were led to demand that they should be allowed to control the appointment of the King's ministers. This demand was at the time revolutionary, and, as a matter of course, the King would not yield to it.

Finally, in 1258, all efforts to restrain the King and the Pope having failed, the barons and the clergy having become one in sentiment through the sympathy created by a common suffering, the Great Council, which had now come to be called Parliament,[1] met at Oxford. The barons came with an army to coerce the King. When the barons met John under similar conditions, they exhausted their demands in Magna Charta. Experience had convinced all who could observe that something more than charters was now needed. The Parliament at Oxford made a rude attempt to create such agencies for administering the government as would effectually restrain the King. A few months before, Henry had been

[1] William Prynne, *On the Fourth Part of the Institutes of the Lawes of England*, 1669, p. 2.

induced to consent to the appointment of a committee of twenty-four, twelve of his own party and twelve of the party of the barons, to adopt measures for restoring order. This committee of twenty-four made a report to the Parliament at Oxford, which, having been adopted, became known as the *Provisions of Oxford*. These required that a body of fifteen councillors should be appointed to advise the King in matters of government, and forbade him to act except upon their advice. The committee of twenty-four was continued, and the offices of State were required to be filled in accordance with their advice. To take the place of the ordinary Parliament, a body of twelve was to be chosen by the barons with whom the council of fifteen was to consult three times each year. If this form of government had been successful, it would have been a government by barons instead of a government by the King. It would have been an oligarchy instead of a monarchy. But the new government did not prove permanent. A few years of strife and civil war ensued during which the King and his son were for a time prisoners in the hands of the nobles. Then the royal party triumphed, and the King was again firmly established in the government.

The political contentions of the reign of Henry III. are significant for many reasons. In the first place, the clergy were gradually becoming less influential as leaders of the people. This was due in part to the jealousy felt by the higher clergy respecting the leadership of the barons; in part to the continued exactions of the Pope supported by the papal party among the English clergy; and in part to the religious awakening of the people through the preaching of the Friars. There was a great national revival in religion and in learning. The quickened moral perceptions of the people led them to see in the corrupt and avaricious Italian clergy forced upon the English

Church, representatives of a corrupt papal See which they more and more distrusted and disliked. This is an instance in which the spiritual teaching of the Church is seen to have a tendency to weaken the Church as a part of the government. Again, it was in the midst of the strife between King and barons that the word "parliament" came to be applied to the national assembly. The change of name did not in itself signify anything, but there were some facts in the history of the assembly during this reign which did signify much. For example, the claim of the Pope to feudal dues from England on account of the hated act of King John acknowledging him as overlord, furnished occasion for resistance on the part of the assembly. Henry's unpopular wars in France also drew heavily upon the nation's resources, and on one occasion, at least, the Council flatly refused a grant demanded by the King.[1]

More significant still was the effort of the barons, continued for more than twenty years, to gain or to exercise control over the appointment of ministers. This attempt reached a sort of culmination in the Provisions of Oxford, in 1258. True, the plan there set forth was, as stated above, no more effective than was that of the twenty-five barons of Magna Charta; yet the attempt itself is suggestive of one feature of the modern Constitution. The Parliament was still an ill-defined body with little regularity as to the members or the classes of persons composing it. Yet, as early as 1249 the House refused to act upon a difficult and important matter on account of the absence of some of its members.[2] This is significant as an early evidence of the idea of a definition of the assembly; still, it was a hundred years later before a tolerably clear definition was attained.

But the most important fact of all was the attempt of the party of the nobles to enter into competition with the

[1] Stubbs, *Constitutional History of England*, Vol. II., p. 65.
[2] Medley, *English Constitutional History*, p. 118.

King to secure a hold upon the counties and towns. The mere presence of representatives from counties and towns in an assembly such as that of the time of Henry III. is a thing of little consequence. But the fact of the existence of a king's party competing with a barons' party for the support of counties and towns by means of a summons to Parliament, is a matter of much consequence. Evidences of such a contest appear in the war between the oligarchy and the King. Having made prisoners of King Henry and his son Edward at the battle of Lewes, in 1264, the barons set up a provisional government with Earl Simon de Montfort, their leader, at its head. In the following year Earl Simon summoned a Parliament of his own supporters to which he invited representatives from counties and towns. Note in this connection a significant fact. The young prince who was then a prisoner had five years before threatened to join the community in compelling the barons to fulfil their obligations.[1] A few years later, Edward, having become King of England, fulfilled that threat, and as a part of the process of fulfilment he too called upon towns and counties to send representatives to meet with him in Council. It is this Parliament of Edward I. thirty years after that of Earl Simon, which marks the beginning of a permanent recognition of the representative feature in the national assembly.[2]

The reign of Edward I. is of unusual interest in the study of the Constitution, whether we view the subject from the standpoint of the forms of government, or from the standpoint of the balancing of the dominant forces of the government. Besides giving to Parliament its representative form, Edward did much to give perma-

[1] Gardiner, *Students' History*, p. 199; Stubbs, *Constitutional History*, Vol. II., p. 81.

[2] See Medley on the Composition of the Model Parliament, *English Constitutional History*, p. 123.

nence of form to the high courts of the realm. It was Edward who succeeded in winning back to the Crown the confidence of the English people, thus, in a sense, undoing the work of John and Henry III. Yet the existence of the Great Charter, and especially the fact that clergy, barons, lesser nobility, and townsfolk had for a generation or two laboured together to secure the ends outlined in the Charter, could not be undone. During part of the time the people looked to the clergy as the chief patrons of their local privileges; part of the time they looked to the barons as their most trustworthy supporters. Larger and larger classes were becoming conscious of personal privileges and of the power of their own classes. Edward could win the loyal support of the people only by convincing them that he was a more effective supporter of the principles of the Charter, than were the barons; that their local privileges were safer in his hands than they would be in the hands of the clergy or the aristocracy.

It will be remembered that from the time of Henry I. the sending of judges from the King's Council to hold courts in the counties tended to strengthen the hold of the King upon the people through their local institutions. Henry II. developed and used this power with marked effect. It should be noticed, too, that one of the important provisions of Magna Charta is that these courts should be held in each county four times each year. During the long regency after the death of John the people enjoyed these among other charter privileges at the hands of the clergy and the barons.

It was part of Edward's policy to turn the judicial system to the advantage of the Crown. In the hands of Henry I., and later in those of Henry II., that system was scarcely distinguishable from the other administrative agencies of the King: the same officers managed all the King's affairs. The beginnings of separation were

noticed in the time of Henry II., and before Edward came to the throne the courts and the common law which had been established through their agency had become a distinct factor in the government. The courts held by the King's justices in the counties had encroached upon the feudal courts, upon the Church courts, and upon the local courts of the hundred, while there was also a tendency to modify the county court. The first effect of the centralized judicial system was greatly to strengthen the power of the Sovereign. But it will be seen that the tendency of fixed laws administered according to rigid rules is, in itself, to limit all arbitrary power. The courts and the law became a bulwark of the people, or, at least, of certain classes of the people, against despotic government. Yet the same courts in the hands of a wise and energetic monarch were ever a source of royal strength as against powerful subjects. Edward I. fully appreciated the value of the judicial system which he had inherited. Three separate common law courts had been gradually developed out of the *Curia Regis* of Henry I., and to them Edward gave a still more distinct organization.[1] He took care, also, that justices should be appointed who would protect the people against the lawlessness of the barons. Were any of his justices suspected of corruption, he punished them as did Henry II. a hundred years before. Thus in Edward's hands the courts of law were made effective for the restoration of power to the Crown.

With the separation of the courts from the King's council came the separation of the judicial from the financial business of the realm. When, as in the times of Henry I. and Henry II., the sovereign used the same body of men to determine and publish his policy, to settle questions of law and of government, and to arrange with the county

[1] See Gneist, *The English Parliament*, p. 114.

courts for the collection of revenue, the relation between the central government of the King and the local governments was close and intimate. No distinction was made between the power of the Monarch as represented by the sheriff, and the same power as represented by the royal courts. With the separation of the courts, however, from the financial administration came a lessening of the effective hold of the King upon the local governments. Royal communication with the county governments was through the sheriffs, but with the encroachments of the King's courts upon the county courts the sheriff's office had become less important. The sheriffs, being subject to the orders of courts as well as of the King, were less efficient agents of communication with county courts. Confusion of authority in the sheriff's office tended to promote corruption as well as weakness there.

From the signing of Magna Charta, the place of the Council, or Parliament, in respect to matters of revenue, became more important. When Henry III. and his barons began to vie with each other in calling upon county courts to send representatives to their respective Parliaments, their chief object was to strengthen their military and financial support in counties and towns. Edward saw, as his father did not, that the King needed to have the loyal support of the people. Much has been made of the fact that the Parliament of Earl Simon supplied King Edward with a model, but Edward seemed, nevertheless, to have proceeded in his own way to find a method of coöperation with his local governments. At one time he called together provincial councils in different parts of his kingdom which were composed of four knights from each of certain shires, and two representatives from each town and city of the locality, besides various clergymen. The barons were not present at these meetings. At another time knights and burghers were called to meet with the

nobles, while the clergy were not summoned. In one case the representatives from boroughs and cities were summoned through the sheriffs; in another the summons was issued through the mayors. Knights were sometimes called to meet with bishops and barons when the burghers and the lower clergy were left out. The clergy were also summoned to separate councils. "But in 1295, for the first time, all these various ingredients were added together in their completed form to make what has been known to after ages as the Model Parliament. To this assembly came archbishops and bishops, three heads of religious orders, sixty-seven abbots, seven earls, forty-one barons, two knights from each of thirty-seven shires, and representatives from each of one hundred and ten cities and boroughs throughout the kingdom, — a body of rather more than four hundred persons."[1]

The formation of Parliament was an incident in the efforts of the King to regain power over the nobility through the support of the people. Direct dealing with the people tended to remove abuses in the sheriff's office, and this not only helped the King to gain the confidence of his people, but for the time being undoubtedly increased his effective hold upon their resources. Our modern notions lead us to think that, as a matter of course, a Parliament limits the power of the King. But a good many things had to happen after Edward established the Parliament on a representative basis before Parliament tended to limit in any appreciable degree the royal power. It is almost impossible to read of such an institution as the English Parliament in the time of Edward without reading into the history ideas and notions which had never occurred to the people of that day. To-day Parliament is sovereign, in legislation, in finance, in admin-

[1] Medley, *Constitutional History*, p. 123; Stubbs, *Select Charter*, p. 482 *seq.*

istration. And because there has been at all times a national assembly under the name of Parliament, Great Council, or Witenagemot, it is natural to associate with that body the vast powers possessed by the Parliament of to-day. It will help us to understand the origin of the modern Constitution, if we look upon the early assemblies not as law-making bodies chiefly, but rather as administrative agencies of the government. Henry I. could get along without giving much attention to the Great Council, because he found in a smaller body of men an effective administrative agency.[1] Henry II., on the other hand, while he continued the operation of the same administrative agencies, yet also made large use of the Great Council.[2] Calling bishops and barons to meet in Council, he was able to compel them to give formal assent to his predetermined policy. In his hands the Council was clearly an agent for increasing the royal power. When the barons first tried their hand at governing, in the time of the conflict with Henry III., they set up a frame of government which left out the Parliament altogether, substituting for it a body of twelve of their own number. Edward I.[3] used the Great Council in the early part of his reign to perfect the judicial machinery of his government. To build up his administrative policy, and to forestall the clergy and the barons in gaining control of the local governments, he adopted the policy of direct communication with counties, towns, and cities through their own representatives. When he called these representatives to meet with his Great Council in 1295, it was chiefly with the intention of strengthening his administration. The Great Council and early Parliaments were administrative and

[1] See Stubbs, *Constitutional History*, Vol. I., p. 312.

[2] *Ibid.*, Chap. XII.

[3] See his work well treated by Gneist, *The English Parliament*, p. 106 *et seq.*

judicial bodies; they were not in the modern sense agencies for determining policies.

The year after the meeting of the noted Model Parliament of 1295, Edward, being still sore pressed for money, gathered companies of merchants, and persuaded them to grant increased export duties. He also collected companies of the clergy, and persuaded them to grant large sums. When Edward again met his Parliament, the Archbishop of Canterbury presented a Bull of the Pope forbidding the clergy to pay taxes to a layman; and on the strength of this, the clergy refused a grant to the King. "Edward, instead of arguing with the Archbishop, directed the justice of the King's Bench to announce that, as the clergy would pay no taxes, they would be no longer protected by the King. The clergy now found themselves in evil case. Any one who pleased could rob them or beat them, and no redress was to be had. They soon therefore evaded their obligation to obey the Bull, and paid their taxes under the pretence that they were making presents to the King, on which Edward again opened his courts to them." Mr. Gardiner,[1] from whom the above is quoted, remarks that in the days of Henry I. or Henry II. the King could not have treated the clergy in that way. The masses of the people now looked to the King rather than to the Church for protection.

Edward I. gained the ill-will of many of his barons because he was constantly stripping them of power. His encounter with the Archbishop and the clergy naturally set the hierarchy against him. His exactions from the merchants likewise set the towns against him. The next year, 1297, when he ordered the Earl of Norfolk to lead an army into Gascony, he was met by a flat refusal.[2] All classes in his Parliament turned at this juncture against the King, and he was compelled to confirm Magna Charta

[1] *Student's History of England*, Vol. I., p. 220.

[2] Green, *History of the English People*, Vol. I., p. 364.

and other charters, and certain important clauses on the subject of taxation were added to the Great Charter. It henceforth became much easier to claim that any general tax must be voted by Parliament, or that any tax not voted by Parliament was illegal.

This incident shows that whenever, by a fortunate coincidence, the nobles, the clergy, and the influential classes among the people were united against the King, they could overpower him. Edward was an eminently wise and powerful king, yet he was forced to add provisions to previous charters which tended to limit his control over taxation. But the true value of the new words of the charter which Edward gave was in the fact that in coming generations they made it easier for the people, through an amplified Parliament, to gain control over taxation. For the time being, the giving of such a charter made it a little more likely that a king would ordinarily call upon the full Parliament rather than upon a smaller body of men for the administration of his finances. It should, however, be distinctly borne in mind that, whether the King used the smaller body or the larger, it was the King who controlled and directed affairs. If at any time the King could not carry out his policy, it was not because of the existence of the institution known as the Parliament, but because of forces outside of Parliament.

It would be absurd to say that it was the Parliament that forced Edward to sign the charter. It was rather the enraged barons, the clergy, and the merchants, with the hold which these had on the lower determining forces of the nation. The idea cannot be too often enforced that if at this time in English history the Parliament had been recognized as having centred in itself the high powers of a modern Parliament, it would have ceased to exist. It was because Parliament was looked upon by all classes as simply one agency for doing a thing which had to be

done in some way, that it was permitted to do that most important of all things, viz. to continue to be. The fact of continuity made it easier in after generations to make of Parliament an agency for governing by public opinion. It was as true in the time of Edward I. as it was in the time of the Conqueror that the powers which really limited the Crown were the Church, the nobles, and the local governments in counties, towns, and cities. Every one of these powers, which were in a sense independent of the Crown, might, as we have seen, be made, under certain circumstances, to minister to the power of the Crown. The real strength of the Crown lay in so balancing these powers one against the other as to make them each in turn support the government of the King. The Church had manifestly lost power at the time of Edward I. Probably a larger and larger proportion of the people in local governments had become conscious of power. The Crown and the barons held their own with, probably, little change in relative strength.

It is a matter of no small consequence that at the death of Edward I. there had been a hundred years of striving for unattained privileges. Magna Charta is a catalogue of such. Each class, we may believe, was still contending for its own narrow privileges, yet the Charter furnished the opportunity for the play of sentiments that were neither narrow nor selfish. It is much more than an empty form that the kings were many times induced, or forced, to ratify the charters by solemn oath. A century of striving to realize an ideal may be worth more to a nation than any amount of obedience to a clearly determined law.

CHAPTER XV

PARLIAMENT AS AN AGENCY OF FACTION

EDWARD II. was a weak monarch, and was disposed to place his affairs in the hands of favourites, who were not acceptable to the ruling classes. The barons wished to regain the power which they had lost at the hands of Edward I. At first they had the support of the nation, and were able to compel Edward II. to place the government in the hands of twenty-one of their number, called Lords Ordainers, who were to exercise practically all power. The Ordainers, for the time being, entirely displaced the Parliament. This is an indication of the sort of Constitution which England would have had if the barons could have had their way. They could temporarily gain the support of the dominant forces of the nation, because the King's government in the hands of odious foreign advisers was excessively bad. But in a few years the government of the barons was seen to be bad also. Then certain of the King's favourites were shrewd enough to devise a way by which he might overthrow the nobles. This plan was to call a full Parliament, and by means of it to destroy the power of the oligarchy. The new Parliament enacted laws providing that matters of government should thereafter be established in a Parliament composed of the clergy, the barons, and the commons.

This point in the history of Parliament is important as

marking the first distinct declaration that the *Commons* should have a share in law-making. The appeal to the ruling classes by means of a Parliament enabled the King and his favourites to prevail over the Ordainers; but having so prevailed, they were unable to maintain their position. The Queen and a faction of the barons turned against the King. He was forced to abdicate his throne, and his son Edward was crowned in his stead. Parliament was used as an agency for deposing one king and crowning another. This may suggest the great Revolution of 1688, but in reality the two things were quite dissimilar. The act of 1688 was a great revolution, because it carried with it a certain theory of the rights of Parliament. There is no evidence that any theory of the rights of Parliament had taken shape in any mind in 1327. Getting rid of a despised king, and an obnoxious husband, was in itself a disagreeable business. The Parliament was the most available agent for such a task. Five years earlier, Parliament was one of the means which this same king had used for getting hold of those forces of the nation which enabled him to destroy his chief enemies among the barons. While these things could all take place without the existence of any distinct theory concerning the rights and powers of Parliament, it must yet be admitted that the acts are in themselves fitted to develop a theory.

The greater part of Edward III.'s reign was occupied in war with France. This war served to bring the consciousness of increased power to large classes of the people. The shrewdness of William I. had led him to preserve the fyrd, or old English militia, and provide for its maintenance. We have seen that until the time of Magna Charta any English king, however bad, could maintain himself against his barons by calling to his aid the English militia. Henry II. thought it worth while

to reorganize and strengthen those local forces, and they became a powerful aid to clergy and the barons in their contest with King John; and all the kings, nobles, and clergy had always more or less influence over the local governments of which the militia formed a part, and according as one or another of these ruling classes gained control of this popular force that class prevailed over its enemies. As an incident to the building up of kingly power, Edward I. still further developed and strengthened the fyrd; but the possibilities wrapped up in the organization were not fully appreciated till bands of those trained and armed peasants had destroyed feudal armies of many times their own number at Crecy and at Poitiers.

Parliaments were habitually used during the reign of Edward III. as agencies for voting supplies.[1] It was during this reign that the two Houses were organized into their permanent forms.[2] The House of Lords was composed of the higher clergy and the earls and barons of the Great Council. The knights from the shires and the burgesses and citizens from towns and cities were formed into one House called the House of Commons. The lower clergy gradually ceased to attend the meetings of the assembly.[3] From the time of the Model Parliament of 1295 to the formation of the two Houses about 1341, much confusion continued to exist in the organization of Parliament. There were times when four diverse classes voted supplies or transacted other business separately. These were the old Council of bishops and barons, the knights, the burgesses, and the lower clergy. They appear to have sometimes met separately or in sections; sometimes to have sat together while still acting separately. Gradually, out of the confusion, arose, during the early years

[1] Stubbs, *Constitutional History*, Vol. II., p. 379. [2] *Ibid.*, p. 376.
[3] Medley, *English Constitutional History*, p. 135.

of the reign of Edward III., the two separate and distinct Houses of Parliament which continue to the present day.

Thenceforth the representatives of the lesser nobility, called knights of the shire, sat with representatives from towns and cities. The House of Commons, as thus composed, represented the wealthy and influential classes. In the counties those who were only a little less wealthy and powerful than the barons were usually chosen to Parliament. In the towns and cities only the more wealthy citizens had an important share in local government, and the more wealthy of these would usually be sent to Parliament. The bringing together of so many important persons in one House and giving to them a share in the government would naturally tend to develop the conviction that Parliament was itself an institution which had rights, privileges, and powers. The House of Lords was led to assert the principle that only peers should take part in the trying of peers, but the House of Commons, from the nature of its origin, held the first place in respect to the voting of supplies. The defining of the functions of the two Houses tended to promote the consciousness of special powers in each. A comparison of their powers would reveal the fact that the House of Commons, so long as it really represented the local governments of the counties and the chief towns and cities of the realm, carried with it the controlling physical force of the nation.

Parliament, thus organized, became a natural agency for resisting the King. It took the place in large part of the armed barons of former times. When a leader among the barons saw the necessity of resisting the King or the King's favourites, instead of raising an army by an appeal to his friends, he sought to gain his ends by means of the Parliament.

During the later years of the reign of Edward III.

England was in such a state of disturbance and strife as would have led in other times to civil war. Notwithstanding the great victories over French armies the results of the war were disastrous to England. Taxes were oppressive, and the money raised was squandered in offensive ways. The King, never a great man, was losing his mental powers and had become the victim of a designing mistress. Causes other than the immediate conduct of the government also served to create an atmosphere of discontent. In 1349 commenced the visitations of the Black Death, which is believed to have destroyed half the population. Social and industrial changes were in progress. Free labour had largely taken the place of bond service, and in consequence of the death of so many labourers there was a natural tendency for wages to increase. But the wealthy classes, being the law-makers, strove to protect themselves by severe and repressive laws against the labourers. Large unrepresented classes who were injured by the conduct of the government became conscious of their injuries. A revival of religion added to the social uneasiness. Many preachers and teachers arose who taught the people that their sufferings were due to the sins of their rulers, while the belief spread that the Church was both rich and corrupt as well as oppressive.[1] By far the most noted of those teachers was John Wiclif, whose preaching with that of his followers furnishes one of the strongest illustrations of the tendency of the teaching function of the Church to weaken its governing function.

The clergy filled a prominent place in the King's Council and among the high officers of State. The laity were always jealous of their power and influence, and a large party among the nobility wished to degrade the clergy and seize the property of the Church. John of Gaunt,

[1] Ashley, *Economic History*, Vol. II., p. 266.

Duke of Lancaster, made himself the leader of a part of the anti-clerical faction. But the Duke of Lancaster was himself feared and dreaded by many of that faction. There was uncertainty about the succession to the throne. The aged King was declining. His son Edward, the Black Prince, was the victim of a mortal disease. It was believed that the Duke of Lancaster aspired to the throne. In this emergency, the Black Prince headed the party of opposition to the corrupt court, now dominated by the Duke of Lancaster, and a Parliament was assembled, in 1376, which has received the name of The Good Parliament. It was noted for the vigorous action of the House of Commons, which refused a grant of supplies until the accounts of the government should have been laid before them. With the Black Prince to support the Commons, the Duke of Lancaster was thrust out of the King's Council; the treasurer was impeached before the House of Lords, convicted, and imprisoned, — the first instance in history of such an act, — and the King's mistress was removed from the court.

In the midst of these reforms the Black Prince died, and following that event the Duke of Lancaster returned to power. Under his direction another Parliament was called, which undid much of the work of the Good Parliament. This incident shows Parliament to have been a tool rather than an important, independent power. Still, it was a much more civilized agency than were the armed troops which it displaced. And it is because Parliament was for so many centuries an effective tool in the hands of first one and then another of the opposing factions of the realm that it has been comparatively easy in modern times to localize in Parliament itself, effective power.

During the reign of Richard II. (1377–1399) the various elements in the Constitution were quite thoroughly tested. The King was only twelve years old at his coro-

nation. There was a baronial faction with the Duke of Lancaster at its head, and there was a clerical party. These were only a short time before at the point of civil war. The masses of the people were overburdened and discontented. The sense of injury on the part of the masses was greatly increased by the preaching of Wiclif and the Lollards. The French and Scots were ravaging the borders, and with the advent of the boy King there was danger that the whole country would be overrun by hostile armies. The dangers from discontented peasants and from foreign enemies were so great that for the first few years of the reign the bishops and the barons composed their differences and united to make up a Council to preserve order and prevent disaster. It was during these few years that there occurred various revolts among the peasantry. The most important of these was the one in the county of Kent, led by Wat Tyler. Armed peasants overran the country, and gained possession of the city of London, and were induced to return to their homes only upon the promise of the young King that their grievances should be redressed. They complained of the unequal taxation of the government and of the tyranny of the landlords. But the word of the King was not observed, nor was the lot of the peasants improved. Nevertheless, the demonstration of power on the part of the populace was such that the wealthy and ruling classes were led to tremble for their position. If, under an ignorant leader, the common people could take the city of London and slay the Archbishop of Canterbury, what might they not do if led by a competent military chief? From this time forth the fear of the masses had a sensible restraining influence upon the quarrels of the privileged wealthy classes.

The first few years of Richard's reign after he was old enough to take personal control of the government were

characterized by violence and faction. The King, with certain of his favourites, undertook to preserve order by the exercise of royal prerogative, and the Duke of Gloucester, one of the King's uncles, headed a faction against them. Gloucester's party controlled the Parliament of 1386; the King's ministers were impeached, and a commission of eleven was appointed to administer the government for one year. In the hope of overpowering this commission, the King secured a decision from his judges declaring its appointment illegal, and was proceeding to summon a Parliament which should punish the commissioners, when five of them, who were called the Lords Appellant, raised the standard of rebellion. Richard was again compelled to yield. A Parliament subservient to the Lords Appellant impeached and executed two of his ministers and drove others from the country. The Sovereign now seemed to be reduced to more complete subjection than ever; yet within a few years the successful oligarchy became itself unpopular, and Richard placed himself once more at the head of the government.

It will be remembered that when Henry III. was put under restraint, a party of the barons assumed control, and their failure led to the trial of a representative Parliament. Again, when Edward II. was in similar fashion restrained by the Lords Ordainers, he was, after a few years, enabled to overthrow the oligarchy by an appeal to Parliament and by enacting a law which gave the commons a share in legislation. So now when Richard II. perceived the waning popularity of the Lords Appellant, he threw himself into the hands of the now fully developed Parliament, and for several years ruled in accordance with its wishes. When Parliament assembled, Richard required his ministers to lay down their offices so that the assembly might not be deterred from making

complaints against them, and he restored the ministers to office only when he was assured that their conduct was agreeable to his Parliament. It will be observed that facts of this sort are of immense value to the modern statesman in the construction of the modern theory of the power of Parliament.

After a few years of parliamentary rule Richard became alarmed at the rumours of plots against his life, and so violent was his conduct that he is believed by many to have been insane. He compassed the death of Gloucester and others of his enemies. He called a packed Parliament, and secured the passing of a law which placed the power of that body in the hands of eighteen of his friends, thus making the royal government absolute. One high-handed act followed another, until, upon the death of the Duke of Lancaster, the estates of the dukedom were confiscated. Upon that the young Henry of Lancaster, who had been banished by order of the King, landed in the kingdom and raised an army to vindicate his right as heir to the title and the estates of the duchy. The King was overpowered, and a Parliament was called under the direction of the triumphant party of the barons, with Henry, Duke of Lancaster, at their head. This Parliament deposed Richard II. and crowned Henry of Lancaster in his stead.

The Parliament which deposed Edward II. made his son Edward king in his place, but when Richard II. was deposed, the direct lineal descendant was passed over. If the law of descent had been observed, the Crown would have gone to the house of Mortimer, which was descended from the second son of Edward III.; but Parliament gave it to Lancaster, descendant of the fourth son. Thus the house of Lancaster was enthroned by means of superior military and political power. Three hundred years later this fact made it seem less irregular for a family to be

put into possession of the Crown through the grace of Parliament, and hence is developed the doctrine that the nation by means of Parliament may do anything it pleases with the Crown.

It is to the rule of Edward III. and Richard II. of the Lancastrian kings that those who withstood the claims of the Stuarts looked for parliamentary precedents. But Parliament according to Pym, and Eliot, and Vane, and Shaftesbury, was a very different institution from Parliament according to Hotspur, and Gloucester, and York, and Lancaster. According to the view of Pym and Eliot, Parliament represented the intelligence, the judgment, and the conscience of the nation; in the time of Richard II. it was a mere tool in the hands of a faction, or often a conspiracy of the privileged classes against the nation rather than a representative institution of the nation.

Before the time of the Lancastrians there had been, in some respects, a decline in the effective power and influence of the masses of the people upon the administrative business of the government. William I. and his immediate successors preserved the local governments of the English and brought themselves into direct touch with those organizations through the sheriffs and other officers chosen by the King. The local governments and the local militia furnished the force which was a determining factor in all contentions between kings, barons, and clergy until the time of Edward III. Coincident with the formation of the House of Commons as the recognized organ of communication between the King and the counties, towns, and cities, these local governments were themselves becoming more exclusive and more aristocratic. The county court ceased to be attended by a large body of the influential people of the county, and its affairs were transacted by the justices of the peace appointed by

the King and by a select number of the knights and the burgesses. The towns and cities had become more wealthy, and their governments were falling into the hands of a more exclusive class.

The long war with France led to a change in the military organization of the country, or coincided with it. There came into being a detached fighting class. This was supported in part by high taxes exacted from the nation, and in part by the great nobles who maintained among their retainers large bodies of armed men wearing their lord's liveries. These made up the train of the great man and by means of them he often became a source of terror to both king and people. Laws against liveries, that is, against these bands of liveried warriors, began to appear with the reign of Richard II. and continued in force for many generations.

During the three centuries which had passed since the Conquest, free labour had been gradually displacing serfdom. The liberated peasants were often, indeed, a less effective political factor than were the former serfs. So long as the serf belonged to a lord he had a sort of representation in local governments. The free peasant was wholly without representation. He was ill treated, and gradually he became aware of his injuries. The peasants' revolts in the time of Richard II. convinced the privileged classes that there was in the abused unrepresented class a force which would destroy them should it be directed by effective leaders. The religious teachers whom Wiclif had trained threatened to become such effective leaders of the abused masses of the people. The party of Lancaster had for a time defended Wiclif and the Lollards. But when that party came into power, with the accession of Henry of Lancaster, the leaders among the Lollards were put to death without mercy; and after the reign of the first two Lancastrians the open pro-

fession of their peculiar religious beliefs which had been made instrumental in promoting political liberty was unknown.

By the time of the deposition of Richard II. in 1399, certain fixed institutions had come into existence which may themselves be counted as factors in the balancing of the high powers of State. More than two hundred years had passed since the organization of the judicial system of Henry II. The common law courts were now well-established and venerable institutions. In their origin these courts were agencies for strengthening the arm of the King, yet in course of time they had come in many ways to limit that power. The uniform administration of law is in its very nature against arbitrary power, and a knowledge of the law is a source of protection to the people. It should, however, be borne in mind that the courts were still often used as a means of tyranny.[1] The higher nobility were accustomed, by means of their armed retainers, to overawe courts, assassinate jurors, and secure unjust decisions;[2] and the power which the great lords exercised over the courts was a large element in building up and maintaining the liveried troops who followed them. A noble could appear in the court on behalf of his retainer, and could get from the judicial body what the feudal inferior could not get for himself.[3] Thus, in one way and another, the courts themselves had a modifying effect upon the balancing of the powers of State.

[1] They have continued to be so used at times even down to the present century. Note, for instance, sentence passed upon Thomas Paine for his book, *The Rights of Man*. See subject treated by Medley, *English Constitutional History*, Chap. IX., "The Liberty of the Subject."

[2] See *The Paston Letters*, ed. by J. Gardiner, 1872, Nos. 418, 420, 472, 503, 504 *et seq.*

[3] Stubbs, *Constitutional History*, Vol. III., p. 530; Greene, *History of the English People*, Vol. II., pp. 16, 17. *Paston Letters*, Nos. 77, 107, 418, 420, and several others.

Besides the three common law courts, a fourth court, called the Court of Chancery,[1] had in the time of Richard II. grown out of the King's Council.[2] Centuries had been required for the common law courts to become a separate institution, and as they became distinct from the King's Council, they assumed the position of lower courts from which there was an appeal to the King in Council. The Chancellor, who was at first the King's secretary, came afterwards to exercise high judicial functions, and so around the office of Chancellor grew up the Court of Chancery. Thus out of the one King's Court of the time of Henry I. had come four distinct judicial bodies, while there was still in the King's Council a measure of judicial power, a remnant of which is to this day exercised by the Privy Council.

After the development of the two separate Houses of Parliament in the early years of the reign of Edward III. a conflict of authority speedily grew up between them and the King's Council, — which had by that time come to be called the Privy Council. The King and his Council altered acts of Parliament, and the two Houses objected. The King issued orders from his Council which were given the force of law. Orders from the Council often conflicted with acts of Parliament, and, in short, there was no clear line of demarcation between the respective spheres of the two institutions.

Thus, out of the one ill-defined assembly of the Norman period had been developed four separate courts, a Privy Council, and two Houses of Parliament. Yet the real moving forces of the nation were not to be found in any of these institutions. They still dwelt in the King, in the dukes and other high nobility, in the Church, in the lower nobility, in the wealthy classes of towns and cities, and in

[1] Medley, *English Constitutional History*, p. 340 *et seq.*

[2] Anson, *Law and Custom of the Constitution*, Vol. II., p. 435.

the lower classes of freemen, who were becoming ever more conscious of rights and of injuries. The existence of the national institutions did, no doubt, modify in some measure the perpetual strife; but, so far as the ruling classes were concerned, it was still a government of force rather than of law, and courts and parliaments were for the most part mere tools in the hands of warring factions.

CHAPTER XVI

THE NOBILITY WEAKENED BY FACTION

THE Crown in the hands of the Lancastrians represented a faction. One great baronial faction had triumphed over another great baronial faction, and there was a tendency to a counter-revolution on the part of the displaced faction. The marked success of the first two Lancastrians in a measure overcame this tendency. There followed during the minority of Henry VI. a political generation of acquiescence in the rule of the house of Lancaster. Then, partly by reason of the personal qualities of the King, partly through adverse circumstances, the factional strife broke out in the middle of the century into the Wars of the Roses.

The roots of that frightful and bloody contest run far back into the early ages of English history, and have been to some extent already traced in preceding chapters. It may be well, however, again to glance swiftly over some of the historic facts and conditions whose tendencies culminated in the great fratricidal strife of the Middle Ages.

From the days of the creation by Henry I. of a new English nobility as a counterpoise to the unmanageable Norman baronage, a tendency to factional divisions may be clearly seen. At first the line of separation was mainly a national one, and the quarrels represented the inevitable jealousy of the English dwelling on their an-

cestral lands towards the greedy and usurping French nobles, and of the French whose arms had established and supported the Sovereign in his conquered realm towards a despised and inferior race which had cunningly secured royal favour. As time went on, the ostensible and even the real grounds of opposition were continually shifting. Each faction was forced to bid for the favour of the lower orders, often with little reference to any question of native or foreign influence; and in some periods power swung from one to the other party, as one or the other gained more of popular support. The great lords on the Scottish borders had been permitted and encouraged by the earlier kings to retain a large measure of independent power, and they naturally became leaders of the opposing forces. Changes in the military organization, too, by which armed retainers, whose business was war, were substituted for mere armed tenants and peasants, helped greatly to increase the power of the lords. At one time one of the aristocratic factions championed the popular side, at another it was the opposing nobles who claimed to support the people's interests. A hundred years before the house of Lancaster was enthroned the Duke of Lancaster headed the people's opposition to the foreign favourites of Edward II. But when Richard II. was to be dethroned, and Henry of Lancaster crowned, the Lancastrians became the leaders of the higher nobility, while a tendency ensued for their enemies to seek to curry favour with the more popular party.

The clergy, likewise, sometimes cast their influence to the royal side, sometimes with one or other of the aristocratic factions. During the Lancastrian period the weight of their choice was much less than in preceding ages. Upon the Continent the Church was itself rent with divisions, and two Popes contested for supremacy. The Church in England had become rich and in a measure cor-

rupt. Kings and nobles had more than once reached forth envious hands to grasp its wealth. Being thus threatened, the clergy were eager to ally themselves with any party which seemed likely to protect them in the possession of their property. Hence their warm support of the Lancastrian kings, who also gratified them by persecuting the Lollards. But more than by fear of losing property the real strength of the Church had been sapped by the moral unsoundness which was becoming clearly apparent to the growing spiritual earnestness and insight of the people, stimulated by criticisms of the religious teachers in the fourteenth century.

In this continual strife of factions may be seen a suggestion of the methods followed by modern political parties. But the red rose and the white were not symbols of political parties in any accepted modern sense. Parties of to-day are held together by common beliefs and common opinions. Lancastrians or Yorkists were bound together by common fears and common hatreds.

The knights, citizens, and burgesses who were represented in the House of Commons had come to be a limited and privileged class. Changes which had been made in the local governments separated them from the masses of the people, over whom they had largely lost influence. The governing classes might now be justly said to constitute a conspiracy against the people. Effective power was in the hands of the King and the great lords. If these had been united among themselves, it is probable that the forms of parliamentary institutions would not have been preserved.

Henry IV. was induced to favour the House of Commons, not because the Commons in themselves stood for a great and effective power, but because he was beset on all sides with great lords who threatened his destruction. Under such circumstances the Commons did represent a

power which was not to be despised. Henry named his ministers in Parliament, and one-third of them were members of the House of Commons. It was understood that ministers thus named were acceptable to Parliament. Sheriffs under the direction of the King or of some lord had been accustomed to name the members to represent the county in Parliament or to interfere with the free choice of the county court. Laws were passed early in Henry's reign to remove this abuse. The House of Commons named auditors to see that the money was expended for the purposes for which it was granted.[1] When a money bill came from the House of Lords to the House of Commons, the House remonstrated, claiming for the Commons the sole right to originate such bills; and the King yielded to their claim.[2] It will be observed that all these facts in the history of the House of Commons were a matter of great convenience to the statesmen who, two hundred years later, determined to make the Lower House the dominant factor in the English government. Henry IV. and his lords made these concessions to the Commons because the Commons were weak. They always had been weak. There had not been a time when a king or a dominant faction among the lords could not call a House of Commons together which would do its bidding. They had seen Parliament after Parliament packed during the previous reign. They expected still to control the membership of the Commons. If the seventeenth century notions of the power of the Commons had entered the minds of the powerful classes at any time during the fifteenth century, Parliament itself would have been ruthlessly snuffed out of existence.

Statutes were passed during the first few years of the reign of Henry IV. which indicate an intention to secure

[1] Stubbs, *Constitutional History of England*, Vol. III., p. 54.
[2] *Ibid.*, p. 61.

greater independence in the selection of members. Yet the effort was not successful, and the interference continued throughout the century. In 1430 a law was passed limiting the franchise in the choosing of knights of the shire to free-holders worth forty shillings a year. Mr. Freeman suggests that when we take into consideration the value of money as compared with present values, in the place of forty shillings we should read forty pounds. It is probable that this law did not essentially change the practice in respect to electing members. The Commons had usually been chosen under the direction of, or at least under the influence of, the King or of ruling lords. Especially was this true whenever the Commons were used as an agency in a political contest.

The Wars of the Roses, which began about the middle of the fifteenth century and continued, with many intervals, till the crowning of Henry VII. in 1485, had a marked effect upon the shifting and balancing of the forces of the government. The government, being in the hands of the few, each party among the warring factions feared the people; yet the Yorkists were distinctly the more popular. The insurrection under Jack Cade in 1450 is believed to have been undertaken partly in the interest of the Duke of York. Still, throughout that cruel and bloodthirsty period little heed was paid to the needs or the aspirations of the common people. Lords with their retainers fought against other lords with their retainers. The victorious party often slew the conquered without mercy. There were many vicissitudes. Lancastrians vanquished Yorkists, and were in turn many times vanquished by Yorkists. Not content with the slaughters of the battle-field, the victors for the time being were wont to call packed Parliaments to continue the work of death through bills of attainder and confiscations. A large part of the existing higher nobil-

ity was destroyed, and much of the land which they had held was transferred to the surviving noble families or to the Crown.[1] That force which had been from the days of William the Conqueror to this fatal era the chief counterpoise to the power of the Crown was, so far as such a function is concerned, utterly swept away. After these wars there was never a time when a faction of the nobility relying upon their own retainers could meet a king on equal terms. For generations after it was impossible to discover in the English government any clearly defined and effective counterpoise to the regal power.

If any such real counterpoise remained, it is to be found in the local customs, habits, and temper of the unrepresented masses of the people. The upper nobility was now weak; the Church was rich but timid; the lower nobility were without effective leaders or organization. The masses of the people could at any time destroy the government, but they could not replace it with another. They held the effective power which conditioned the action of future kings, but it was chiefly a power to destroy.

The existing conditions may be thus seen to have favoured the centralization of power in the hands of kings, and a line of monarchs now appeared with a genius for gaining and holding power. If the masses of the people could, as they did, improve their condition in the midst of destructive civil war, much more could they improve it if, while retaining all their acquired privileges, they could at the same time enjoy the comforts of peace. The people naturally approved a strong and orderly government. The nobility and the clergy were also disposed to favour a strong hand lest an enraged nation should strip them of their privileges.

[1] See Stubbs, *Constitutional History of England*, Vol. III., p. 15 *et seq.* Green, *History of the English People*, Vol. II., p. 7.

At the close of the Wars of the Roses and the beginning of the reign of the Tudors, the forms of the Constitution had been determined. In the first place, the House of Commons had become the recognized agent for voting supplies.[1] Under the three Lancastrian kings, Parliaments were constantly used as agents of government. Edward IV. got a Parliament to vote him supplies for life, and was thus enabled to get along without Parliaments during much of his reign. The grants made by Parliament he supplemented by "benevolences" which he exacted from the rich. A Parliament in the reign of Richard III. made the exaction of benevolences illegal. The point to be especially noticed here is that the facts are such as to render it easy to prove that at this time Parliament was a recognized taxing agent, and that in matters of taxation the House of Commons held the first place.

During the weak rule of Henry VI. Parliament adopted the practice of introducing regular bills and passing them through the two Houses before presenting them to the King for his signature. Before that time legislation took the form of a proposition from the King to be approved by Parliament, or of a humble petition from the Parliament to be approved by the King. Edward IV. made a complimentary speech at the opening of his first Parliament, and he promised to rule according to the law. This, it will be observed, is a good precedent. It was also a good precedent when, almost a hundred years earlier, Richard II. in a fit of parliamentary fervour required his ministers to lay down their offices upon the assembling of Parliament, so that Parliament might feel free to accuse any one of them of malfeasance in office.[2] All such acts are important because of the support which they give to modern parliamentary theories and practices.

[1] See Hearn, *The Government of England*, p. 381.

[2] Gardiner, *Student's History of England*, Vol. I., p. 280.

Parliament had been made the tool of all sorts of high-handed judicial and executive acts. It began the impeachment of ministers in the time of Edward III.; it was brought into conflict with the judges in the time of Richard II.; and the events were such as to give weight to the modern contention that Parliament is above the judiciary in authority. An impeachment makes the Commons the accusers and the House of Lords the judges. The fierce contests of the Wars of the Roses gave rise to the summary destruction of men and the confiscation of estates by bills, called bills of attainder, passed in the ordinary way through both Houses. Time and again Parliament had been made the agent for controlling or choosing the King's ministers. Especially had Parliament claimed control over the expenditure of money.

CHAPTER XVII

EARLY TRAINING FOR DEMOCRACY

LOOKING simply at the forms of parliamentary action, nearly all may be seen in acts before Henry Tudor became king in 1485. Green tells us that nothing was added to the Constitution after the New Monarchy (which he dates from Edward IV.) until the century of the Puritans and the Stuarts.[1] This is true if we are looking simply for forms of action, and for material out of which to create the modern theory of the powers of Parliament. The Parliament of the fifteenth century had everything which we associate with a modern Parliament, except power, influence, independent authority, and such a connection with the nation at large as to make it a really representative, national institution: all of these it lacked. Its hold upon the nation was less direct and effective than was that of the Norman and early Plantagenet kings. These kings came into intimate relations with their people through members of their Council, through sheriffs whom they appointed, through the system of courts which they set up, and through the fyrd, or local militia. When the later Plantagenets called representatives from the local governments to attend the meetings of the King's Council, the act resulted in the breaking of the nation into two parts, leaving the greater part of the people on one side and the ruling, privileged classes on the other. The

[1] *Short History of the English People*, p. 303.

admission of knights and burgesses to the Council tended to destroy rather than to promote popular representation.

But if there had been a loss in respect to the relation of the masses to the King's Council and to Parliament, there had been a distinct gain in respect to their relations to the courts. When the Wars of the Roses broke out, the people had for centuries enjoyed the benefits of the common law courts, and all through the civil conflict the judicial processes went on with little interruption. There were, indeed, many instances of cruelty and injustice perpetrated by juries and courts when overruled by powerful classes; yet, so far as the masses of the people were concerned, in their ordinary dealings they received a fair degree of justice at the hands of those institutions. The common people had become law-abiding. It was mainly the rulers only who were lawless, and, while the lawless elements in the nation were destroying each other by civil war, the ordinary industries flourished and the people prospered.

England had ceased to be a nation of farmers. Edward IV. was called the Merchant Prince. He owned ships and engaged in commerce. More than a hundred years earlier Edward III. had encouraged the importation of weavers from Flanders. The manufacture of woollens in endless variety had grown up. Towns and cities were enlarged and prosperous.[1] Country folk had made their way into the cities, and some of them had risen to positions of leadership in trade organizations. Certain laws placed upon the statute books during this period serve to show the trend of the changes in progress. One of them was designed to prevent labourers from leaving the farms. Ordinances were passed in the towns to prevent the scandal of villeins rising to the position of master. From

[1] For growth of towns; see Ashley's *English Economic History*, Vol. II., Book II., Chap. I.

this time forward the towns held a more important place in those political contentions which resulted in the development of the English Constitution. With the greater security which came to England with the Tudors, there grew up among the wealthy townsfolk the habit of deserting the cities and establishing country residences. At the close of the Tudor century townsfolk and middle class countryfolk were ready to unite in opposition to the monarch.

It has been already remarked that the working of the present Constitution is dependent upon the state of mind of the people, and one element in that attitude and temper which is of the utmost importance is the essential conservatism which prevails to-day among all classes. It is not easy to account for the peculiar temper of a nation; but in a study of the characteristics of the English people at the close of the fifteenth century, large account should be taken of the fact that for many centuries an orderly government had been maintained by means of the common law courts, and of this other fact that the dwellers in towns and cities were the subjects of a great variety of political and social experiences. The Norman kings set the example which other monarchs followed of granting charters to towns and cities. Under royal patronage the freemen in the towns were protected from the brutality of feudal despotism, and gained much practice in various forms of self-government. They were organized into trade and craft guilds. No man stood alone. All were bound together in coöperative enterprises. Difficulties between the town corporations and the guilds, and between the guilds in their relations to each other, were continually arising and demanding adjustment. Within the guilds were masters and apprentices between whom were many disputes requiring settlement. From the middle of the fourteenth century there existed a distinct

class of journeymen, or wage receivers.[1] These formed themselves into labour organizations, and for generations there was conflict between the organizations of labourers and those of employers.

The religious element also contributed to the friction between classes and orders. Religious fraternities and other societies abounded among the laity, and the religious motive was a leading feature in all the industrial organizations. Many of the later guilds grew out of the religious brotherhoods, so that a single society came to provide for the secular interests of a trade, while at the same time it maintained a priest to pray for the souls of the members, supported a chapel with lights perpetually burning before the altar, performed a religious play at stated seasons, and managed charitable funds for the benefit of their members and dependents. Especially was the religious motive prominent in the labour organizations. Masters complained that the workmen were seeking to raise their wages under the guise of piety. The religious brotherhood which spread from the towns to the country contributed to the development of a lower middle class in the villages.

While liveries were playing such a conspicuous part in the later phases of the feudal system, there sprang up in the cities and towns liveried associations, made up, at first, of a limited membership from societies already existing, but not cut off from the company, or craft, of which the livery constituted the aristocracy.

Now it may be wide of the mark to say that the centuries of experience in the common law courts, and in the many organizations which embraced a large proportion of the people, accounts for that peculiar quality of character which enables the modern English to maintain their delicately poised Cabinet system, — especially as the com-

[1] See Ashley, *English Economic History*, Vol. II., p. 101.

munal and guild institutions were common to England, France, and Germany, — yet we can readily believe that those experiences have had much influence in the formation of national characteristics. By means of them large numbers of people gained practice in political affairs, learned self-control, and acquired the habit of effectual coöperation.

As the government of counties and hundreds became more exclusive, that is, came to be controlled by fewer persons, so there was likewise a similar movement in all organizations of every name. The early guilds were for the most part associations of equals; in later times the authority within them came to be wielded by the few. The journeyman societies were all either destroyed or brought into subjection to the craft, or company, in connection with which (and, in a sense, in opposition to which) they had arisen.[1] In the religious societies and in the municipal corporations, also, authority became more and more centralized in a few hands.

Probably language is used entirely amiss when any of these early organizations are spoken of as being democratic at any period. It is a more accurate form of speech to say of the early governments of the counties, hundreds, and towns, and of the early guilds, that they would be democratic if, with corresponding forms of organization, they existed at the present day. But in the olden time the ideas out of which modern democracy grows were wholly wanting in the minds of the people. There was probably no more real democracy, as now defined, in the rude primitive age when the greater part of the people did the same things, and were related to each other as equals, than in the later ages when greater diversity appears, and the relations were those of higher and lower

[1] For an interesting account of these societies, see Ashley's *English Economic History*, Vol. II., p. 117 *seq.*

ranks. The change simply indicated greater wealth and a further division of labour. It was then held to be the business of some men to govern, and there was a tendency in all the voluntary societies, as well as in cities and counties, for the exercise of authority to become hereditary. Political strife went on in all the ranks of life, not because of the existence of a spirit of democracy, but rather because of the continual conflict of class interests.

Nothing can be more helpful in promoting a correct understanding of the existing democratic Constitution of England than a clear apprehension of the fact that the ideas now expressed by the word "democracy" are altogether new in the world's history. Merely that the word is old is no indication that its meaning is old. To the mind of the Greeks who gave us the term, *Demos* meant a privileged class. It was a striking characteristic of the Athenian democracy that nine-tenths of the people were ignored by the ruling classes. The slaves of the Greeks were often of their own race — their own flesh and blood; yet the moral code of the Greeks treated the slave as other than a human being. A classical Greek with a Salvation Army conscience is an utterly unthinkable being.

American annals record a memorable sentence which, with accompanying events, well illustrates this contrast of view in different ages. In 1857 the Chief Justice of the Supreme Court of the United States in rendering an important judicial decision gave utterance to these words: "The negro has no rights which the white man is bound to respect." To the mind of the classically trained lawyer the statement was true in fact and correct in law. The speaker attributed the sentiment to the statesmen of the previous century, and — with individual exceptions — their views were, no doubt, fairly represented. But the words of the Chief Justice fell upon the ears of men of a different spirit, men brought by the onward march of

civilization and the growth of humane and Christian feeling into an attitude of revolt toward the coarse brutality and pagan heartlessness which the words embodied. In less than twenty years from that day the Negroes of the United States were not only in possession of all the rights of manhood and citizenship, but they were also in control of the legislatures of many of the Southern states and were making laws which white men are still bound to obey.

Democracy was a term of reproach to the statesmen who framed the early American constitutions. The new ideas which the word now represents were then finding utterance; and, while no objection was brought against the ancient, classical meanings, the modern notions of democracy were heard only to be rejected and condemned. Only in the rare, exceptional mind did this new thought become a conviction earlier than the present century. Now, that view of democracy represented by Thomas Jefferson has been for a century gradually filtering into the American mind. The momentous revolution — for it is nothing less — has come and is coming to the American without observation.

To the Englishman the case is wholly different. The introduction of the new idea of democracy has been accompanied by certain specific acts. Now, if there were nothing to be accounted for in the present English Constitution except the democratic theory and those governmental institutions which are in harmony with it, the easy way to accomplish that would be to go with the multitude and call everything democratic in the past history of England which admits of such a construction. But it is necessary also to account for the Crown, the House of Lords, and a formal constitution which appears to contradict in many ways the democratic constitution. To explain this apparent contradiction it is necessary to use

discrimination in respect to the meaning of words, — to avoid as far as possible the confusion arising from employing the same words with a variety of meanings. When we apply the term "democracy" to the ancient English counties, hundreds, towns, guilds, and religious societies, we mean by it something wholly different from its meaning when applied to the modern Constitution. All careful historians will admit that the earlier democracy, so-called, was without a clearly defined theory of the right of all to participate in the government. But it is this clearly defined theory which is the essential element in the new democracy.

The distinction is so important that, at the risk of being tedious, I venture to introduce one more illustration. Among the mountains of Switzerland are found little pure democracies which seem to link the government of the ancient primeval tribe to the Swiss constitution of 1848. There is, however, no satisfactory evidence that democracy in the modern sense of the word existed anywhere in Switzerland much earlier than 1848. At any previous time, wherever the men who composed the little local democracies were led to take part in a government outside of their ancient prescriptive rule, they have acted in ways quite undemocratic. They have shown no predilection in favour of democratic forms; they have confined the privilege of governing to the hands of the conveniently few. It was the French, at the close of the last century, who compelled the close oligarchies which composed the governments of the thirteen ruling cantons to cease to play the tyrant over the eight subject cantons. And after the Napoleonic wars it was the monarchies of Europe which compelled the thirteen oligarchies to admit into the Confederation on equal terms the remaining nine cantons. So in Switzerland, as elsewhere, modern democracy is distinctly modern.

It must of course be admitted that the ancient, customary democratic ways of the Swiss are of immense importance in their relation both to the origin and to the practical working of the modern democratic theory, just as a corresponding experience of the English people in their early local governments in the guilds, in the various societies, religious and industrial, and especially in the working of the jury system, is of great importance to any theory accounting for the modern democratic Constitution. But it must not on this account be forgotten that modern democracy is something quite distinct and different from the ancient Grecian type and from the customary democratic habits of the Middle Ages.

CHAPTER XVIII

HENRY VII.

AS to how much was added to the effective power of Parliament during the reign of the Tudor kings historians are not agreed. Those who are not careful to distinguish between forms of Parliamentary action and effective Parliamentary power based upon public opinion — that is, upon a definite theory of the power of Parliament as a representative national institution — are likely to hold the opinion that almost nothing was added during this period. But when proper distinctions are held between form and substance, the view is likely to prevail that the real foundation for the modern Parliament was laid during the century of the Tudors. Before this century there had never been a Parliament which was looked upon as centring in itself the power of the nation independently of the will of the Monarch; there had never been a Parliament which was not a mere formal agent for transacting necessary business, or, at most, a mere tool in the hands of a faction. At the end of the Tudor century there was a Parliament which was generally felt to represent the views of a powerful class which called itself the nation. Elizabeth was a wise and successful ruler, but it was everywhere observed that Parliament had a will of its own which was not always in harmony with the will of the Queen. It was something new in English history when a successful monarch could not control the action of

Parliament. We are accustomed to say that Elizabeth showed her wisdom in yielding to the wishes of Parliament, and that the Stuarts showed their stupidity in stubbornly refusing to yield.

Before the time of Elizabeth, or at least before that of Henry VIII., it would have been absurd to talk of a powerful monarch manifesting wisdom by yielding to a Parliament or a national assembly. Before the Wars of the Roses the only thing which a sensible monarch yielded to was an army. Those who fail to distinguish between form and substance may say that John yielded to a national assembly at Runnymede. To such as hold the view that a legislative assembly forced the King to yield to its demands, the last clause in Magna Charta must appear a huge joke. The first step towards a correct understanding of the development of the English Constitution cannot be taken by one who does not understand that the last clause in the charter was not a joke at all. If we regard substance rather than form, the body of twenty-five barons who were appointed to make war upon the King, and to compel him to observe the provisions of the charter, bore a closer resemblance to a modern Parliament than did the assembly which appointed them. The twenty-five barons were looked upon as having a will apart from the will of the Monarch. They were regarded as representing in this respect the wishes of the ruling classes as opposed to the views of the King. It should never be forgotten that previous to the Wars of the Roses, whenever there was an attempt to govern otherwise than according to the King's wish, a small body was chosen for this purpose. In some instances this small body formally displaced the national assembly. But the kings were expected to yield neither to the smaller body nor to the larger body; they were simply expected to yield to a superior army. To make war upon the King was the regular, and we may

say the constitutional, method of restraining him. It was likewise regular, and in a sense constitutional, for the King to destroy any one who made bold to dispute his will in the national assembly. Public opinion had no organ, and hence, as an effective force in the modern sense, public opinion did not exist.

Such was the state of affairs at the beginning of the Tudor rule. At the end of the reign of Elizabeth, England was governed in large part by public opinion; and the recognized organ of public opinion was the Parliament. Parliament itself came to be looked upon as representing the nation, and as having a will of its own apart from the will of the Monarch. There is involved in this change the essential idea of the Great Revolution. If we do not distinguish between form and substance, we may suppose that when Parliament uncrowned James II. and crowned William and Mary, it did nothing more than Parliaments or national assemblies had done many times before. The Revolution of 1688 was not great because of what Parliament did; it was great because it was distinguished from all previous similar acts on account of the new views which had come to be held as to the place of Parliament in the government. These new views came into existence during the previous century. We should expect, therefore, to find in the Tudor century rather than in that of the Stuarts the psychology of the Great Revolution.

Gardiner says that England needed a chief constable and that Henry VII. furnished what was needed. There had been a generation of violence and civil war, and there was now an unusual desire for some one to keep order. Notwithstanding the fact that many great lords had been destroyed in the wars, there were still many remaining. It was an easy matter to make new lords to take the place of all who had been destroyed. But the Tudor kings

seemed to see that it was not to their advantage to restore the power of the great families. It was rather to their interest to see to it that independent feudal leadership should never be regained. To do this, they needed the constant support of powerful classes, other than the great feudal lords. Henry VII. relied for support chiefly upon the country gentlemen, upon lawyers, and the well-to-do middle classes in towns and cities. He had also the support of the clergy.

For more than a hundred years there had been laws against liveries, yet during the entire period the use of liveried men had flourished. Henry VII. laid a strong hand upon this practice and suppressed it, thus aiming a severe blow at the independent power of great lords.

It had long been the practice of the powerful nobles to interfere with the ordinary courts, to overawe judges, to terrorize juries, and in many ways violently to interrupt the course of justice. Henry VII. hit upon a method of effectually restraining these acts. He established a court which the lords could not overawe. From the time when the courts took permanent form under Edward I. there had been a remnant of judicial business in the hands of the King and his Council. Courts of equity had been built up out of this remnant of judicial power. The ordinary courts tended to limit the power of the kings, hence the sovereigns naturally clung to the judicial power in the Council.

Henry constituted a court out of the Council and two judges especially appointed, which had an important part in the government of England for a century and a half. It is called the Court of the Star Chamber, and it was always an arbitrary power in the hands of the King. Henry VII. used this court as a means of restraining or destroying the great lords. He found that taxation was unpopular among the middle classes on whom he chiefly relied for his sup-

port; so he resorted to the method of exacting money from the rich by means of his Court of the Star Chamber. Henry was a great stickler for the forms of law; and a law had been passed in the time of Richard III. against exacting benevolences. Henry, however, held that this was no law, since Richard was a usurper, and he continued to raise large sums by exacting benevolences from the rich. Other large sums he secured by fines and confiscations. Thus he accumulated a full treasury and left it to his son. He, moreover, maintained a policy of peace and order and economy.

Henry VII. was a good, virtuous tyrant. He paid little attention to Parliament during his reign, which lasted twenty-four years. There is evidence that his tyranny, virtuous as it was, would have broken down had it been longer continued. His tools of the Star Chamber, Empson and Dudley, were speedily executed by the new King in response to a popular demand.

I admit that it requires an effort to see in the reign of Henry VII. much of the theory of the modern English Constitution. But there is in this reign one thing which should never be lost sight of. It might easily have happened that the great lords during this period should have regained much of their lost power. Henry might very naturally have rested for support upon them instead of upon a larger number of middle-class folk. Had he done this, there is reason to believe that the habit of going to war against the King would have continued. But Henry VII. initiated a policy which was fatal to the leadership of the great lords. This policy was continued and perfected by Henry VIII. Had this work been less thoroughly done, it is not likely that there could have been a century without civil war. If there had not been a century of government according to the forms of law, it is not likely that the Stuart kings would have been called upon to face that

state of the public mind which actually confronted them. It is in this rather remote way that Henry VII. may be said to have contributed to the formation of the state of mind out of which the peculiar Constitution of England is constructed.

The financial policy of the Tudor kings had also much to do with the disappearance of the leadership of the higher nobility. In the olden time, before Edward I. had called representatives from counties, towns, and cities to attend the meetings of his great Council, there was at least some sort of close relation between the King's government and the masses of those who paid the taxes. The old county courts which yielded to the demands of the King for money and regulated the amounts did in an important sense represent the people who paid the taxes. The House of Commons had never in the same sense represented the people. At the close of the Wars of the Roses, the House of Commons had long been a tool in the hands of one or other of the warring factions; hence it could not in the old manner grant supplies and carry with the grant the consent of the tax-payers. The granting of supplies had come to be habitually associated with victorious armies as a part of the fighting business. Henry VII. stirred up a formidable rebellion in Cornwall by an attempt to collect a subsidy which had been regularly voted by Parliament.[1] A vote of supplies by Parliament did not, therefore, carry with it the acquiescence of the people.

Taxation was the one point which the masses of the people seem to have considered worth fighting about.[2] It was from the action of these masses, whom the Parliament did *not* represent, that the King learned that the attempt to collect a general tax was a dangerous busi-

[1] Hume, *History of England*, Vol. III., p. 51.
[2] Hallam, *Constitutional History*, Vol. I., p. 28.

ness. It seemed to be safer, more in accordance with the will of the nation, to take money from the rich by means of the Star Chamber than to levy a tax upon the nation at large by means of Parliament. The fact that Henry VII. called few Parliaments by no means argues that he was unmindful of the will of the nation. Indeed, the King seemed to represent the nation better than the Parliament. The same has been said of Henry VIII. and of Elizabeth. If this is true, we have the remarkable occurrence of more than a hundred years of practically consecutive history in which national representative government coincided with the person of the Monarch. During this time there had been slowly built up an institution which would be capable of representing the nation when a family of monarchs should arise who failed to do so.

CHAPTER XIX

HENRY VIII. AND THE REFORMATION

HENRY VIII. was more completely the man of his time than any person in his realm. He ruled thirty-eight years, and the England of the beginning differed much from the England of the close of his reign. At the beginning, the Church in England was a part of the Western European Church with the Pope of Rome at its head. At the close the English Church stood dissevered from all connection with Rome, the religious houses had been destroyed, a large part of the ecclesiastical property had been confiscated, and the clergy had been subordinated to the will of the King and the Parliament. The people had, in the meantime, greatly modified their views in the direction of Protestantism. Great changes had likewise taken place in the occupations and industries of the people, and it was the age preëminently affected by the New Learning. To represent such an age for so long a time requires a peculiar personality. Ever since that era an unceasing debate has raged respecting the character of King Henry VIII. both as a man and a statesman, and there seems no prospect of its ever coming to an end. A man who was so large a part of an age, so full of the spirit of change, so marked by the effervescence of new ideas, an age which clung to the old while at the same time reaching forth

to the new, will not be readily understood by after generations.

Henry secured the services of men of eminent ability, among the most noted of whom were Wolsey, More, and Thomas Cromwell. Wolsey brought the power of the Roman Church to the support of the Crown. Sir Thomas More was the most brilliant representative of the New Learning, and he was made Chancellor during the brief period of transition from the dominance of Wolsey to the final break with Rome. Cromwell was the chief minister of the Reformation. Each of these able and powerful ministers was in turn sacrificed to the King's will. It is unaccountable that Henry should have compassed the death of so many influential persons while at the same time he continued to grow more popular with all classes. It was a time when all in the kingdom, except the King alone, were made to feel the force of law. The lower classes had long been subject to law; now queens, bishops, and nobles of every rank were made to feel that they too were subject to the same higher power.

But even under a monarchy so absolute as that of Henry VIII. careful research reveals certain indications of positive movements in the direction of modern democracy. Sir Thomas More was during the early years of his reign the familiar companion and friend of the young Prince, and it was, in 1516, that *Utopia* appeared. In that work we have a distinct announcement of some of the principles of modern democracy, a clear intimation that the government of England was in fact a conspiracy of the rulers against the people. It is undoubtedly easy to overestimate the importance of such a publication. The advanced thought of purely literary labourers has had, perhaps, less to do with the world's progress than is generally believed. It would be rash to claim or to imagine any general or even any wide acquaintance with the book

Utopia for that or any other age. Something may, however, be credited to the influence upon the mind of the King in his susceptible years of views so full of that seminal power which insures growth. Henry was certainly no modern democrat; but he did with marked effect and with steady persistence what other kings had done before him: he looked to the unrepresented classes of the people for support.

It was a time of notable alterations in the industrial life of the people. The change from tillage to pasture began about the time of the Wars of the Roses and continued through the time of Henry VIII. This involved in some cases the forcible expulsion of some of the tenants from their holdings. There is evidence that the Yorkists gained strength by espousing the cause of the dispossessed peasants, and that the Tudors followed the Yorkist policy in that regard. In 1517, one year after the publication of *Utopia*, Henry appointed a commission to examine into the matter of enclosures, and upon the report of this commission the government took such summary action against the landlords as struck terror among them. "From this time the idea of a royal commission was never absent from the minds of the politicians."[1] It should be observed that the institution of a royal commission was in a sense a revival of the ancient direct appeal of kings to the people, and of the people to the kings, against the local oppressors. In this case the commission intervened on behalf of the lower orders of the people.

Coincident with the suppression of liveries and the establishment of the reign of law, population shifted from the towns to the country. Manufactures arose in the rural districts; and, by comparison, the towns were less prosperous than formerly. Much suffering and discontent ensued as an incident to so many changes, and the

[1] Ashley, *English Economic History*, Vol. II., p. 283.

existence of large numbers of discontented people among the lower classes made it easier for the King to deal with the ruling orders as he pleased.

But the subject which interested the masses of the people more than all others, and affected them most, was that of religion. It has been already stated that in all their organizations, municipal, industrial, and friendly, religious motives and religious practices held a prominent place. For centuries there had been a tendency to divergence between the official clergy and that religious teaching which actually affected the masses of the common people. Among the first publications of the new printing-press were Wiclif's tracts, which had during the intervening century been kept in circulation in manuscript. There were Lutherans in England long before there was a Luther. This state of religious sentiment among the masses was a factor of great importance in the work of destroying the independent power of the clergy by means of King and Parliament. The ancient antipathy between lords and clergy was also an element of support to the King when the great struggle came on. The fact, however, of especial significance here, in an attempt to account for the modern Constitution, is the interest of the common people in matters of religion.

The most formidable insurrection which Henry VIII. was called to face grew out of a religious controversy. In 1536, when the destruction of the religious houses was well advanced, the people of the northern English counties were led to believe that all the institutions of religion were to be overthrown and all church property confiscated. The complaint which was made the basis of the rising included matters of taxation and changes in the land laws as well as the spoliation of the Church; but it was the religious policy which was the chief object of attack. The "Pilgrimage of Grace," as it was called, received

the support of the great body of the population in the region affected. It was directed not against the King, but against his evil advisers. Henry adroitly accomplished the dispersion of the insurgents without bloodshed, and then proceeded leisurely to the execution of the leaders. From this time forward it was questions of religion rather than of taxation that stirred most profoundly the sensibilities of the English people.

The first Parliament of Henry VIII., in voting the usual grants and tonnage and poundage to the King for life, inserted in its record "that these grants be not taken in example to the kings of England in time to come." We find here an early instance where a Parliament not backed by a powerful armed faction made a record which implies a deliberate intention to resist the ordinary demands of kings for money. The early Parliaments of Henry VIII. treated the demands of the King with liberality. Then there were seven years without a Parliament. In 1523, when a new Parliament had been called, Wolsey, the Lord Chancellor, went before the House of Commons and demanded on behalf of the King an enormous grant. The independent members openly resisted the grant. A little later Wolsey again appeared before the Commons without their consent. After the speech of the Chancellor the members of the House sat in silence, refusing to make any answer. "At last the Speaker, Sir Thomas More, falling on his knees, with much reverence, excused the silence of the House, abashed, as he said, at the sight of so noble a personage who was able to amaze the wisest and most learned men in the realm; but with many probable arguments he endeavoured to show the Cardinal that his coming thither was neither expedient nor agreeable to the ancient liberties of the House."[1] The Commons insisted upon the right to deliberate in

[1] More, *Life of Sir Thomas More.*

the absence of the King's minister, and, after fifteen days, voted a much smaller sum than the one demanded. A little later an attempt was made to exact subsidies from the people by means of a royal commission; this aroused such a formidable resistance that the King thought it best to recede from his demands. He then resorted to "voluntary contributions" from the rich, which he promised to repay. When it was urged that these benevolences were contrary to the law of Richard III., Henry secured a decision from the judges declaring the law of Richard void because Richard was a usurper. When Parliament was again called, instead of voting money to pay the King's debts, it passed a statute freeing the King from the legal obligation to pay his debts, and this was done more than once during the reign.

It requires no explanation to show that in these events there are evidences of the growth of the ideas out of which the modern Constitution has come. Here were the demands of the most powerful king in the English line resisted and thwarted by the House of Commons and the tax-payers. In this action, too, the House of Commons was not supported by an armed faction. The only support which the Commons had was the knowledge that there had grown up in the land large bodies of citizens who were trained in the habit of resisting the tax-gatherer. Not only was the King foiled in his legislative programme, but, powerful as he was, his administrative officers were resisted, and he was compelled to recede from his demands. It was not until he fell back upon the well-tried policy of Henry VII. of exacting money from the helpless rich, that he attained eminent success and could be sure of the approval of the nation.

In this connection it is well to notice the niggardly policy in which Elizabeth persisted. Henry VIII. spent freely because he could get an abundance without incur-

ring the enmity of the nation. Elizabeth had no such supply, and hence she pursued an economical policy. It seems probable that the three Tudor monarchs acted in this one respect in accordance with the wishes of the nation; that the monarchs represented the nation more nearly than did the Parliament or the Church.

From the beginning of our history to the time of the Tudor kings, there have been two sources of effective leadership apart from the King. These have been the great lords and the clergy. These forces have been balanced against each other, and one or the other has gained an advantage according as it succeeded in securing the coöperation of the masses of the people in their local institutions, which all the time furnished the physical force. From the end of the reign of Henry VIII., there ceased to be effective leadership either from the ranks of the great lords or from the clergy. Or, to state the case more accurately, the great lords and the clergy had ceased to have the means, independently of the Monarch, of getting themselves into working relations with the physical forces of the nation. As independent institutions, lords and clergy had dropped out. True, the House of Lords remained; but it was effectually tied to the House of Commons, and the latter House stood nearer the effective force of the nation. True, also, the high Church officers remained; but these were made to feel their subjection to the King, and the masses of the people had lost the habit of looking to them for leadership. So great a change would naturally tend to absolutism unless some sort of effective checks had in the meantime appeared to take the place of those destroyed.

Such needful checks, however, were not wanting, and their sources may be found in the new value acquired by religious opinion from the time of the Reformation. There had, indeed, been no time in English history when such

beliefs did not play an important part among the national political forces; but from the later years of the reign of Henry VIII. their relations to the other effective influences in political affairs, and the channels through which their power was brought to bear, may be seen to have undergone a striking change.

Formerly there had been but one recognized Church embodying the ecclesiastical and spiritual authority. The Church was coextensive with the nation. The clergy represented a large measure of political power, and, as the accepted teachers of religion they often gained effective political support from the people. In those times when portions of the clergy had become conspicuous for corruption or for neglect of religious duty, the resulting criticism had sometimes served to alienate large numbers of the people from their political allegiance to their clerical leaders; hence the political power of the Church was weakened through the operation of religious conviction, while opposing political forces were consequently strengthened.

But now spiritual authority was no longer derived from a single source. Conflicting religious beliefs became the principal substance out of which have been developed those modern political parties which have taken the place of the former balancing, against each other, of class interests and contending factions. That religious opinion should have had so prominent a share in the attainment of those forms of organized public opinion which we call political parties is the point to be here especially observed.

We have seen in the case of the Lollards that a revival of religion was closely associated with a political and social movement; that it was religious teachings, in part, which stirred the people to rebellion. Religious beliefs had much to do with the feeling of injustice on the part of the people, and this was one source of resistance to op-

pression. When the Lancastrian kings ruthlessly crushed out the open profession of Lollardy, they did not destroy the religious opinions upon which Lollardy was founded. Those opinions of life and duty were perpetuated, and they naturally formed an important element in the character of that unrepresented part of the nation which the Tudor kings encountered, and which they were induced to respect. When, therefore, the teachings of the Reformation came into England there were multitudes whose minds were already prepared to receive them; and when the division in the Church took place the habit of political action from religious motives was well established.

The strange coincidence whereby the religious teachings of the Reformation fell in with important political changes are a familiar chapter in English history. It seems probable that Henry VIII. was controlled, in so far as he was controlled at all, by his desire for popularity or by his appreciation of the necessity of satisfying those with whom rested the effective physical power of the nation. Therefore in the early part of his reign, while the ideas of the reformers were regarded as foreign, or un-English, Henry took his share in the arguments against Luther and the Reformers, and won from the Pope the title of Defender of the Faith. It is difficult to find a time in English history when it was unpopular for an English ruler to quarrel with the Pope or to resist his demands. So, in the matter of the divorce, Henry ran no risk of stirring up the masses in England to oppose his desires. Later, when the teachings of the Reformation had permeated to a large extent the mind of the nation, Henry embraced the opportunity to destroy the religious institutions, to confiscate the property of the monasteries and abbeys, and to reorganize the Church in accordance with the reformed teachings of the day. He took special pains to accomplish this work in such a man-

ner as not to arouse the indignation of the people; feeling his way along, he destroyed at first only the weaker religious houses and prepared the minds of the people for the change by a publication of the abuses alleged to exist in them. This, along with the general tenour of the reformed teachings, made it possible to effect the revolution in a quiet and peaceable way.

If we are looking for the development of the modern Constitution, we cannot neglect the uses made of the House of Commons during the latter part of the reign of Henry VIII. Henry would not break with the people. To maintain this policy he found it desirable to sacrifice not the property only of the rich and powerful, but the lives of many of them also. It is said of him that he was ever ready to sacrifice his dearest friend to his lightest desire. Now it is clear that a king cannot for forty years maintain a policy which involves the continual beheading of queens, bishops, judges, and noblemen unless he has command of unusually effective tools. The chief tool of Henry VII. was the arbitrary court called the Star Chamber. When his son became king, that tool had become unacceptable to the nation; there were prejudices against it. To appease the multitude, Henry VIII. had two of the obnoxious judges of this court beheaded on a trumped-up charge of treason. His agents in this business were the ordinary courts and juries. He continued, nevertheless, to use the Star Chamber, but he did it warily, and he kept himself, besides, well supplied with a variety of courts which could be at all times relied upon to do his bidding. When he wanted Wolsey destroyed, Wolsey knew too well that it would be folly to resist. Sir Thomas More knew that his life hung upon the King's will.

Yet during all this time, that is, during the reigns of Henry VII. and Henry VIII., men's minds were possessed

with a sort of infatuation for law. It was law that was doing everything. A story is told of a judge in one of the new parts of the United States who was placed under the painful duty of sentencing one of his neighbours to be hanged. Addressing him in an entirely neighbourly way, he said: "Now, Mr. Smith, I want you to understand that it is not I who am hanging you, but it is the law." The idea pervaded the Tudor period that it was the law that governed, and the law was conceived of as something objective and apart from kings or institutions. Only the initiated knew that it was really the King who was hanging them, and it is not unreasonable to suppose that they were themselves often so infatuated with the idea of law that they failed to distinguish between the law and the royal will. It was a time of great reaction from the rule of faction and brute force. The New Monarchs used tools which seem only a little less barbarous and brutal, when we compare them with the higher ideals of modern times, than were the leaders of factions and armies which those tools displaced. Yet to the generations that witnessed the change, the difference seemed immense. There is a wide difference between the prompt beheading of a few potential faction leaders according to the forms of law, and the meeting those same leaders on the field of battle. The practical results of substituting one method for the other are great, and it is a fact not to be lost sight of that in England this great practical change was closely associated with an exaggerated notion of the reign of abstract law.

The Tudor kings at all times showed a wholesome respect for Parliament. During much of the time this respect was expressed by not calling Parliament together, by securing the necessary funds without troubling Parliament. Henry VIII. wrote to the Pope that his Parliaments were accustomed to discuss and decide matters independently.

It is quite likely that the King's intention, in this instance, was to make his Parliament a scapegoat for the odium attached to his refusal to comply with the Pope's wishes. Nevertheless, there was a grain of truth in what he said, as is shown in the case of the House of Commons insisting on the privilege of considering the matter of supplies apart from the dictation of the Chancellor. Another example of the vindication of a privilege of the House of Commons is seen when a member of the House having been arrested, the Commons sent its sergeant to demand his release. The sergeant was resisted: whereupon, all who had had any share in the arrest of the member were arraigned before the House and committed to prison, and the King approved this action of the Commons in the strongest terms. In this instance it should be observed that in defence of its own privileges the House of Commons acted as an independent high court with power to punish offenders. But the fact which stands out most prominently in the history of Parliament in the time of Henry VIII., is that it was for the most part the King's most pliable and effective tool.

The courts of law were governed by the rules of procedure, and in an age when high notions of abstract law prevailed the rules of the courts were likely to be in the way of an arbitrary king. Even the Court of the Star Chamber had its rules. One rule, which prevailed in courts of every sort, required that in case of the punishment of a culprit, some offence should be charged against him in the records. Henry's courts had been exceedingly complacent in this respect, but when it came to the supreme act of destroying the last remnant of independent leadership in the old nobility, and at the same time striking down the Church, and taking its property, it was at times extremely desirable to have a court which would destroy the King's enemies without making a record against them

of any specific offence. We have seen that in the time of the Wars of the Roses it was customary for the victorious faction to make use of Parliament to destroy its enemies and take their property. But now in this intensely legal age a doubt arose as to the legality of Parliament's condemning a culprit without recording any charge against him, and without allowing any one to speak on his behalf. To remove this doubt, the judges were consulted, and the judges ventured to suggest that it would not be a good example for the high court of Parliament to act in the manner described. Nevertheless, they decided that no act of Parliament could be called in question in a court of law. With this point thus disposed of, Henry found in the House of Commons his mightiest weapon. The House of Lords, with its members in jeopardy of their lives, furnished no effective resistance. By a careful selection of the members of the Commons the King's will could be done, and whatever was done was legal; and, according to the notions of the day, that which was legal could not be very bad.

It will be seen that this exaltation of the Parliament and of the House of Commons in particular above all other courts, is of no small consequence in the task of accounting for the modern Constitution. The Parliament was not only made the instrument for the summary destruction of the enemies of the King, but by means of it the most high-handed and sweeping changes were made. Courts were set up and statutes were passed to accommodate the King in all his personal affairs of divorce and marriage and the destruction of objectionable wives. In a limited way the King's orders were by act of Parliament given force of law. The King was made the head of the English Church, and by a series of statutes the Church was reorganized, former religious practices were made punishable by law, and new faiths and forms were

made obligatory. It is difficult to see how so many changes could be made in so short a time, with so little disturbance, except for the remarkable concurrence of the strong hand, a triumphant and pliable Parliament, and a rapidly changing nation.

CHAPTER XX

RELIGIOUS DISSENSION AND THE GROWTH OF THE HOUSE OF COMMONS

WHEN Henry VIII. died, in 1547, England had been for more than sixty years continuously governed by the strong hand. The quality of the statesmanship of such a government is revealed when the strong hand is removed. For more than a decade the institutions which Henry VIII. left stood the strain of the alternate rule of contending religious factions without producing serious civil war. Though it is probable that the endurance of such a strain could not have been greatly prolonged, the fact that it continued so long speaks volumes for those who had formed the institutions.

We never quite know whether Henry VIII. was a Romanist or a Protestant; or whether or not he was a religious man at all. The Church as he left it was partly Protestant and, according to the later standards, it was partly Roman Catholic. He had moved along with the nation, and, in the main, he had kept the nation united. He had made only such changes as could be effected by terrifying the few while not offending the masses. Henry being dead, the government drifted into the hands of those who were distinctively Protestant. A sweeping destruction of images followed. The mass was abolished, a new prayer-book was adopted, and new articles of faith were made obligatory. There was developed a decided ten-

dency to persecute those who refused to adopt the new views. By means of packed Parliaments the government accomplished its ends. There was, however, some show of parliamentary resistance, and there were some slight rebellions by way of protest against the changes enforced by the extreme Protestant party. But there had not been time to test effectively the Protestant policy before the government passed into the hands of the Roman Catholics by the crowning of Mary. Again Parliament manifested a spirit of resistance and again it was found possible so to control the membership of the House of Commons as to make it possible to legalize the ancient religion. Mary found courts as ready to destroy the enemies of her party as had been the courts of her father to do his bidding. But this policy took the form of religious persecution and profoundly stirred the sensibilities of the nation. Henry could destroy his enemies by the score without causing a ripple in the national mind. All was done legally, and it was expected that the law would destroy the law-breaker. But in the eyes of the people Mary's enemies were those only who differed from her in religion, and their destruction appealed to the profoundest popular feelings. Mary, however, also died too soon for the testing of her policy.

She left England divided into two camps, — a Protestant party and a Romish party. It is not possible to state with confidence which of these parties was the larger or which of them had the greater physical force. These parties were at the same time religious and, in a certain sense, political. It was the business of the government to say which forms of religion should be observed. If the government should lean to the Romish forms, it would offend the Protestant party. If it should lean to the Protestant forms, it would offend the Romish party. These opposing bodies did not, however, correspond to

fully developed political parties as known at the present day. They were not organs of public opinion maintained for the purpose of controlling the action of the government. Still, the existence of the contending religious classes was fitted to modify the action of the government, and fortune favoured the Protestants.

There may be some doubt about the real religious opinions of Elizabeth, but it is not possible to doubt that the result of her reign was to make England almost entirely Protestant. The general history of the period had much to do with this result. The nations of Europe were engaged in religious wars. The next heir to the throne in England was Mary, Queen of Scotland, who was a devoted Romanist, and for many reasons the favourite of the Roman party in England. Mary was closely allied to France, and up to this time the English were not accustomed to look with favour upon either Frenchmen or Scotchmen. The circumstances of the candidature of Mary for the throne of England had the effect of winning for Elizabeth the sympathies of the English people, whether Catholic or Protestant. At such a time men's religious views are likely to follow their political sympathies, special circumstances now intensified this tendency in England. There was the murder of Darnley, the repeated attempts upon the life of Elizabeth, the plots against her throne. Then there was the Massacre of St. Bartholomew, due to the Catholic party in France. Finally, England was stirred to the greatest depths by the coming of the Invincible Armada. Of the few who remained Roman Catholic, the greater number were English or anti-Papist in their political sympathies. Elizabeth found England divided into two nearly equal religious parties, and she left it strongly Protestant.

The power of the Pope in England had at no time been great. Unless there were peculiar temporary reasons to

the contrary, the King, the lords, the English clergy, and the great body of the people were always opposed to being governed from Rome. When King John submitted to the Pope, and partly because he submitted, he had all England against him. From the days of the Conqueror there were laws whose object was to limit papal interference in English politics. From century to century there was a tendency for these laws to grow more numerous and more stringent. When Henry VIII. proposed entirely to displace the power of the Pope, he did a thing in itself agreeable to the general political sentiment; and he was careful not greatly to offend the religious sense of the people. But after the violent Protestant rule of Edward VI. and the still more violent Romish rule of Mary, it became exceedingly difficult for any one to rule without greatly offending the religious sense of a large class of the people. Elizabeth came as near to doing this as it was possible for mortal to do. Yet, as stated above, the relation of external to internal history was such as to make Elizabeth's rule distinctively Protestant, and at the same time to make the English nation almost as equally so. The nation, however, did not remain moderate in its Protestantism as did its ruler. The Pope, never a favourite, became now the personification of all that is abominable. The burning of heretics, assassinations, massacres, gunpowder plots, in a blind unreasoning way were all charged to the Pope. "No Popery" became a party cry in England which has not wholly lost its force to the present day. But all England did not become thus fanatically Protestant. There were influential persons who remained convinced and consistent Romanists. There was a much larger number who, while not Romanists, were moderate in their Protestant views, and both the Romanists and the more moderate Protestants were naturally disposed to resist changes

either in religion or in political institutions. Such conditions were favourable to the growth of those ideas out of which political parties have been developed. What may be called the old Constitution, under which class was balanced against class, while the masses of the nation had no share in the government, cannot, indeed, be yet said to have given place to the new Constitution, with a government swayed by opinion through its two great organs of popular expression known as political parties. So great a change was not reached suddenly. But in an effort to understand this change, no reign compares in importance with that of Elizabeth.

Elizabeth herself is an enigma. We do not quite know whether she was a short-sighted, fickle-minded woman, living along from hand to mouth, trying first one experiment and then another, or whether she possessed a sort of superhuman genius for statesmanship which enabled her to foresee the outcome of the most occult political forces, to form a secret plan and to carry it into effect by deceiving and outwitting her own statesmen and philosophers, and the potentates of Europe. Almost all statements about the character and motives of a ruler, and especially statements as to the relation of the personal qualities of a ruler to contemporary and future politics, rest upon mere opinion. Modesty of statement in such a case does not necessarily argue a lack of understanding. Looking at results, Elizabeth's reign seems to have been fortunate for England. On the theory that the Monarch was weak and fickle, there was a fortunate coincidence between these qualities and the needs of England. On the theory of transcendent ability, Elizabeth saw into the mind and heart of her people, and determined at all hazards to give that people the best possible chance. Whatever may be the theory accepted, the fact remains that there is essential harmony between the apparent needs of the nation and the personal qualities of the Monarch.

Elizabeth furnishes a convenient personification of the spirit of modern politics. The England of Elizabeth was not the old England in which there were distinct classes having a separate access to the dominant physical forces of the nation. There had been successive generations living under a continuous reign of law. There were neither barons nor bishops who could be relied upon to call out the nation and to redress grievances by force; and there was not yet a Parliament capable of effective use as an organ of public opinion. Yet England was divided into two religious parties ready to cut each other's throats. These parties were kept in balance one against the other. There was a sort of party government without party organs; or rather, the Queen served as an organ for both parties. If the Queen was an indeterminate character, the modern political party is likewise in many respects an indeterminate force. It is said of the Queen that she was "the greatest liar in Europe." There is still a common belief that much untruthfulness prevails in party politics, and this notwithstanding the fact that the two parties have distinct organs of expression. What an amount of falsehood and deception would ensue if the modern parties with their contradictory views were compelled to find expression through the same person!

The Parliaments of Elizabeth did not reach a really dominant place in the government; yet it was a time of great parliamentary progress. Every Parliament that was called showed a spirit of resistance to some demand or wish of the Queen. The earlier ones insisted that the Queen should marry; and when she ordered them to desist from pressing that subject, they still insisted upon their right, and she was induced to yield so far as to promise compliance with their demands. Throughout her reign Elizabeth was extremely sensitive as to permitting Parliament

to meddle with the affairs of the Church. One Strickland, introduced a bill to alter the prayer-book, and for this he was imprisoned by order of the Privy Council. But this act stirred up such a storm in the House, over the breach of privilege, that Strickland was released. Another member, Paul Wentworth, said of certain rumours and messages which tended to interfere with the freedom of debate, that he wished they were buried with the father of them in hell. For this bold speech he was imprisoned for a month before being restored to his place in the House.

Such contests were numerous, and the spirit of the House of Commons grew bolder and more determined. The last of Elizabeth's Parliaments secured from the Queen a promise that the granting of monopolies should be discontinued. The ministers of the Crown had fallen into the habit of taking part in the debates of the House of Commons. Notwithstanding the complaints of the Queen against the much speaking of the House, and in the face of positive orders that the speaking should be limited, it nevertheless grew more bold and significant. There were frequent complaints in the Commons about interference with the election of members. Many of the members were creatures of the government, yet there was at all times a goodly number of independent members. The votes on many important issues were very close, and some of the divisions were hotly contested. There was a quarrel between the two Houses over a matter of procedure, in which the Lords recorded a protest, but yielded nevertheless, to the Commons. In another instance the Commons asserted their right of precedence in all measures of taxation. The spirit of the Parliaments which faced the first Stuart kings was clearly nurtured in the Parliaments of Elizabeth.

In an effort to understand a constitution based upon public opinion, it is worth while to notice the literature of

the nascent period. The rule of the Tudors coincided with the appearance of the New Learning, by which the politics of the time was in many ways affected. The poets of Elizabeth sang as they pleased. An atmosphere of intellectual vigour and activity is favourable to free thought and free speech in politics and in religion. The long speeches in Parliament were due in part to the consciousness on the part of the orators of possessing ideas worthy of utterance, and to a fondness for public speaking. The printing press was deeply affecting the political and religious thought of the time. It is difficult to see how public opinion could have been effectually turned to account without the art of printing.

The industrial conditions had likewise much to do with preparing the way for a new Constitution. Nearly all that was feudal had long since passed away. Feudal justice, never general in England, had been long since displaced by the common law courts. Feudal armies disappeared with the Wars of the Roses. Feudal land tenure had been for the most part succeeded by contract between landlord and tenant. The substitution of law for violence tended to the enrichment of large classes of the people. By the end of Elizabeth's reign, England, judged by all former standards, was a rich country, and wealth was in the hands of men who knew at what cost it had been gained, and who knew also how to guard it.

If the views here presented are correct, the period of the Tudor monarchs was one of rapid constitutional construction; one in which the substance of the old Constitution was essentially changing, while the foundations of a new Constitution were being laid. The form of the old remained; the substance was altered. According to the old Constitution the recognized, or we may say, the constitutional, way of limiting the power of the Crown was to make war upon the King. Under the new Constitution

public opinion limited or controlled the Monarch, and there were in time developed organs of public opinion capable of ruling the nation with little reference to the will of the Monarch. Under the new Constitution making war upon the King became irregular and revolutionary; an act not justifiable unless the King persisted in disobeying the law or the Constitution.

Under the old Constitution sovereign, barons, or bishops prevailed according as either gained the coöperation of the people acting through their local institutions. During the entire ante-Tudor period Parliament is to be regarded as simply a part of the King's judicial, administrative, and legislative agencies. It is not to be thought of as an institution possessing independent powers. The House of Commons was packed and controlled either by the King or by a faction hostile to him among nobility and clergy. The creation of the House of Commons led to a sort of breaking away of the ruling classes from the people, to a sort of conspiracy of the ruling classes against the masses. If the ruling classes had been united among themselves, there is reason to believe they would have broken or greatly checked the spirit of resistance among the masses. But they were not at any time united. The aggrieved masses maintained a measure of coherence, being at all times kept in a fighting attitude on account of the violence and aggressions of the ruling classes. On account of the weakness and apparent inoffensiveness of the national assembly, it was granted a perpetual existence. In the hands of the factions the Parliament was made the instrument of various high-handed acts of government. These acts were such that when Parliament itself became an agent of public opinion, it also became the one symbol of the unity of the nation, older than kings, more enduring than dynasties, the destroyer of evil monarchs, and the final authoritative expression of the will of the nation.

It is not so easy to name the distinct elements of the Constitution, or of the dominant forces of the government as they appeared at the close of the Tudor period. The Crown, of course, remained with its various judicial, administrative, and legislative agencies. Effective and independent leadership of the nobility had disappeared. But a statement of this sort needs to be carefully scrutinized. The nobility still, as ever, furnished political leaders. Even in these most democratic times we have high authority for saying there yet remains "a sneaking kindness for a lord," and there have always been tendencies to revert to the leadership of an hereditary nobility. What precisely, then, is the difference between the leadership of the nobility before the time of the Tudor monarchs and the same leadership after that time? This question may be answered by saying, the earlier leadership was chiefly feudal and military; the later has been chiefly political. The old nobility furnished the natural rallying-point for military resistance. Henry VIII. put a "crick in the neck" of every nobleman who has since been tempted to engage in the old-fashioned style of leadership. Elizabeth was averse to bloodshed, but she continued the practice of beheading the few noblemen who showed a tendency to revert to the ancient form of leadership. Since the Tudors, noblemen have been effective leaders only in so far as they have excelled in political management.

When feudal armies and liveries disappeared, the House of Lords remained as the chief organ of the nobility. We have seen that the House of Commons was made the most effective weapon for the summary destruction of lords and bishops in the later years of Henry VIII. The natural tendency of such a proceeding is to weaken the House of Lords as an institution, and to strengthen the Commons. Even in the earlier time when Parliament was a mere tool,

it was often convenient for a triumphant faction of Lords to use the House of Commons as the agent of unusual or high-handed acts. All such acts tended to the ultimate increase of the power of the Commons at the expense of the Lords. In the time of Elizabeth, the Lords received less attention, relatively, than the Commons; it was the Commons alone who were constantly in hot water with the Queen. In reply to an address urging her to marry, the Queen declared that "she was not surprised at the Commons; they had had little experience, and had acted like boys: but that the Lords should have gone along with them, she confessed, filled her with wonder." When a contest arose between the two Houses, the Lords protested and then yielded. In the time of Elizabeth, also, the precedent was established of allowing the heir to a peerage a seat in the House of Commons. Noblemen had from the earliest time taken part in selecting members of the Commons, and the younger sons of noble families were accustomed to sit in the House. Now it was held that the heir to a peerage should have a place there likewise. These are all factors of importance in accounting for the relative weakening of the House of Lords and the final enthronement of the Commons. And the result has been that peers, in order to lead in politics, have often found it necessary to act through the Commons.

It should be observed also that when the clergy ceased to be leaders in the old sense they did not cease to be important factors. At a time when learning was still limited, an educated class, which was also a class having control of the agencies of education, could not be an insignificant factor in politics under a constitution dominated by public opinion. But the old, partially independent, political Church had passed away. It was first rent into two opposing religious parties, and a century later the Established Church found itself confronted by a con-

siderable number of Dissenting organizations. Religious opinion has since the Tudors been a much more important political factor than the small modicum of political power remaining in the Established Church. That is, the teaching function of the Church has counted for more in politics than has its governing function.

By the time of the death of Elizabeth the Constitution may be said to have become, so to speak, greatly simplified. The really dominant sources of power and influence had become reduced to two. These were the Crown with the judicial and administrative agencies of the government, and the two Houses of Parliament, which, through one branch, the House of Commons, had come into vital relations with a class capable of asserting coördinate powers with the Monarch. The Tudor rulers had championed the unrepresented English people as against privileged classes, and in so doing they had nursed into life a representative assembly capable of competing on equal terms for the support of the nation. From the political contention thus joined has been developed the modern Constitution.

In the contests between Crown and Parliament a part of the nobility sided with the one, and a part with the other power. A part of the Church supported the Monarch, and a part supported Parliament. So likewise among the common people, one portion favoured the King, and another the House of Commons. Society was divided perpendicularly rather than horizontally. When in later centuries political parties were formed to continue the political contention, each party set up an equal claim to represent the entire nation.

Along with this preëminence of sovereign and Parliament among the powers of State, certain facts concerning the increased value of the Council as a factor in the government should not be overlooked. It will be remem-

bered that as soon as the Houses of Parliament had become clearly defined, in the time of Edward III., difficulties arose between them and the Council. Parliament was able to secure enactments condemning the practice of the Council in the matter of altering acts of Parliament; nevertheless the fact remained that, since the King and the Council were the administrators of the laws, and were also the highest court of appeal, they really had much to do with the making of the laws. Orders in Council had the force of legal enactments, and there was always a tendency for that method of law-making to encroach upon the rights of the two Houses. Under Tudor rule the Council experienced a remarkable development. Out of it the Star Chamber, the Council of the North, and various other arbitrary courts were formed, and it assumed to interfere in many ways with the ordinary courts. Jurors were even punished for daring to render decisions contrary to the wishes of the Council. One of the late Parliaments of Henry VIII. gave to King and Council unlimited powers of general legislation. This peculiar expansion of the powers of the Privy Council is important because it helps to explain many incidents in the long contest between King and Parliament, and also because it is out of the Council that the Cabinet, the unique feature of the modern Constitution, has been developed.

CHAPTER XXI

THE CROWN AND THE HOUSE OF COMMONS

WHAT would have happened to the English Constitution if the Tudors and the Stuarts had changed places? It is useless to try to answer such a question; yet it is not possible to understand any theory of the modern Constitution without a distinct realization that the England of the Stuarts was different from the England of the Tudors. There is also warrant for believing that there is a marked difference between the personal qualities of the Tudors and those of the Stuarts. We credit the Tudors with an unusual insight into the politics of their day; while the Stuarts, with the exception of Charles II., are credited with a phenomenal obtuseness as to the perception of current political forces. How much of this reputed difference is due to a difference of circumstances, it is not easy to discern. The first two Tudors carried forward the work of destroying the effective leadership of the great lords, temporal and spiritual. To do this they looked for support to the country gentlemen, to merchants and lawyers, and they took special pains not to offend the masses of the people. These early Tudors cast in their lot with that part of the nation which a hundred years later constituted the parliamentary party. They represented the people as against the privileged and powerful classes. In carrying out this policy, Henry VIII. weakened the House of Lords, and strengthened the House

of Commons, so that ever afterwards the House of Commons remained the most effective organ of the nation. Under Elizabeth this House of Commons had long years of practice in more or less effective resistance to the Monarch. The leading issues between the Crown and the House of Commons were joined in the time of Elizabeth, and these grew ever more marked and clear throughout the whole of her reign. Elizabeth's chief concern was to keep Romanists and Protestants from open conflict. She refused to make her conflict with the Commons her chief concern. But before she died the stress of the contest against the Romanists had passed away; new religious and political issues had appeared. Had her life been prolonged, she would have been compelled to make these new issues her chief concern. Had there been a new Henry VII. and a new Henry VIII. to follow Elizabeth, they would have seen the chief enemy to the King's power, not in an old feudal nobility, not in an old wealthy Church, but in a skilled and practised House of Commons, backed by the greater part of the middle class people; that is, the country gentlemen, lawyers, and wealthy townsmen.

We know what the early Stuarts did with those new issues; we do not know what the early Tudors would have done in a like case.

It is not unlikely that the England of the Stuarts differed more widely from the England of the early Tudors than did the personal qualities of the monarchs. It was comparatively easy for the early Tudors to carry out a dark and secret policy extending over many years. Some of their most disreputable acts have been discovered only in rather recent times. Henry VIII. could easily deceive the nation, and he knew that he could do so. The Stuart kings could not deceive the nation, and it was the misfortune especially of Charles I. to act as if it were an easy

task to do so. In the time of the early Tudors the New Learning affected only the select few. In the time of the early Stuarts learning had profoundly affected the nation. "England," says Green, "had become the land of a Book." Multitudes read the Bible, and its teaching filled their thoughts and their speech. A public conscience grew up which was superior to mere partisan feeling. Religion, learning, and politics were related far more closely than they had been in the time of the Tudors. The high notions of law in the time of the Tudors played into the hands of the monarchs. In the time of the Stuarts, these same high notions of law rendered equally effective service for the Parliament.

There is a fable concerning two oxen which is intended to point the moral that in the light of ideal justice it makes no difference whose ox it is that is gored. But in politics it really does make a difference. The early Tudors and the early Stuarts alike made use of arbitrary courts to restrain and to destroy their political enemies. In the one case the act is commended as just and right, while in the other it is universally regarded as infamous. Who were the chief political enemies of the early Tudors? In our modern democratic parlance they were feudal lords who, by means of armed retainers, were accustomed to prey upon the nation. They terrorized courts, assassinated witnesses and jurors, and by violence obstructed the ordinary course of justice. Kings could meet violence with violence, but Henry VII. preferred the more just and humane method of restraining the violent lords by means of arbitrary courts. The use of the Star Chamber in its original form for such a purpose is now commended. If a ruler be driven to a choice between defeating one armed faction by another or restraining it by means of special courts of law, he is in duty bound to choose the courts. Who were the chief political enemies of the early

Stuarts? It is now the common belief that previous to 1640 the political enemies of the Stuarts were jurists, lawyers, country gentlemen, and merchants, who were willing to sacrifice ease, personal freedom, property, and life itself for the sake of the Protestant religion and the common liberties of the people. To have used the Star Chamber and other arbitrary courts to restrain and destroy such political leaders is accounted infamous.

The early Stuart kings, however, did not themselves take the modern literary view of their own position in the government. James I. and Charles I. both believed themselves to be as good and as virtuous as the Tudor rulers. They believed that the Protestant religion and the liberties of the people were as safe in their hands as they had been in the hands of the Tudors. In this opinion they were supported by a large class of the educated and the influential people of their day. On the royal side also was the weight of Roman Catholic influence. The early Stuarts were not Romanists, but the natural sympathies of sincere Romanists are in favour of permanence, order, and authority, and these seemed to be on the side of the King. In England the chief opponents of the King were so intensely anti-Roman Catholic that it was practically impossible for members of that sect to act with them. It was a time of great religious wars upon the Continent, and strong papal parties existed in Scotland, and especially in Ireland. Wherever a point of contact was possible between papal power, or a papal party and English politics, the Papists usually favoured the King as against the Parliament.

Again, there was on the side of the King the moderate party, or the less radical reformers, in the Established Church. It should be borne in mind that, until the sword was drawn in the parliamentary strife, the great body of the people in England were members of the le-

gally established Church. The members of the Puritan party were not generally Separatists until after the Rebellion. They still hoped to capture the Church. The bishops and a large proportion of the clergy gave cordial support to the King, while the Puritan clergy of the same Church gave as cordial support to the Parliament. The few Separatists, or the members of the sects, were also in sympathy with Parliament, but had little influence. At the same time a Presbyterian church organization was regarded by the Stuart kings as an enemy of monarchy.

The Stuart kings enjoyed the cordial support of the remnant of the old nobility. Although it was true effective leadership on the part of the great nobility had been destroyed, it does not at all follow that the nobility were not still influential in politics. To curb the Welsh it was convenient to allow great lords with considerable independent power to hold estates on the borders of Wales. Down to the time of the Stuarts, in order to protect England against Scotland, the great estates of the north were maintained. At times these powerful territorial magnates exercised a restraining influence even upon the kings themselves. Nevertheless, under the early Stuarts some of the most effective weapons of the Crown were found in the border counties. The Court of the Council of the North, instituted by Henry VIII., was in the hands of Charles I. a tool of arbitrary government, as were similar courts on the borders of Wales. This was true in spite of the fact that the Council of the North was often used for the defence of the masses against the tyranny of the squires. Wherever the influence of the higher nobility was strong the king's cause had cordial support; King, bishops, and noblemen were at one. But, what was more than all else, the first Stuarts had undisputed possession of the administrative agencies of the government, and the high courts of every name and kind

were almost absolutely under their control. Under the sway of these administrative agencies the people had enjoyed unexampled peace and prosperity for more than a hundred years. It is not at all strange that in such circumstances these kings should have lofty notions of their own dignity and power.

The House of Commons, composed of country gentlemen and lawyers, and merchants from towns and cities, represented the well-to-do classes of town and country. They are the same classes upon which the Yorkists and the early Tudors had especially relied for support. Successful kings had ever allied themselves with the lower classes among the people, and had won their support by protecting them from local tyranny. The early Stuarts had certainly a favourable opportunity to strengthen their position in this time-honoured way. The long contest over enclosures[1] had left bitter recollections in the minds of the poor. The many industrial changes which accompanied the Reformation had served to create a large discontented class. The popular risings which occurred in the later years of the reign of Henry VIII., and during that of Edward VI., had been characterized by bitterness toward the rich. The army of the government was designated as "the gentlemen's army," while that of the insurgents was described as "the Rising of the Commons." It was regarded as a war of the commons against gentlemen. There is evidence that there was still much social discontent which the Stuart kings might have turned to their own advantage against a Parliament of gentlemen. Some support they did receive from the poor, and sometimes they used their arbitrary courts for the defence of the lowly. It would appear that Wentworth, especially during the time of Charles I., perceived the importance of furnishing royal protection to the inferior classes, yet no

[1] See Ashley, *English Economic History*, Vol. II., p. 267 *et seq.*

Stuart king was popular, and Parliament was in the end more successful than were the monarchs in winning the adherence of the unrepresented masses.

With the coming of the Stuarts there were injected into English politics distinct and conflicting theories of government. This is the one great contribution of the Stuarts to the modern Constitution. Without this theorizing, what we now know as the English Constitution could never have been. If the Tudors ever theorized about abstract rights of the Crown and Parliament, they kept their theories to themselves. They occupied their energies in governing, and in settling the various difficulties as they arose. It is conceivable that a free and harmonious Constitution might have been developed in this way, but it would have been a totally different Constitution from that which now prevails. Philosophers and jurists would undoubtedly have theorized in any case, but the unique feature of English politics from this time on is found in the fact that the entire body politic has been accustomed to contend over conflicting theories of government. The peasant as well as the philosopher is called upon to profess a belief in an almost incomprehensible theory of the government.

We have already seen that a nucleus of the parliamentary party with a well-defined theory of the powers and privileges of the House of Commons was already formed when James came to the throne. Elizabeth put forward no conflicting theory, but she took care if possible to have her own way. She scolded and she reproved her refractory Commons, but she set forth no abstruse theories. James, on the other hand, answered the theory of the Commons by a precise theory of the Crown. According to the theory of the Commons the Parliament — consisting of King, Lords, and Commons — is the sole agency for making laws, and the House of Commons is the sole

agency for originating a vote of supplies. The King must act through ministers and officers, all of whom are liable to be punished for violating the laws. The government is a government of law, and Parliament is the only agency capable of changing the law. James came to the throne of England with a well-defined theory of the powers and duties of the monarch. James was not a fool. Had he remained in Scotland, he must have been accounted a wise ruler. He had a nervous dread of swords, but he was far from being a coward. He was a worthy representative of a race of monarchs whose high mission it was to break the power of feudal faction in Scotland and give a chance to order and civilization. His boyhood and early manhood were spent in times of ecclesiastical contests and the fiercest conflicts between rival political factions. As a young ruler he had coped with all the enemies of the Crown and had apparently overcome them. He had subdued the factious lords. The Presbyterian Church included the great body of the Scottish nation ; it possessed a form of organization well fitted for purposes of civil government, and had for a time exercised the controlling power in the government ; yet the young King successfully withstood the Kirk. It was only when he was subjected to the restraining hand of Elizabeth that he was compelled to submit to its sway. As soon as the foreign restraint was removed, James set up an episcopacy and brought the Presbyterian Assembly under the control of the Crown.[1] Flushed with victory over the last and most formidable of his enemies in his Scottish dominion, he was called to the English throne.

James was already an experienced king, and it is not therefore strange that he held definite views of kingcraft. While sitting in his Scottish council, he had literally felt the heavy hand of a sturdy follower of Knox who told

[1] Greene's *History of the English People*, Vol. III., pp. 50–54.

the King to his teeth, "There are two kings and two kingdoms in Scotland. There is Christ Jesus, the King, and His kingdom, the Kirk, whose subject James the Sixth is, and of that kingdom not a king, nor a lord, nor a head, but a member." Christ, he declared, had given full power to His Church, and it was the duty of a king to assist those whom Christ had set over His Church, not to control them. But James was as much a Calvinist as were the followers of Knox. He, too, accepted the Bible as the voice of God. If we follow appearances, we are bound to say that he was as honest and as sincere in this as were the Presbyterians. Before he became an English king, he had received a sign in which the Presbyterians were lacking. He had been exalted while his enemies had been abased.

There was no thought of separating religion from government either on the part of James or on that of the Presbyterians. Toleration was not dreamed of by either. The Presbyterian theory made all men equal before God, and it made an elected assembly of the clergy the visible expression of God's government on earth. James's theory made the King the head of the Kingdom of God on earth. In his view, to abandon his office as king was treason against Jehovah; it was to invite the return of violence and barbarism which it was the high mission of his House to banish from Scotland. It was quite reasonable for him to say at an early conference held in his new kingdom, "The Presbytery agreeth as well with monarchy as God with the devil." Episcopacy, as then seen in England, agreed entirely with monarchy, because the bishops under the Tudor monarchs were subservient to the kings. In James's view the bishops were an essential part of divinely ordained kingship. James felt sure that he could govern Scotland, and it was but natural that he should expect to govern England

with comparative ease. The Tudor monarchy in England had been the example and the inspiration to Stuart monarchs in their desperate efforts to bring order out of chaos in Scotland. James's theory of government did not seem to be at all out of harmony with the past or the present government of England. He had no more objection to government by means of Parliaments than he had to government by means of bishops. He simply expected Parliaments to work in harmony with the Sovereign as did the bishops and as had mainly been the habit of Parliaments both in England and in Scotland. A Parliament without the Monarch was no Parliament. If at any time one of the fractions of a Parliament had been made a tool of the King's enemies in the State, the circumstances had been such as to give no support to the view that such a fraction was in itself a thing to be dreaded by mighty kings.

The arguments of the lawyers who contended for the power of the Commons must have struck James as singularly feeble and incoherent compared with the arguments of the members of the Presbyterian Assembly who had been drilled in the school of John Knox. These lawyers conceded that James rightly held in his hands the agencies of government; they simply insisted that he should act in accordance with what they deemed to be the law. To James this seemed a weak sort of exhortation or preaching, and one who had withstood the preaching of Knox in the days of his youth was not likely to be greatly affected by such exhortations in his mature manhood. When this fraction of a Parliament (the House of Commons) virtually claimed that *it* was the true representative of the English nation; that it was practically the sole source of both law and supply; that in defiance of the known will of the King it could determine the policy of the government; that

the King as well as his ministers was but the servant of the law; and that, the House of Commons being the chief source of law, the King and his ministers were but servants of this fraction of a Parliament, — it was but natural that he should think, if he did not say, "Such a House of Commons agreeth as well with monarchy as God with the devil." Such a claim James was prepared to resist to the last. Rather than yield to such a claim the son of James chose to die.

Some modern historians have hit upon the theory that at some time or other before the Tudors there had been a golden era of parliamentary rule, and have comforted us with the notion that the parliamentary party in the time of the Stuarts was sustained by the remembrance of that past age. It is certainly true that some of the members of the party used language which is fitted to suggest a belief in the ancient high powers of Parliament. But they drew support from events in the time of the Tudors as well as from the earlier history. They ransacked all history for arguments.

Any one who takes the trouble to give attention to the ordinary method of political argument will clearly perceive that it is not at all necessary that history should be true in order to be useful. The uninterrupted existence of something that can be called Parliament, with such acts as in the nature of the case became associated with such an institution, was just as useful to the parliamentary party of the Stuart period as would have been the most conclusive proofs of the high powers of Parliament in the remote past. It is an egregious blunder to assume that in such a contest the chief motive for action ever comes from a theory of the remote past.

The lawyers, merchants, and country gentlemen were in many ways made to feel that since the Crown, the higher nobility, and the bishops were at one, they were

themselves next called upon to resist the encroachments of absolute government. The House of Commons was their most convenient organ. By reading history backward we can see that it was of immense advantage to this party that the blunt fanatical Stuart kings boldly put forward their theory of divine right. There had been no time in the remote past when there was any sense in maintaining a persistent theory about the powers of either the House of Commons or the Crown. When Henry VIII. wrote to the Pope that the House of Commons was accustomed to discuss and decide things freely, he was doubtless playing his old trick of making the Commons a scapegoat for those acts of his own which were obnoxious to the Pope. When, in the time of the Wars of the Roses, Fortescue recorded the remark that the "kynge may not rule his peple bi other lawes than such as thai assenten unto,"[1] he was indulging in mere academic talk. Neither in his nor in any previous day had there been any definite theory of the powers of different governmental agencies which either controlled or greatly influenced the politics of the day. But when in Scotland a divinely ordained republican Kirk was met and restrained by a divinely ordained king, then there were injected into politics conflicting theories of government which, independently of any definite governmental policies, did influence and did tend to dominate politics. It is not possible to understand the modern English Constitution unless we see clearly that this was something new in English history.

Without these rigid contradictory theories it is difficult to see how the House of Commons could ever have been advanced to the practical attainment of all that the Presbyterian Assembly claimed. Without the martyr-king, on the other hand, it is not likely that the promotion

[1] Plummer's *Fortescue on the Gouvernance of England*, p. 109.

of the House of Commons would have been accompanied by the careful preserving of all the consecrated forms of monarchy. In the time of Elizabeth the upholders of the privileges of Parliament had much difficulty in answering the defenders of the Crown. The Queen did nothing which was not according to the customs of former monarchs. Even the Lancastrians imprisoned members of Parliament for making objectionable statements. In still earlier times an archbishop risked his head when he dared to oppose the King's will in the national assembly. The most effective answer which the parliamentary party could make to the court lawyers was to shout the word "Privilege" in louder tones and to threaten to make the business of government more disagreeable if their wishes were not respected.

But when James and Charles put forth their theory of divine right, they shocked the sensibilities of the English nation. This doctrine was not only new; it could easily be made to appear both dangerous and revolutionary also. It seemed to mean that the King could rule without a Parliament, and the statement of such a theory made it possible for the first time for parliamentary lawyers to appeal with effect to English history. Without such an issue the parliamentary party was weak, especially so in its appeal to history; with such an issue, the party was strong, not only in the prejudices of the English nation against foreign, innovating kings, but also in its appeal to history. Had ever a king ruled in England who was not crowned by Parliament? Had not Parliament again and again removed one king from office and set up another? Did not these very Stuart kings rely in large part for their title to the throne upon the acts of Parliament? With such an issue men were forced to think of Parliament as an institution apart from the King. When this analysis was for the first time forced into the minds of

Englishmen, there ensued a strong natural tendency to look upon the elected part of Parliament as peculiarly representative of the English nation.

To understand the modern Constitution it is necessary to perceive that both the theory of the Stuart kings and that of the opposing parliamentary party have been preserved and harmonized the one with the other. Not only have the consecrated forms of monarchy survived, but those forms still hold important relations to the working of the Cabinet. And in the office of Prime Minister absolute rule may be seen working in harmony with a democratic House of Commons. Hence the Stuart theory of monarchy may be said to have contributed not only form but substance as well to the present Constitution.

CHAPTER XXII

THE EARLY STUARTS AND THE COURTS

THE state of the judiciary in the time of James I. throws light on the modern Constitution. On his way to London to be crowned, James ordered a thief to be hanged without benefit of judge or jury.[1] This may have been an expression of the exuberant spirits of the new sovereign in view of the summary powers of the kingship to which he had fallen heir. The incident shows, however, that the new king did not appreciate the reverence for law and its forms which had grown up in England. But in dealing with the high courts of the realm James appears to better advantage. Failing to get adequate supplies from his first Parliament, he followed the example of former kings and collected a duty on currants. A merchant by the name of Bates refused payment, and his case was brought before the Court of the Exchequer, where he pleaded that such an impost was illegal without the sanction of Parliament. The judges decided in favour of the King, and in the arguments accompanying the decision they touched upon a subject of great difficulty from the standpoint of the parliamentary party. To the King, they said, belonged the responsibility of governing; and in the nature of the case government involves a large amount of discretionary power. The judges in Bates's case drew a distinction between private

[1] Charles Knight, *The Popular History of England*, Vol. III., p. 308.

rights, where common law and parliamentary action should prevail, and acts for the public good where the absolute power of the King should prevail. According to this theory, the absolute power of the King extends to all matters of foreign relations. The collection of a duty upon a foreign import pertains to foreign affairs and is hence a part of the discretionary power of the King. We know how, in later times, the parliamentary party solved this difficulty by taking out of the hands of the monarch the responsibility of governing. In the time of James no one had dreamed of such a solution. Had James I. and Charles I. only been moderate and husbanded those manifest advantages which custom had conceded, it would have been better for their cause.

Even before the decision in Bates's case James had got the better of his Parliament by means of the courts. He was anxious to have his Scottish subjects naturalized as subjects of England. Parliament refused to comply with this wish. He then presented a case to the courts in which an infant, born in Scotland after the accession of James to the throne of England, claimed a right to inherit property as an English subject. The judges decided in favour of the infant. This decision had the effect of naturalizing all Scottish subjects of the King born after his accession to the throne of England. Thus the King secured through judicial decision a law which Parliament had refused.

Later, James suffered a rebuff at the hands of the Chief Justice, Sir Edward Coke. The King proposed to regulate by proclamation the building of houses in London and to forbid the manufacture of starch from wheat. On consulting the Chief Justice and certain other judges as to the legality of such proclamations he received from them a clear and emphatic opinion to the effect that the proposed proclamations were illegal; that the King could

not create an offence by proclamation, nor in any way alter existing laws. Furthermore it was declared illegal for the King to punish in the Court of the Star Chamber any one for an offence which was not at the same time punishable in the ordinary courts. These opinions of the Chief Justice were in after times universally accepted as good law. At the time they were delivered they gave weight to the contention of the parliamentary party in the House of Commons. But for his championship of the parliamentary cause, the Chief Justice was degraded from his office and imprisoned in the Tower. The high courts were filled with judges who were subservient to the King. Even the claim of Charles I. to the right of levying a tax on all England under the name of "ship-money" received the sanction of the courts.

After the contest with Coke and his associates, the ordinary courts were subservient. Justice had been poisoned at the source. The Star Chamber was now an old and venerated institution. Apparently it was as effective an agency in the hands of the Stuarts as it had been in the hands of the Tudors. At no time did the Star Chamber inflict the death penalty, but it could compass the destruction of the King's enemies through the rigours of a prison, through mutilations of the body, through banishment and confiscations. Other arbitrary courts remained which could inflict the death penalty. The court of the Council of the North and courts on the borders of Wales entirely superseded the common law courts in those regions. In parts of England where the arbitrary courts established by law seemed to be inadequate, the King, through the exercise of that discretionary power for the public safety which the courts conceded to him, could set up military courts for the punishment of his enemies. There also was the High Commission Court, established in the time of Elizabeth, which exercised

jurisdiction over moral, religious, and ecclesiastical offences. In the hands of subservient bishops this court was a mighty weapon for the use of James and Charles. The House of Lords was also a high court of appeal, and its decisions were usually favourable to the King.

It is difficult to understand how the House of Commons could have withstood such an array of judicial and administrative power if the House itself had not also been a recognized high court of the realm. From the earliest times, the local courts in England were engaged in all sorts of governmental business. Law-making, law-executing, and law-interpreting were so blended together as to defy distinct analysis. The King, through his courts, was at the same time discovering, declaring, interpreting, and executing laws; and to attempt to analyze this business into distinct departments leads to confusion and error. From the beginning, the King and his high courts embodied all the powers of government. The chief reason why this government was not absolute was that at all times there were those in the kingdom who would not obey it.

In the time of the early Stuarts no one had thought of limiting the government by dividing it into departments. It was more difficult in the time of James I. for a citizen to conceive of a government divided into departments than it is for an American to conceive of a government having legislative, executive, and judicial functions united in the same hand. The King expressed the unity and simplicity of government. The King, the Lords, and the Commons at the end of the sixteenth century had held together so long that they had become, in a sense, a single undivided ruler. An action might originate in one portion of this compound ruler, but it was no act of government if it did not express the will of the entire ruling power.

An American who has not made a special study of the history of his ancestors, has difficulty in understanding how the veto-power dropped out of the English Constitution. The explanation is found in this persistent unity of government. It is interesting to observe that the seeds of empire were planted by Englishmen in the New World just at the time when a new theory of kingship forced into prominence for the first time the possibility of dividing government into separate legislative and executive branches. For centuries, indeed, courts had existed which attended to judicial business alone, but every important governmental agency had also a measure of judicial power. The House of Commons was itself a court of record, and it was also a part of the undivided sovereign authority. As a court it acted upon its own motion and in defence of the privilege of its own members. In 1543, at a time when royal power was at its height, the House of Commons sent its sergeant to demand the release of one of its members who had been imprisoned for debt. The jailer and sheriffs of London refused to comply, and maltreated the sergeant; whereupon the sheriffs and the jailer were arraigned before the House for contempt of court and committed to prison, the King expressing in strong terms his approval of the action. In the time of Elizabeth the House interfered to protect a servant of a member from a court of law. In several instances men were committed to the Tower for assaults upon members. While the King had so much of judicial support, it was of great consequence that the House of Commons was also able to vindicate its position as an independent court of record on matters touching the privilege of members.

Much power also rested with the Lower House on account of its relation to the trial of high officers of State. Impeachment of ministers began in the time of Edward II.

In trials of that sort the House of Commons appeared as the accuser, the House of Lords sitting as a court to hear and render judgment. In these high state trials, the sense of unity in government was so strong that when one part acted it almost determined the action of all other parts. That is, when the Commons impeached an officer, it was expected that the Lords would convict him, and that the King would perforce add his approval. When there came to be a settled conflict between King and Commons it was therefore of great consequence that the House of Commons was the first to act in cases of impeachment. Bacon and other ministers of James were impeached, convicted, and removed from office. Buckingham, Charles's favourite, was seriously threatened, and, later, Wentworth and Laud were got rid of.

It is from the State trials in the high court of Parliament that the doctrine of ministerial responsibility has been perfected. At no time was it deemed proper to put the King on trial, because the King was the head of the court. It would be like trying the Chief Justice in his own court while he was still Chief Justice. But the minister who obeyed the King's orders might be punished. The court assumed that the minister advised the thing done, though he might have been known to have advised just the opposite. Parliament, as a high court, made good the claim that the minister is responsible and punishable, although the King may have ordered the ministerial act. In harmony with this view has been developed the principle that all officers are individually responsible for an illegal act, even though the act may be ordered by a superior whom they are bound by law to obey.

There was another method of procedure capable of being used with still more terrible force against the King's officers; that was the bill of attainder. An impeachment required that at least the forms of a trial

should be observed. In such a case difficulties might arise in securing conviction in the House of Lords. The House of Commons first proceeded against Wentworth and Laud by impeachment. But on account of delays and obstacles in the House of Lords, it accomplished their destruction by bills of attainder. Notwithstanding the fact that the great body of the Lords were in sympathy with the culprits, such was the force of the principle of the unity of government that in these high acts of state the Lords gave approval to the bills. Formerly, in these state trials, Parliament had been a mere tool in the hands of the King or in those of an armed faction; now the House of Commons, through the prescriptive unity of the ruler, was able to take to itself a part of the sovereign action of the united government.

CHAPTER XXIII

A SOVEREIGN KING *VERSUS* A SOVEREIGN PARLIAMENT

THROUGHOUT the whole of English history the getting of money troubled the kings as did no other sort of business. From the meanest peasant to the haughtiest noble, the people cherished a high appreciation of the right of individual possession. They would not consent to give their money unless they were promised something in return. The weak classes were for generations subjected to exactions at the hands of the strong; yet this was never carried to the extent of breaking their spirits. We have seen how the first Tudors, the mightiest of monarchs, quailed before resisting peasants and citizens. Even when his Parliament had voted him a tax, Henry VII. had difficulty in collecting it, and found it easier to levy upon the defenceless rich. Henry VIII. had a similar experience and pursued a similar policy. Elizabeth, having no rich classes whom she could conveniently rob, solved the problem by carefully making use of the arbitrary methods of raising revenue still left to the Crown; while, for the rest, she refused to spend more than the Commons would grant. England was one of the richest countries in the world, and James I. did not at all appreciate the obstacles in the way of securing the income necessary to the government. He had all the arbitrary courts which the early Tudors used, but he lacked the rich and helpless classes.

The nobles and the bishops, who were the descendants of the rich classes that the Tudors had robbed, were James's strongest supporters. The merchants, the country gentlemen and the lawyers, who had been the chief supporters of the early Tudors, had never been accustomed to surrender property in large amounts at the demand of an arbitrary court. The leaders in the House of Commons knew, as James and Charles did not know, the nation's reserve power of resistance to arbitrary exactions. It was of immense advantage to the Commons that in the contest with the King they appeared at the same time to be the champions of the people against arbitrary exactions. Against the new theory of divine right the Commons had as a defensive weapon the old habit of asking favours and insisting upon redress of grievances before granting supplies. Under the new issue with the Crown this old habit takes on a new meaning. From the standpoint of the King, Parliament was simply one of the many agencies in his hand for getting supplies. These agencies were all equally legal and equally righteous. Sovereignty was viewed as a simple thing, and in the last analysis, according to the royal theory, sovereignty rested with the Sovereign. Upon his theory it was the duty of the Commons to vote supplies. If they refused to do this, it became the duty of the King to collect the supplies without the vote of the Commons. If the Commons persisted in refusing necessary taxes, then the House of Commons became obstructive, unconstitutional, and revolutionary. In support of this view the King and his lawyers appealed to history.

The Commons also appealed to history in support of their ancient and undoubted right to vote or withhold supplies. They, too, held to the notion of the unity and simplicity of sovereign power. They had long ago vindicated their right, as against the House of Lords, to con-

trol the votes of supply. Now, forced to an issue with the King, they made the further claim that in the matter of appropriations the Commons represented the sovereign power of the nation. Under this theory the King was reduced to a state of a mere petitioner. They would grant him supplies or withhold them as they pleased. They asserted in even louder tones than the court lawyers had done that their view was in accord with the ancient and unchanging Constitution of the English government. In this debate the idea of an ancient and unchanging Constitution was born, and two theories regarding it became prominent. One made the king the predominant power; the other, the nation through the House of Commons. According to the theory of James and Charles these two views of the English Constitution were contradictory and impossible. The events of the first half of the seventeenth century would indicate that this view was correct. Yet it is the mystery of the Constitution of to-day that both of these views have survived, and that they have actually been harmonized with each other.

The lawyers in the House of Commons seemed to see clearly, if modern historians have not, that their strongest argument in this emergency was not found in past history, but in present politics. From ancient history and from their new theory the Commons found themselves in possession of but a small fragment of sovereign power. From the standpoint of pure logic, their position was not enviable; but from the standpoint of contemporary politics, it was superb. Here was a foreign and unpopular king who insisted upon a wholly new theory of absolute sovereignty; yet he asked supplies of the House of Commons. By the simple process of forcing the King to concede something, no matter what, to the demands of the Commons, as a condition of the granting of supplies it would be demonstrated that the so-called

sovereign was limited, and the germ of sovereignty which the Commons claimed would thenceforth grow, and in course of time the Commons would be practically sovereign in the making of laws and in the determining of policies. It is not necessary to assume that the party of the Commons had any clear vision of the remote results of their contention. They did, however, see clearly the desirability of checking the growth of the divine-right theory by compelling the King to act inconsistently with his theory whenever he asked for supplies. This policy, independently of any definite intention, tended to transfer the notion of sovereignty from the Monarch to the nation, and to the House of Commons, as the best representative of the nation.

Both James and Charles were wont to think that they could outwit their Parliaments by appearing to yield, and then could gain their points through the exercise of arbitrary power. They were doubtless conscientiously of the opinion that they were not bound by promises made under compulsion. In this they were not unlike the Tudors, but they differed from the Tudors in that they habitually aroused suspicion. Notwithstanding the fact that these sovereigns claiming divine right were again and again forced to make concessions to the demands of the Commons, they seemed to think that it added to their dignity openly to claim that they were not bound by such action. They even took this view of the solemn assent to statutes enacted in full Parliament.

The chief concessions on the part of the Kings were in course of time summed up in the great act known as the Petition of Right, wrung from Charles I. by his third Parliament. This act required in the most explicit terms that the King should abolish the principal abuses of which for thirty years the Commons had complained, and should rule according to laws established by Parliament.

Charles's conduct clearly showed that he had no intention of obeying the new law. Before granting the petition he had endeavoured, through his friends in the House of Lords, to have a clause inserted "saving intact the *sovereign power* of the King." This gave to Sir Edward Coke and other parliamentary lawyers a fine opportunity to emphasize the contention that the laws of England were sovereign. "The statutes," said Coke, "are absolute without any saving 'sovereign power.' Magna Charta is such a fellow that he will have no 'sovereign.' I wonder this 'sovereign' was not in Magna Charta, or in the confirmations of it. If we grant this, by implication we give a 'sovereign power' above all law." The Commons refused to admit the saving clause, and the King ultimately granted the Petition in its original form.

The habit of reverence for law which had been so thoroughly drilled into the English people during the entire Tudor period was now of great value. We have seen that even in their most high-handed acts the Tudors were scrupulous in observing the forms of law. James and Charles, in their contentions with the Commons, suffered themselves gradually to acquire the reputation of law-breakers. To the man who thinks the King a law-breaker that king cannot at the same time appear to be sovereign; and, for the multitude, if the King does not represent the sovereign power, then Parliament does. Sir Edward Coke and a few lawyers may have satisfied their own minds by conceiving of abstract law as sovereign, but such a notion would have little force with the masses of the people. They would have a government which they could see. If the King was not the head of that government, then the two Houses were the head. Thus it became natural to associate all the past history of England with the Parliament, that is, the two Houses apart from the Monarch, as the sovereign agency of law. Not

only Magna Charta, but all the former liberties of Englishmen, now became associated with this ever-existing national assembly; and from this time on the glories of the Constitution were more and more thought to radiate from the two Houses of Parliament. The King's blunt claim to a right to disobey the law tended to arouse the rebellion which culminated in his execution.

The circumstances giving rise to the Petition of Right were as different as can be imagined from those which led to Magna Charta. The entire atmosphere enveloping Magna Charta is shadowy and indefinite. We are not quite sure that the meeting at Runnymede ought to be called a legal national assembly. The terms of the charter are broad enough to admit nearly all things good and glorious which ever have been or ever may be found in the history of human liberty. The American rightly feels as deep an interest in Magna Charta as does the Englishman, and other nations justly admire it. But the Petition of Right is directed against a few very definite and well understood abuses. It was drawn up at a time when government had become more precise. The new statute forbade the King to continue the collection of certain taxes which, as the parliamentary party maintained, did not belong to him by royal prerogative. It forbade the King to keep in prison subjects who had not been convicted of any crime; or to billet soldiers in the houses of citizens; or to subject citizens to trial in courts of martial law. The act also required the King to govern according to law. For Charles to observe the provisions of this act would have been to vacate the office of King as understood by him. This he had not the slightest intention of doing. He promptly imprisoned the leaders of the House of Commons who had forced him to grant the Petition of Right, and, in utter violation of the new statute, ruled eleven years without calling a Parliament.

CHAPTER XXIV

RELIGIOUS CONTROVERSY

THE course of action followed by Charles I., after the granting of the statute known as the Petition of Right, was more than ever in flagrant violation of law and more and more obnoxious to the law-abiding spirit of the people. It cannot be doubted that from this source alone, had time been given to exhaust the long patience of the slow-moving masses, would have come the convulsion which did in fact arise primarily from other causes. More thoroughly fixed in the hearts of the people than even their reverence for law was now the principle of religious freedom. "England had become the land of a Book," and the great constitutional debate was in its origin a religious controversy. In Scotland, the Kirk, claiming divine right to exercise authority over all men, not excepting the sovereign, had been met by a king claiming divine right to exercise absolute authority at the same time and place. Both King and Kirk had substituted their own peculiar views of the Bible for the Pope. Each found in the Bible the expression of the divine will which all men are bound to obey. During Charles I.'s reign, between 1629 and 1640, through a splendid English translation of the Bible, all England was becoming familiar with its teachings.

It had been common at all times in English history for the bishops to hold one view in political contentions and

a portion of the lower clergy to hold another view. The Church as a political institution seldom acted as a unit in politics; and there have been many times when the influence of the Church as a political institution was favourable to one political faction in the government, while the influence of the prevailing religious teachings of the Church was favourable to an opposing faction.

When James I. came to England, the national prejudices were intensely anti-papal; yet there were influential classes who did not share this national prejudice. Between the Papist and the fanatic whose religion consisted largely in the detestation of popery were in England all grades of opinion, yet there were strong tendencies to divide into two parties, the radical and the conservative, the Puritan and the legal Churchman. The Episcopalian Church was that by law established, and nearly all the people were accounted members except the Papists and a few of the extreme Protestants who entirely repudiated the authority of the Establishment. Elizabeth's policy had been one of resistance to extremes, and James found within the Established Church a moderate party which had been trained under Elizabeth to restrain the more radical of the clergy. The independent party in the House of Commons was largely composed of those in sympathy with the Puritan, or the extreme anti-papal, party in the Church. These Puritans were refractory in matters of Church discipline, as well as in matters of parliamentary action. While remaining in the Church they still refused to conform to some of its requirements, and were therefore disliked by the bishops. Among the higher clergy were a few moderate men who favoured a conciliatory course in order to stay the tendency to schism. Scotland was nearly all Presbyterian in religious belief, and while Presbyterianism was conquering Scotland, it spread also into England, so that in the time of Elizabeth

the Puritan party in the Church was mainly composed of those who favoured a Presbyterian policy and held the Presbyterian theory of Church government. These early Presbyterians had, however, no intention of being a sect. In their view the kingdom of God on earth was simple. It included under one form of government all men; and that form of government was the Presbyterian Church. The early English Presbyterians, with Cartwright as their leader, proposed to have all Englishmen submit to the rule of the one divinely ordained Church.[1] This movement was at its height about 1572. The Presbyterians, though all-powerful in Scotland, in England encountered much resistance and were forced to face the disagreeable alternative of remaining in the Established Church or becoming a sect. Most of the Puritans, or Presbyterians, chose to remain, but they were of that part of the Church which was constantly clamouring for more radical changes and more strenuous opposition to popery. Upon the accession of James, therefore, there was a strong party within the Established Church of England which desired the modification of the Episcopal forms in the direction of Presbyterianism.

The year after James was crowned King of England, the reforming party in the Church arranged a conference with the King, the object of which was to secure concessions to the Puritan party. A petition was presented, asking permission for those whose consciences approved, to omit the wearing of the surplice, etc. There were present at the conference those who favoured such a modification of the Church discipline as would make it easy for the Presbyterians to remain in the Church. At this meeting James made the statement, already quoted, that the Presbyterian Church could not be reconciled with monarchy. He threw the whole weight of his authority

[1] Hallam, *Constitutional History*, Vol. I., p. 189.

in favour of the extreme conservatives among the bishops, who were for enacting the most rigid conformity. James and the bishops were at one, and the Puritans thought themselves driven to look more and more to Parliament as the bulwark of the nation against vice and against popery.

The men still lived who had been alarmed by the Invincible Armada. They looked upon Spain as the enemy of religion and the special enemy of England. A war against Spain would at any time be popular. James constantly offended both the religious and the patriotic sense of the nation by his friendship for Spain. He failed to secure the marriage of his son and the Infanta, yet his known efforts to that end aroused an intense antipathy towards him. Hence the parliamentary party, in all their contests with the King respecting the privileges of their members, in all their impeachment trials, in their championship of the cause of resistance to arbitrary taxation, enjoyed a constant and increasing support from the Puritans; and there was a strong tendency for these sentiments to become general. Charles at length married the daughter of the King of France, and as one condition to this marriage both James and Charles promised to secure the toleration of Romanists, although they had previously given solemn pledges that this should not be done. With the masses of the people the religious policy of these kings had more telling effect in favour of the Parliament and the parliamentary theory of government than all other issues.

There is much in the teachings of the Bible which tends directly to promote freedom of speech and independence of thought and action in the face of authority. A prophet of the Lord made the wicked Ahab to tremble on his throne, and yet the same prophet was exiled by orders from a corrupt court. When the champions of the parliamentary party were imprisoned and mutilated, they

appeared to their Puritan supporters as martyrs to a purer religion. John the Baptist told King Herod that he ought not to have his brother Philip's wife. A little later the head of John was presented to the offended woman. Mr. Prynne wrote a book against the vices of the day, in which all classes, not excepting the King and Queen, were reproved for what the ultra-Puritans considered their evil ways. For this Mr. Prynne had his ears cut off so close to his skull as to endanger his life. It is a rule of life revealed in the Bible that righteous men have ever been accounted worthy to suffer at the hands of the rulers in a wicked generation. In the eyes of Bible-reading Puritans, Charles and his associates were ungodly men who devised evil against the nation.

Charles was too correct a man in his personal life to make it easy for the Puritans to convince the nation of his personal unrighteousness. His sins were political and ecclesiastical. Prynne had written against sports and theatrical performances, and about the time of the publication of his book the Queen took part in a theatrical exhibition. The more intelligent leaders of the parliamentary party repudiated the teachings of Prynne; yet to the masses of the Puritans he was a martyr for the cause of righteousness. The Queen, moreover, was known to be a Papist, and it was not easy to convince a Puritan of that period that any practice was right which a Papist approved.

Archbishop Laud was Charles's powerful supporter in the Church. There was a saying common in the time of the Normans that the Archbishop and the King were the two oxen to draw the English plough. This saying seemed to be perfectly exemplified in Charles and Laud during the eleven years of tyranny. The one had centred in himself all effective civil government, and the other had all effective ecclesiastical power, while the two were one in

spirit and purpose. By means of the bishops and the High Commission Court, innovations were effected in the Church which convinced the Puritans that Popery was being reëstablished. Communion tables were placed at the east end of the chancel, and bowing at the name of Jesus was introduced. Strict conformity was required. For departures from the forms of the Established Church clergymen were fined, imprisoned, and otherwise punished. In matters ecclesiastical and religious, Charles's government was without a flaw either as to legislative, executive, or judicial power. He had all the agencies which a government could wish.

One flaw, however, is seen in secular government in the lack of a harmonious Parliament. But Charles enjoyed the services of a minister who for a time promised to supply this deficiency. Among the boldest members of the opposition in the time of Elizabeth were Paul and Peter Wentworth. To the same school, under James and Charles, belonged Thomas Wentworth. Until about the time of the granting of the Petition of Right Wentworth was a staunch member of the parliamentary party. A little later he became the King's chief supporter. He believed that the King's government could be made complete by restoring to his use the ancient subservient Parliament. To this policy he gave the name "thorough." The North of England was Wentworth's first field of operation; there he proved that out of a Council of the North an efficient and at the same time a subservient governing body could be formed. Going thence to Ireland, he proved that a most absolute government could be formed by means of an obedient Irish Parliament. With such a Parliament restored to England, nothing would be lacking to the formation of a permanent and harmonious absolute government.

If Charles I. could have added to his absolute govern-

ment in the North of England and in Ireland a similar government for Scotland, the English Puritans would have had a much more serious contest than they actually had. The King did, in fact, appear to have such a government in Scotland. When his father became King of England he was making progress in his policy of subduing the Presbyterian Church and building up Episcopacy. But this was a gradual process extending throughout the whole of his reign. He used the subservient Scottish Parliaments to transfer power slowly from the Presbytery to Parliament and bishops. James's policy was fairly successful; his Parliaments were submissive, the Crown was strengthened, and the religious sense of the nation was not greatly offended. The most unpopular act of his reign was that known as The Five Articles of Perth, which required kneeling at the communion, the observance of holy days, and other practices which suggested the return of Popery. James was at that date, 1621, seeking a popish alliance with Spain. During these changes the forms of worship established by Knox were for the most part left intact, and the property of the nobles was undisturbed, the estates being left as they had been settled at the time of the Reformation.

When Charles became king, in 1625, all was changed. He proposed to resume for himself possession of estates which had been granted by the Crown forty years before. The Scottish government seemed to be such as suited Charles well. The legislature, such as it was, could be got to vote whatever the King wished, and there was a council of State, called the Lords of the Articles, made up of his own supporters, which could either legislate or control legislation. He seemed to have not the slightest perception of the reserved power that inhered in the Scottish people and Presbyterian Church. But in 1637, when Charles and Archbishop Laud proposed to substitute the

English Prayer Book in place of the liturgy of John Knox, the nation rose in rebellion.

It should be noticed that this rising in Scotland occurred just when the English people also were being goaded to the point of resistance. Under the name of ship-money, Charles and his lawyers had developed a scheme which would enable their government to prolong its existence for an indefinite period without the aid of Parliament. Out of an ancient and long disused prerogative permitting the King to call upon towns to furnish ships to ward off danger, was developed the theory that the King could levy a tax upon the entire country, and that the King himself should be the judge of the emergency requiring such a tax. John Hampden refused to pay the tax, and succeeded in obtaining a decision in the courts upon the legality of the act. It was through encouragement from the judges that Charles had entered upon the policy, and a majority of the court sustained the prerogative of the King in the trial of Hampden; but in rendering the judgment the judges of the Court of the Exchequer stood seven to five in support of the government. The practical effect of the judgment was the defeat of the King. The persistent collection of what they regarded as illegal taxes seemed to the people a fresh instance of law-breaking by the Sovereign and his courts.

From 1637 to 1640 Charles's government was in desperate straits. His despotism was completely broken in Scotland. He was forced to concede to that country a representative government, and along with the representative government came perforce the restoration of the Presbyterian Church. Still there was not peace between the King and the Scots. The restored Scottish Parliament made demands which the King could not, or would not, grant. So there was war in Scotland. The King's government in England was powerless without the means

of raising money, and Charles was forced to call a Parliament, which he did in 1640. In view of what happened a few years later it is a matter of amazement that so moderate and conservative a Parliament could come together to face a king who had for eleven years carried on an arbitrary and illegal government. Yet even with this mild-tempered Parliament Charles quarrelled, and sent its members home in anger at the end of three weeks. Later in the same year he was forced to call a new Parliament. On the faces of the members of this Parliament eye-witnesses testified that one could read the determination not to be commanded, but to command.

CHAPTER XXV

TOLERATION AND DEMOCRACY

THE most important facts to be observed in the attempt to account for the modern English Constitution are not those pertaining to King, Parliaments, and courts, but rather those which pertain to the spirit and the acts of the common people. From the beginning kings had prospered or failed according as they gained or lost the support of the people. Under the rule of the common law the common people became law-abiding, centuries before lawlessness was suppressed among the ruling classes, and it was by gaining their support that the Tudor kings were enabled to induce respect for law among the ruling classes. Through the jury system, through local government, through the militia, through guilds, labour organizations, brotherhoods, and various other societies, religious and social, a large proportion of the people had gained experience in matters of government.

In the few popular uprisings which occurred in the time of the Reformation during the later years of Henry VIII. and Edward VI. it was observed that the common people exercised great self-restraint. A popular uprising did not take the form of a brainless mob. There was discipline and self-restraint pervading the mass. In all the strivings of the masses religious teachings and practices held a dominant place. The monks and the friars brought hope and courage to the most hopeless, during the Middle

Ages. Wiclif and the Lollards created a demand on the part of the people for greater purity among their rulers, and thus helped to prepare the way for the Reformation. The risings at the time of the Reformation occurred in part because the people were made to believe that religious institutions were all in danger of being destroyed. When religious opinion was injected into English politics there was already a profound and general interest in the subject. The beginning of the Civil War had been preceded by more than a hundred years of Bible-reading in the English tongue, and the great body of the people had formed habits of thinking and reasoning on religious questions.

We have seen that the modern English Constitution is based upon the theory of democracy. The origin of this theory must ever be a matter of much interest. Since we have had inflicted upon us the theories of the political philosophers of the seventeenth and eighteenth centuries regarding the nature and origin of government, we incur great difficulty in reading aright our previous history. From the days of our youth our minds are filled with various ideals towards the attainment of which governmental agencies are being directed. The natural order seems to be, first the ideal and then the striving for its attainment. We are probably correct in assuming that there has been something of this element in all human effort. That is, human beings in every state and condition have striven after some sort of ideal. But the peculiarity of our position arises from the fact that before we are called upon for responsible action our minds are filled with multitudes of unattained ideals. Democracy stands for an unattained ideal. We know that such a government as a true democracy has never existed, yet we hold that there has been progress towards the attainment, which we hope and expect will sometime be reached.

Another unattained ideal is that of religious toleration: there is progress towards its attainment, but it is not yet attained. Up to the time of the Civil War England had not been much affected by the writings of political theorizers.

Mr. Freeman has in mind the difficulty of reading correctly our early history when he says that the ancient Witan was in one sense more democratic than would accord with the dreams of the wildest liberal, while in another sense it was more oligarchic than the extreme conservative would wish. We have seen that the guilds and other societies had in their origin what we would call a democratic form, yet in all cases they tended to lose that form. The ideals that filled the minds of the people of the Middle Ages were such as were in accord with the division of men into various ranks and estates. It was the business of the few to govern; it was the province of the many to be governed. All striving was for the attainment of the special privileges of a class. We ought to be able to see clearly that it is a misuse of terms to apply the word "democracy" with its modern signification to any organization of the Middle Ages. With us the term stands for an ideal, a theory of government. An unconscious democracy is an absurdity inconsistent with our use of the term. Yet all through the Middle Ages various bodies of men were induced to act like democrats; they were induced to join hands and share a common lot; they gained experiences which tended to develop the democratic theory. After the democratic theory had been developed it gained much support from that which had only the appearance of democracy in the earlier society.

A similar course of reasoning applies to religious toleration. When there was but one Church in Western Europe there was much that had the appearance of toleration. There was certainly a wide range of conflicting

doctrines, teachings, and practices. The Pope looked upon Luther's teachings at first as not at all peculiar; the monks were accustomed to use great liberty in debate. In England there was always a good deal of variety in religious teachings and practices. The suppression of Lollardy was for political and social rather than for religious reasons. But all the toleration, all the liberty of thought and discussion, which preceded the Reformation existed without any distinct and well-defined theory on the subject, while to the modern mind, if the theory of toleration is left out, the distinctive meaning of the term is wanting.

Both democracy and religious toleration became for the first time recognized and important factors in English history during the Civil War. They both grew out of a hundred years of Bible reading and attempts to apply Bible teachings to human government. The Presbyterian covenant united the people of Scotland into a formidable nation; and it was the Presbyterians of Scotland who first broke the tyranny of Laud and Charles. The Presbyterians in England were, naturally enough, ready to unite England and Scotland under one faith and one Church government. Hence, when war between the Parliament and the King arose, the Presbyterian party gained control of the former. The covenant was adopted by Parliament, was accepted by the army, and very generally signed by the Puritan party throughout England. But the covenant in England could have no such uniting effect as it had had in Scotland in the previous century. Many English Puritans preferred a reformed Episcopacy to the Presbytery, while the most aggressive of the Puritans favoured neither. Ever since the time of Elizabeth there had been Bible-reading Englishmen who held to the view that each body of believers in the place where they happened to live, by uniting themselves together for reli-

gious purposes, constituted a true Church with full powers of discipline. The Puritans in America had adopted this form of Church government. At the meeting of the Long Parliament many American Puritans returned to England. Their views of Church and government were rapidly increasing in England, and they were the most enthusiastic of the parliamentary party.

Oliver Cromwell, himself an Independent, determined to make use of the enthusiasm of the extreme Puritans to break the force of the Cavaliers. It was among the praying soldiers of Cromwell's army that the ideas of religious toleration, which had before been expressed by a few individuals and held by a few feeble sects, became a permanent and important force. At the hands of the "honest men" in Cromwell's army the English people enjoyed religious toleration for the space of fifteen years. Since that time government has with great difficulty succeeded in enforcing religious opinions or religious observances. Toleration became a religious conviction, and ever after had a marked effect upon science and learning as well as upon politics and religion. At the birth of toleration the Presbyterians were labouring to bring all England and Scotland under one system of faith and Church discipline; but after the army of toleration was disbanded the Presbyterians in England were themselves forced to become a sect and to join the ranks of the tolerationists. Since the long rule of the army of honest men and tender consciences the word "toleration" has had a new meaning. It has become a distinct religious dogma.

The origin of democracy was scarcely less distinctly religious.[1] In Scotland the great body of the people entered into covenant with themselves and with their God that

[1] For an excellent treatment of this subject see Borgeaud, *The Rise of Modern Democracy*, translated by Mrs. Birkbeck Hill.

they would maintain and defend their faith and Church discipline against all powers. Thus united they made themselves invincible. In the beginning there was among them no distinct theory of democracy in government. Yet this constant and effective appeal to the body of the faithful believers to maintain the Church and State tended in itself to develop a theory of government. In the Presbyterian system, however, the centre of interest was not in the congregation of believers, but in the general assembly or the smaller representative bodies. In the absence of an already developed democratic theory the Presbyterian Church tended to an aristocratic form of government. In Scotland, however, it was not left to itself: being constantly threatened, there were frequent appeals to the congregation of believers.

It was, however, among that class of Bible readers who found in each body of believers the divinely ordained Church that the distinctive democratic theory of government was first formed. With these the congregation of adult believers had, by divine appointment, in themselves all ecclesiastical power. These were the Baptists and Independents, who appeared in England during the previous century, but for the most part had been kept out of the country by persecution. They lived, some of them, in Holland; but the largest body were in New England. Some of these drew a sharp line of distinction between the spiritual and the secular government. With these it was in matters spiritual only that all power rested with the congregation of believers. But whatever the scope of this power, the congregation was in its nature a pure democracy — a democracy read directly out of the Bible. It may be that this peculiar reading of the Bible is due in part to ancient habits of local government among the English; or it may be due to the custom prevalent in the Middle Ages of forming societies of

equals for various purposes. The fact that seems well established is that modern democracy as a vital principle came into conscious existence in these sects.

The forty years of debating between the leaders in the House of Commons and the supporters of the Crown had something to do with the preparation of the ground for the democratic seed. The leaders of the Commons manifested no special democratic tendencies, yet the exigencies of debate required frequent appeal to something which they were pleased to call the nation, or the people. These phrases had meant nothing in particular, but in the tug of civil war there were at hand Baptists and Independents who were ready to give them a precise and important meaning. They taught that monarchy was a sin. It was only when Israel had fallen into sin that they asked for a king. These religious enthusiasts, as we have seen, controlled the army. They believed that it was their duty to punish the King for his crimes. It was their intention to abolish forever the monarchy and the House of Lords and establish a republic. In response to this demand the King was executed in an orderly way. While the act was at the time generally disapproved, yet the entire English nation acquiesced.

Charles represented a theory of monarchy which the parliamentary party could not logically answer. The Puritan democrats who had gained control of the army gave a logical and satisfactory answer. It was that if kings violated the laws they were to be punished as other men. Among the last words of Charles was a declaration that he desired the liberties of his people, but that this consisted in having a government. "It is having *share* in government, Sirs; this is nothing pertaining to them. A subject and a sovereign are clean different things." Charles was no doubt honest and sincere in his convictions. The Puritans who controlled the army were

equally sincere in the conviction that the time had come to enforce the lesson that kings as well as people were subject to the laws.

It was the democratic element in the army and in the country which furnished the aggressive force which led to the execution of the King. This force, however, did not grow: there was reaction. Cromwell himself was not a democrat, but he was a sincere and consistent tolerationist. The important thing to be observed is, that after the death of the King there always existed, in the minds of some men, a clearly defined theory of democracy; and whenever one was disposed to revive that theory of monarchy for which Charles died, there ensued a tendency to revive the view of government which led to his death.

CHAPTER XXVI

THE REBELLION AND THE COMMONWEALTH

THE Long Parliament proceeded, according to the time-honoured parliamentary habit, to ask for a redress of grievances before the consideration of supplies. Their grievances were not a few. Laud, and Wentworth (now Earl of Strafford), and other officers of the Crown were accused by vote of the Commons, and thrown into prison. Strafford was attainted of high treason, and the King, notwithstanding he had promised that not a hair of his head should be touched, consented to his execution. He also gave approval to a bill that the Parliament should not be dissolved except by its own consent. He farther gave his consent to acts abolishing the Star Chamber Court and all other arbitrary courts which had been used by Tudor and Stuart kings. He assented also to laws making it illegal for the King to collect any manner of revenue except by consent of Parliament.

It will be observed that these measures went much farther than the Petition of Right. They assailed the King's arbitrary power as entrenched in the courts, and, by controlling supplies, they struck at arbitrary power in all administrative officers. With the condign punishment of their worst enemies, and with the attainment of so large an amount of reformatory legislation, a portion of the parliamentary party began to feel that all had been attained

that should be demanded. A bill known as the "Grand Remonstrance" demanded, among other things, that ecclesiastical policy should be controlled by Parliament. After an earnest debate, the measure was carried by a majority of eleven, but so earnest was the minority that they insisted upon the unheard-of plan of publishing a protest along with the Grand Remonstrance. A portion of those who opposed the remonstrance ever after acted with the King's party. The King, elated at the thought of having so strong a following in the House of Commons, went to such extremes as made it difficult for his followers to remain faithful. The Queen was striving to have an army from the north brought to London to overawe the Parliament. She had also written asking the Pope to come to their help with an army. The King was suspected of preparing an army of invasion in Ireland; and, to crown all, he ordered his attorney general to impeach of high treason the five most conspicuous leaders of the House of Commons, taking, moreover, the foolhardy course of going to the House in person with a company of soldiers to arrest the five members. Such acts diminished the number of the King's followers and greatly inflamed the minds of his enemies.

This attempt to arrest the popular leaders led immediately to civil war. Nearly two hundred years had passed since the Wars of the Roses, and civil war, always an awkward business, is especially so after having been delayed for so long a time through respect for the forms of law. At first the parliamentary party fought daintily. They were not a little perplexed as to what they should do when the fighting was over. The simplest plan seemed to be to push their armed resistance just far enough to induce the King to pursue a tolerable policy and then to end the strife. For a year or two the advantages on the field of battle were on the side of the

King. The moderate fighting of the parliamentary party seemed to be disastrous and to promise defeat and failure.

The leaders in the Commons met the theory of the court with an idealization of all past factional strife in opposition to kings. After the analogy of former times they intended to avail themselves of the physical force of the unrepresented masses to destroy their political enemies. In their bitterest strivings with the King, just before the beginning of this eleven years of arbitrary rule, there were one or two of the leaders who proposed that they should adopt the policy of open championship of the cause of the people in resistance to arbitrary exactions, but the majority chose the narrow policy of making the contest turn on the privileges of members of the House. They expected the masses of the people to fight for them, though to do this was to concede that a member of Parliament had a peculiar right to be shielded from arbitrary taxation. The lack of vigour on the part of Parliament in the war with Charles was due in part to hereditary fear of the unrepresented masses.

Thomas Carlyle has placed us under great obligations for his contributions to the discovery of Oliver Cromwell. For this we can forgive him much of his erroneous and foolish teaching about the part which heroes have played in human history. The beneficent hero is the man who recognizes, expresses, and coöperates with certain favourable tendencies which exist in human society independently of the small self of the hero. Conspicuous ability in a man who fails to do this is a nuisance. Cromwell had wit enough to see, if Carlyle did not, that the determining factor in his career was his "honest men." Without these he was nothing and could do nothing. The honest men were still a dominant power after Cromwell was dead. When they were disbanded and sent

home, they were still conspicuous among their neighbours for sobriety and industry.

For a thousand years or more it had been the habit of Englishmen to destroy the enemies of the leaders who succeeded in pleasing them or in winning their favour. These leaders were usually selfish and factional. From the standpoint of the people the choice of leaders was a choice of evils. In Oliver Cromwell the people found a leader who was in spirit and sympathy one of themselves. In his eyes life was reduced to its simplicities. Royalty and nobility were as trumpery. If a high-born man showed a true nobility of spirit by his willingness to be commanded by the peasant officer who had superior gifts for such service, he was received and honoured. If, however, he showed a meanness of spirit by insisting that the accident of birth should count in his favour, Cromwell would none of him. Oliver's honest men were not simply such as were willing to die for duty; they were willing to do the far more difficult thing of attending to duty in the details of ordinary life.

By means of a few thousand common, religious Englishmen of his time, Cromwell made himself master of the united kingdom of England and Ireland. He executed the refractory King, and for a decade he and his army were practically the rulers of England. For a time this government took the form of a military despotism. Yet at the hands of this government real justice was meted out to all classes more perfectly than Englishmen were wont to experience.

Had England developed any sort of legal, artificial constitution, such as Americans know, those attempts at constitution-making in the time of Cromwell would be of immense interest. But real constitution-making proceeded along other lines after the Commonwealth. It is, however, a great mistake to suppose that Cromwell and

his army did not make real and important contributions to the English Constitution. In the first place, the movement was a sort of re-creation of the ancient fear and respect felt by the ruling classes for the common Englishman. There was but one English king so dull as not to learn this lesson. And he was thrust from the English throne with the disgust of Tories, Whigs, and the nation in general. This respect for the common Englishman is a part of the substance of the modern Constitution.

Then, too, the Cromwellian episode furnished a precedent for the participation of this common Englishman in the high affairs of state. It is true that there was a sharp reaction from this practice; yet, as Englishmen looked back upon it after a lapse of a few generations, or even after only a few years,[1] the government of Oliver seemed quite as healthy, quite as English in its spirit and temper, as the government of any king by the name of James or Charles. It helps us to appreciate the equanimity upon which the present Constitution depends to reflect that Cromwell and his army did not grow selfish and grasping, but that they sought rather to do good unto their fellow-men as they had opportunity. Thirdly, it can now be said that there was a time when England had a government without a king. Englishmen cannot but take pride in the fact that during the Commonwealth the government of England was respected abroad as almost never before. It is reasonable to believe that the equanimity so essential to the present Constitution is a good deal promoted by the consciousness that, in the last resort, England is not shut up to a single sort of government. We may reasonably conclude that this reflection is favourable to the constitutional temper of monarchs as well as subjects.

It would be easy to extend the list of ideas and events

[1] See Pepys' *Diary*, edited by Lord Braybrooke, pp. 415, 420.

of the period of the Civil War and the Commonwealth which have had more or less influence upon the modern Constitution. The unity and the simplicity of government were broken. In 1641 the King's ministers were punished, and many reforms were enacted by a Parliament consisting of King, Lords, and Commons. Strafford was attainted and executed with the approval of the King and the two Houses. In 1644 Laud was attainted and executed by a Parliament consisting of Lords and Commons only, and the judges in the high courts refused to support the Lords in their wish to withhold their approval of the execution. In 1649 the King was executed by order of a special court, created by the act of a Parliament consisting of a House of Commons only. Such events tend, as no amount of political debate could, to force the people to analyze Parliament into its component parts. Such events tended also to promote that indefiniteness in the use of the word "Parliament" which, as we have seen, is so important and convenient a feature of the present Constitution. These events were likewise favourable to the contention that the House of Commons is the one enduring and essential part of Parliament.

The various attempts to form a government without a king are of especial interest to Americans in that they tended to promote the analysis of government into separate legislative and executive departments. This tendency, as we shall see, was arrested in England. But the theory of the division of government into departments, emphasized in the time of the Commonwealth, while exerting a marked influence over the process of developing the modern English Constitution, controlled in a positive and striking way the constitution-making of the Englishmen who colonized America during the Stuart century.

It was during the period of the Civil War and the Commonwealth, that the religious issues arose which domi-

nated English politics for the next forty years. Charles and Laud had convinced the Puritans that they were intending to restore Popery. The Puritans in the Church of England looked to the Scottish Presbyterians for support. In 1643, while the parliamentary army was in danger of being overcome by the King's army, the Parliament, in order to secure the coöperation of the Scottish army, adopted the Covenant, and thus made the State religion in the part of England controlled by Parliament Presbyterian. Episcopalians who would not subscribe to the Covenant were deprived of their livings. The Independents and the Baptists greatly increased in number, while the Quakers and many other sects arose. All of these found their chief support in the towns and cities, while in the country the influential classes held on to the old way and the old religion. The Cavaliers were composed mainly of the nobility, and the clergy of the Episcopal Church, and some of the country gentlemen. The Roundheads, or the Puritan party, had their chief support in the towns.

It should be observed that before the Civil War, the word "Puritan" in England usually meant a member of the Established Episcopal Church who was opposed to the innovations favoured by the King. But after the Commonwealth the word never meant a member of the Established Church. There was henceforth little use for the word except in its historic term. The Puritan party fell with the Commonwealth. After the Restoration those who had been called Puritans were usually called Dissenters. This was a new term applied to all who would not conform to the worship of the restored Church. From this time a large proportion of the English people were Dissenters. There were still a few Romanists, Charles II. himself, perhaps, being secretly one of them, while James II.'s adherence to the ancient faith was undisguised. A large part of the

political contentions for thirty-eight years, until the deposition of James II. in 1688, turned upon the effort of the kings to secure the toleration of Papists, with the ulterior object, as the people believed, of reëstablishing the papal Church.

CHAPTER XXVII

THE MONARCHY OF THE RESTORATION

THE Convention Parliament which restored Charles II. to the throne passed a resolution to the effect that according to the ancient fundamental laws of the land the government consisted and should consist of King, Lords, and Commons. A farther resolution attributed all the recent troubles to an attempt to destroy the ancient Constitution by the separation of the head from the limbs, and declared that this breach should be healed by restoring the King to his people. The restoration of the King was regarded as a resumption of the ancient Constitution at the point of the rupture between King and Parliament in 1641. The great acts of reform passed by the Long Parliament and approved by Charles I. were made a permanent part of the law of the land. Hyde, who was made Earl of Clarendon, and who had deserted the parliamentary party after the acts of reform in 1641, was for seven years the chief adviser of the restored Monarch. If the question had been asked, What shall be done if the King should persist in using his judicial and administrative agencies in violation of the laws of Parliament? no satisfactory answer could have been given. One could not say that a refractory king might be beheaded, because the execution of Charles I. had come to be viewed with horror. The King could not in any legal way be punished, because he was an essential part of the sovereign power.

All that could have been said in answer to such a question was simply that it was expected that the King would be reasonable and law-abiding. If he were not, then the Houses of Parliament must do things which would make life disagreeable to him. The restored government under Charles II. was the same undivided authority of former times. The ancient Constitution was still double. In the minds of some, the King was subject, in the last analysis, to that part of the government known as the two Houses of Parliament. That is, the King was linked to the two Houses in such a way that he could not act without them, and hence he must act in harmony with them. In the minds of others, there was a large field of government in which, in the last analysis, the two Houses were subject to the will of the King. In their view the ancient Constitution secured to the King many high prerogatives. In respect to these, harmony was to be secured by the submission of the two Houses to the will of the King. In any event, harmony of action could be obtained only by assuming a peculiar state of mind on the part of the King and the two Houses. The two Stuarts of the Restoration brought to the business of government a state of mind which tended in its results to clarify the double vision of the ancient Constitution.

Charles II. and James II. had the simple notions of the ancient Constitution which led their father to the block. They would not consent to define a limit to royal prerogative. If there is anything which it would seem that a king ought to have learned, it is that, after the failure of the scheme of arbitrary taxation in the hands of Charles I. and after the abolition of the arbitrary courts which made the working of such a scheme possible, the King must hereafter look to Parliament as the source of his supplies. But it does not appear that either Charles II. or James II. had at any time any notion of depending upon

Parliament for all their supplies. From the beginning of his rule Charles II. was negotiating with Holland and France for money which would enable him to rule without Parliament. This was the constant policy of the two kings of the Restoration. They kept their eyes upon France for both money and troops to enable them to govern England. Charles II. was wise enough or indolent enough to find the line of least resistance in English politics for the promotion of his policy. Had it not been for the question of religion, we may believe that under such a king the Crown would have regained much of its lost power.

The release from the grip of Cromwell's soldiers, and the coming in of the new King were attended with almost universal rejoicing. This was expressed by sending to the new King a Parliament composed almost entirely of Cavaliers. The country gentlemen who had felt the stern hand of upstart military officers who assumed to dictate to them the details of their private lives, experienced a great relief. Now that the Cavaliers were again in power, it is probable that the memory of Cromwell's rule seemed to them worse than did the actual endurance of it. Lord Clarendon probably voiced the common feeling when he said at the opening of the Cavalier Parliament, "That monster, Commonwealth, cost this nation more, in her few years, than the monarchy in six hundred years. The confounding the Commons of England with the common people of England was the first ingredient of that accursed dose which intoxicated the brains of men with the imagination of a Commonwealth." These are ravings which arise from dread of the ghost of Demos which had been raised during the Civil War. In the Tudor period when the people enjoyed the support of kings, the common people of England were the Commons of England. Says a State paper of 1515: "What comyn folke in all this world may

compare with the comyns of England in riches, freedom, liberty, welfare and all prosperitie? What comyn folke is so mighty, so strong infelde as the comyns of England?"[1]

A little while after the above testimony was recorded, in the last decade of the reign of Henry VIII., there was a rising of the commons against the government. During the Tudor century such insurrections were described as risings of the commons against the gentlemen. But after the Puritan Civil War, in which the House of Commons, which had always been an institution of gentlemen, had been roughly handled by some of the common people of England who claimed a share in the government, it seemed natural to the Cavalier mind to draw a sharp distinction between the Commons of England and the common people of England. According to the new definition "the comyns of England" had now come to mean the gentleman class itself having a share in the government, while the common people of England were simply the common herd who were to be governed.

At the time of the invitation for the return of Charles II., the ground was still insecure, and it was thought best to have the Presbyterians unite in the call, and Presbyterians in England were certainly led to believe that they would be tolerated. At first it seemed probable that a scheme for a modified episcopacy, which would make it easy for them to remain in the Established Church, would be adopted; but a suggestion from the King that Papists should also be tolerated caused the scheme to fail in the Convention Parliament. In the Cavalier Parliament the Episcopalians were so strong, the hatred of Puritans so intense, and the memory of the alliance between Presbyterians and Independents so fresh, that the course of legislation was turned against all of every name who

[1] Quoted by Froude, *History of England*, Vol. I., p. 27.

refused to conform to the Episcopal Church. From this date Protestant non-conformists are usually called Dissenters, and this latter term is applied only to those outside the Established Church. In 1661 a Corporation Act was passed making it unlawful for any one to hold office in a municipal corporation who would not renounce the Covenant and take the communion according to the forms of the Church of England. This act had the effect of excluding Dissenters from Parliament, since in many cases the corporations chose the members. By the Act of Uniformity passed in 1662 every clergyman and schoolmaster was required to assent to everything contained in the Book of Common Prayer. This drove out of the Church two thousand clergymen at one time. In the towns, Presbyterians generally went with the Dissenters; in the country, they went with the Episcopalians. Thus the towns became full of dissent, while the country was Episcopalian.

The King proposed to relieve Dissenters from the penalties of the Act of Uniformity by the exercise of his royal prerogative. His chief motive was believed to be sympathy with Papists. The Parliament, though intensely loyal, would not brook the idea of tolerating either Papists or Dissenters. The Conventicle Act of 1664 forbade, under heavy penalties, any meeting for worship other than according to the practice of the Church of England; and the following year witnessed the passing of the Five Mile Act, forbidding a Dissenting minister to come within five miles of a town, or borough, or any place where he had officiated as a pastor.

During the early years of the Cavalier Parliament various declarations were made to the effect that it was a great crime to take up arms against the King. One act directed against Dissenters required them to take an oath of non-resistance, and another that they would never

endeavour to alter the government of Church or State. It is interesting to notice that the House of Commons in this Cavalier Parliament had become the English Pope. It exercised the power which in the former reign was in the hands of the King, and Laud, and the High Commission Court. Charles II. desired to be indulgent towards Dissenters, and especially towards Roman Catholics, but that was the one thing which the Cavaliers in the House of Commons would not permit. They were quite willing to pass laws requiring other people to obey the King, but in the matter of religion the King must submit to the House of Commons.

With the disappearance of the old arbitrary courts, which had been the chief weapons in the hands of kings, since the coming in of the Tudors, greater prominence was given to the King's ministers. The rule of Charles II. furnished a sort of prophecy of this great and unique feature of the modern Constitution. He had something a little like a Cabinet, with a statesman at its head who suggests the Prime Minister. The changing of these ministers also corresponded with important acts in Parliament. For seven years, until 1667, Lord Clarendon was at the head of the Ministry. Clarendon was driven from office by a demand of the House of Commons for an investigation as to the way in which money, voted for the war with Holland, had been spent. The Commons suspected that it had been squandered on the King's mistress, a suspicion which was well founded. The minister resigned, was impeached by the House, and, at the suggestion of Charles, fled the country. After Clarendon, the King relied for advice upon a group of men whose initial letters chanced to spell the word "Cabal." It has been falsely assumed that these men acted together after the manner of a Cabinet. The fact is that they were jealous of each other, and were not consulted by the King

in a body. One was a staunch Romanist, others were Protestants, still others were indifferent as to religion. In 1673 Arlington, an unscrupulous man, wishing to supplant Clifford, a staunch Romanist, in the office of the Treasury, secured the passage of a Test Act which required all office-holders in the government to take an oath declaring a disbelief in the doctrine of transubstantiation, and to take the communion according to the forms of the Church of England. By this act not only was Clifford driven from office, but the Duke of York, afterwards James II., was forced to resign his office in the Admiralty, and all consistent Papists were deprived of office.

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CHAPTER XXVIII

THE BEGINNINGS OF POLITICAL PARTIES

FROM 1667 to 1675, during the so-called Cabal Ministry, the King was really his own minister, consulting one or other of his advisers as occasion served. In 1675 Charles found in the Earl of Danby a minister able to relieve him of some of the burdens of political leadership. All the ministers of the Cabal group were discarded. Among these was Ashley Cooper, commonly known as the Earl of Shaftesbury. Shaftesbury now became the recognized leader of the opposition to the King's policy. These events are of the utmost importance in their relation to the modern Constitution, because under the leadership of Danby and Shaftesbury were developed permanent political parties and party names which have continued to the present day.

More than a hundred years earlier, England was divided into papal and Protestant parties of almost equal strength, and Elizabeth ruled by a personation of party politics, holding an even balance and following the dominant tendency in the State. The contest under the first Stuarts followed, in the main, the analogy of the old factions, rather than that of the modern party. It was a contest chiefly for privileges. Yet this contest had in it resemblances to modern political strife, in that there was a constant appeal to the people on matters of opinion as touching both the nature

of the government and the question of religion. In the time of the Civil War, the two sections were known as Cavaliers and Roundheads, but there was little more resemblance to the modern political party than was suggested by the Red Rose and the White Rose two hundred years earlier. In 1629, when Pym and a few other leaders proposed to make common cause with all tax-payers in the contest over the Petition of Right rather than contend for the peculiar exemption of members of the House, there was an issue raised between two divisions of the parliamentary party which is quite suggestive of the methods of modern parties.

The modern party assumes to represent the true interests of the entire people. It accepts the essential features of existing institutions, and proposes to adopt such a policy as will be for the public good. The life of the party of the present day is dependent upon the existence of conflicting opinions about definite policies. The historical continuity of the two modern parties has been dependent largely upon two views of English history. One party emphasizes the blessings which have come to England through the authority of the Church and through orderly government. The other party lays greater stress upon the blessings which have come to Englishmen through contests for liberty. In its origin one of the parties took the Stuart view of the ancient Constitution, while the other was more inclined to the parliamentary view of the Constitution. As history recedes, there is a tendency in each party to take an identical view of the remote past. Yet in the one there is a superior fondness for the ancient institutions, such as the monarchy, the House of Lords, and the Episcopacy; while in the other party there is a special fondness for reforms and for the House of Commons as the chief agency of reform.

When Shaftesbury was dismissed from office, in 1675,

the sentiment in favour of toleration for Dissenters had become strong. Danby headed the party opposed to all toleration either of Romanists or Dissenters. Both parties opposed the toleration of Romanists. Danby brought in a bill forbidding any one to hold office or sit in Parliament who would not take an oath declaring that he believed resistance to the King to be in all cases illegal, and that he would never endeavour to alter the government of Church or State. Such a law would have excluded Shaftesbury's party from Parliament, and he succeeded in preventing its passage. It was during the Danby Ministry that some of the most disgraceful intrigues of Charles II. with the King of France occurred. The long-continued policy of the King to secure the introduction of Romanism through aid from France was having the effect of turning public sentiment in favour of non-papal Dissenters, who on all occasions manifested a disposition to suffer persecution at the hands of Parliament rather than accept, at the hands of the King, a toleration which included Papists. Shaftesbury believed that if a new Parliament could be assembled, his friends would be in the majority. The King and Danby held to the Cavalier Parliament elected in 1661, fearing that a new election would return a House less favourable. There were fears of French invasions and popish plots, and Shaftesbury's methods of agitation tended to make the most of these fears.

In 1678 Titus Oates began that remarkable series of fabrications which for several years profoundly effected the public mind, and resulted in the judicial murder of many innocent Catholics. About the same time Shaftesbury came into possession of evidence which would convict Danby and the King of intrigues with the King of France, and Danby was impeached and driven from office. The King, in order to put an end to the trial of Danby,

consented to dissolve Parliament. In the new House of Commons the party of Shaftesbury had a large majority, and he was now made the chief minister. The new Parliament passed the Habeas Corpus Act, and was proceeding to enact a law which would exclude the Roman Catholic James from the throne. To prevent the passage of this bill, Charles dissolved Parliament. Oates and other liars were still supplying the courts and juries with Papist victims, and the new Parliament was still more favourable to the party of Shaftesbury.

The King now took personal charge of the opposition to the Shaftesbury party. He gave less attention to intrigue with Louis, King of France, and addressed himself to the task of winning the favour of the English voters. Shaftesbury let it be known that in case James was excluded from the succession it was the intention of his party to enthrone the Duke of Monmouth, an illegitimate son of Charles II. James had two daughters who were Protestants, the eldest being the wife of William of Orange. To pass over the claims of these was not according to the views of the better class in Shaftesbury's party. Charles refused to assemble the new Parliament, which he knew to be against him. Shaftesbury and his friends sent up petitions for the assembling of Parliament. The friends of the King sent up petitions expressing abhorrence at the attempt to force the hand of the King. It was at this time, in 1680, in the midst of this "petitioning" and "abhorring," that the two parties received definite "party names." The names first employed were "Petitioners," for the party of Shaftesbury, and "Abhorrers," for the party of the King. After a time the Petitioners were called by their enemies *Whigs*, a term which was intended to suggest a Covenanting rebel of Scotland, from Whigamore, a name applied to the peasants in the west of Scotland. The Petitioners retorted with

the term *Tory*, a word suggesting a popish thief in Ireland.

The reaction due to the gradual discovery that the popish plots were manufactured, and that many Catholics had been judicially murdered, was causing public opinion to turn in the King's favour. Tories were gradually being reconciled to the succession of James. The troubles of the time suggested the return of the horrors of civil war. A rigid theory of divine right was put forward. The Tories now taught that it not only was a sin to resist the King, but also that the hereditary right was of divine origin and was indefeasible. The King carefully watched the course of public opinion. He assembled Parliament late in 1680, and when it proceeded to pass the Exclusion Bill, it was dissolved. Another Parliament was called the next year, which was also Whig, and the King, fearing, or pretending to fear, violence in London, summoned it to Oxford. The Whig members, also fearing violence, went armed to Oxford. These reminders of the beginning of the Civil War had a powerful effect upon the public mind. Charles now became sure that the people were with him, and he dismissed the third Whig Parliament, and ruled for the remaining three years of his life without a Parliament.

During these three years of personal rule, Charles found the judges in the high courts as accommodating as they had been in the palmy days of the Tudors and early Stuarts. London had been a stronghold of Whigs. By a writ of *Quo Warranto* Charles called upon the city to show cause why the ancient charter should not be forfeited. The judges of the King's Bench decided in the King's favour. Charles then tried to compromise with the city and arranged a new charter which would give the King a controlling hand in the government. Failing in this, he took the government of London into his own

hands and appointed the mayor and other officers. Encouraged by this success, he proceeded to remodel all the municipal corporations and transfer their governments from the hands of Whigs into those of Tories. When the next parliamentary election occurred in the first year of James II., the members from towns were chiefly Tories, having been chosen by the new corporations created by royal prerogative. Having secured control of the government of London, Charles was intending to proceed with the punishment of Shaftesbury by means of a Tory jury. Fearing this, the Earl fled to the Continent, where he soon died.

In 1683 a conspiracy, known as the Rye House Plot, was formed among the more violent of the Whigs to seize or to murder the King and his brother. The discovery of this plot led to the revelation of a plan on the part of the leading Whigs to force the King to call a Parliament. This was interpreted as a treasonable act. The Earl of Essex, one of the accused, committed suicide, and Lord Russell, a fellow-conspirator, was brought to the scaffold. Charles was thus triumphant over all his enemies and had the sympathy of the great body of the nation. He had appealed to the English people in favour of the claims of his brother James and had succeeded in crushing out all opposition. When the King died in 1685, James was immediately accepted as his successor. In Scotland, indeed, an insignificant rebellion occurred, and the Earl of Monmouth led a rising in the west of England; but these movements were in themselves of trifling consequence and were easily suppressed.

CHAPTER XXIX

THE TYRANNY OF JAMES II.

JAMES was disposed to accept literally the high Tory doctrines of his day, and to draw from them destructive conclusions. For a whole generation the party which had now come to be called the Tory party had been compelling their political enemies to swear that it was a sin to resist the government of a king. For a few years the doctrine had been strenuously taught that it was likewise a sin to desire to have the kingly office filled by other than the person providentially born in the direct line of succession. There was not only the divine right to be obeyed; there was also the divine right of the heir to be crowned. Coincident with the teaching of these extreme views Charles II. and his brother James had grown immensely popular. There was a universal dread of civil war. Charles probably had wisdom enough to distinguish between the dread of civil war and a belief in the foolish doctrine of divine right. He had learned from experience that the stiff Tories of his day never intended to apply their doctrines to any but their political enemies. Whatever may be said of other Stuarts, it would seem that all must agree that James II., on all matters touching his religion and his duties as king, was wholly lacking in common sense. He found England loyal to the core and united in the support of his claim to the throne. In three short years he became a fugitive from throne and

country, leaving England united in the purpose to permit neither James nor the son of James to ever occupy the English throne.

Had James been capable of learning from experience or from observation, he would have known that it was useless to attempt to force the Roman Catholic religion upon the English Tories. Even in their acceptance of the extreme doctrine of divine right they had recognized the fact that a king might order an act contrary to the divine law. In that case they taught that it was the duty of the subject to suffer the penalties of the King's government rather than disobey God. James called a Parliament which was largely Tory, partly because of his own popularity, and partly because, three years before, Charles had placed the municipal corporations in the hands of Tories. Yet this Tory Parliament soon found itself in opposition to the King's policy.

The King asked for the repeal of the Test Act, and Parliament refused. The King had already adopted the policy of appointing Roman Catholics to office in violation of the Act. Parliament began to prepare a formal remonstrance, and the King prorogued the two Houses. Failing to get his acts legalized in one way, he tried another. He asked the judges if it would be legal for him by the exercise of royal prerogative to dispense with the operation of the Test Act. Four of the judges decided contrary to his wishes, whereupon he immediately dismissed them and filled their places with four others who held his view. He then secured a unanimous decision by the court that the King had power to dispense with the operation of a law.

Having now an obedient and efficient judiciary, the King's policy rapidly developed. Clergymen who had openly espoused the Roman Catholic religion were kept in office. Papists were appointed to vacant benefices.

To assist in reforming the Church he established by royal order an Ecclesiastical Commission Court, and issued a declaration suspending the operation of all laws against Dissenters and Papists. In the teeth of the fiercest opposition he forced a Catholic president upon Magdalen College, Oxford. James had succeeded so thoroughly in the packing of courts and juries that at the end of two years he determined to pack a Parliament. As Charles in 1682 had changed the voting constituency in municipal corporations from Whigs to Tories, so James, in 1687, reorganized the corporations and changed the voting constituency from Protestant to Roman Catholic. Yet even in these changed municipalities, with the notorious Jeffreys at the head of the Commission of Elections, it was found to be impossible to get a Parliament which would ratify the King's policy.

Failing in his efforts to pack a Parliament, James then fell back upon his packed courts and the royal prerogative. He issued a second Declaration of Indulgence, which he ordered clergymen to read in all places of worship. By a sort of poetic justice, the brunt of the opposition to the detested policy of James fell upon those very clergymen who, by their narrow partisan policy, had driven from their ranks the Presbyterians, had pursued a cruel and vindictive course towards all Dissenters, and had for a quarter of a century most assiduously preached the doctrine that it was a sin to resist a king. When six bishops came into the presence of the King with a petition requesting that the clergymen be excused from obeying the King's order, James saw in the act the raising of the standard of rebellion, and expressed surprise that these men, above all others, should be the first to rebel against his authority. He did not understand that in political matters it makes a very great difference who owns the ox that is gored. Whatever may be said of the

clergymen of the Restoration, they were Protestant in their convictions and would sacrifice their lives rather than see the Roman Catholic religion restored. Encouraged by the example of the bishops, the Protestant clergy, generally, refused to obey the King's order. Instead of reading the Declaration of Indulgence according to the order, the father of John Wesley preached from the text, "Be it known unto thee, O king, we will not serve thy gods, nor worship the golden image which thou hast set up."

James seemed not in the least daunted at this demonstration, which would have convinced a wiser ruler that his position was untenable. What could a king do in such a country, where even Jeffreys, with almost unlimited power of choice, could not find in the towns and cities of England men who would sustain the King's policy, and where even the Tory Church was almost a unit in the determination to disobey the Sovereign's express command? The King, however, had still one agency which had thus far proved faithful. At the time of the Monmouth rebellion, there seemed to be no limit to the cruelty which could be wreaked upon the sympathizers with the Monmouth faction. Even the Bloody Assize of Jeffreys seemed at the time to be not out of harmony with the temper of the public. In the use of his judicial and administrative agents, the King had not been seriously resisted. Sheriffs, constables, juries, and judges had been found who would do what they were told to do by the King and his friends. James relied upon these agencies to effect the summary punishment of the seven bishops who had signed the petition. They were tried upon the charge of seditious libel; but such had come now to be the feeling of opposition to the King, that even the packed jury united in a verdict of not guilty. Under the very eye of James, the soldiers whom he was reviewing,

and upon whom he was confidently relying to crush out rebellion, joined in the popular clamour when the news was received that the bishops had been acquitted.

In the midst of the contest between king and bishops, a son was born to James and his Roman Catholic wife. So long as the direct heirs to the throne were the Protestant daughters of James, the English Tories could hold the theory of the divine right of inheritance. They could submit to much worrying at the hands of the King, with the prospect of relief as soon as he should die. But to contemplate the succession of a Papist son was more than they could endure. A partisan interest was felt by the Tories in James's oldest daughter Mary, who was the wife of William of Orange, because when Shaftesbury and the Whigs put forward the candidacy of Monmouth, the Tories broke the force of the movement by urging the claims of Mary. When Monmouth was out of the way, William and Mary became the candidates of the Whigs also. The birth of a son to the King coincided with the height of national indignation at the royal policy. The bishops were under arrest; the exigencies of the condition of William of Orange in his efforts to save his country from the grasp of Louis XIV. made it seem absolutely necessary that he should have the coöperation of England. So, upon the topmost wave of the national rejoicing at the acquittal of the bishops, leading Tories and Whigs united in an invitation to William to come over and deliver them from their king. William promptly began to prepare an army of invasion. When he landed he was received as a deliverer. A large part of James's army deserted him and joined that of William. The King remembered the fate of his father, and took refuge with his friend, the enemy of England, Louis XIV. of France.

CHAPTER XXX

THE GREAT REVOLUTION

WITH the departure of James, England was without a legal, orderly government. William consulted with the House of Lords and such members of the various Parliaments of Charles II. as could be assembled. The members of the one Parliament of James II. were not called, because they had been chosen by the remodelled corporations, and it was assumed that such a choice was invalid. The Lords and the Assembly advised the calling of a Parliament. The Parliament thus called was regular and legal, except that there was no king to summon it. This Parliament declared that "King James II., 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 the kingdom, had abdicated the government, and the throne had thereby become vacant." Parliament having thus satisfied its members that the throne was vacant, proceeded to fill the throne by crowning William and Mary as jointly King and Queen of England, with the proviso that the administration should rest wholly with William. The crowning of the new Monarchs was conditioned upon the acceptance of an elaborate statute then known as the Petition of Right,

but afterwards called the Bill of Rights, in which all recent abuses of royal prerogative were made illegal.

This is what historians call the Great Revolution. It was a bloodless revolution. There was apparently just as slight a change in the government as was consistent with the getting rid of James. The Tory Lords would have preferred to make William Regent, and Mary Queen, but William gave them to understand that if he was not made King for life, he would return with his army to Holland. The English feared that such an act would leave them to the tender mercies of the army of Louis and James. The crowning of William was as severe a shock to the theory of divine hereditary right as the joining of William's army had been fatal to the doctrine of non-resistance.

This revolution was great because of the theories which came to be permanently associated with it. It suddenly put an end to a constitutional contention of a hundred years. William was many times dissatisfied on account of his treatment at the hands of Parliament, but he at no time asserted a divine right to rule in defiance of Parliament. No one could say that he had any title to the throne other than that conferred on him by an act of Parliament. All through the reign of Anne, the rightful heir, according to hereditary right, was on the Continent, backed by the King of France, who was ready at any time to force the English people to recognize the claim of the son of James. So long as Louis lived and fought there was no time for Englishmen to divide over nice theories about their Constitution. William ruled by the favour of Parliament; Anne ruled likewise by the grace of Parliament. Then upon the death of Anne, with the direct heir to the throne still living and contending for his rights, an entirely new family of rulers was imported from the Continent and installed in possession of the Eng-

lish Crown. For more than two generations the existence of the pretenders to the throne caused the English nation to keep alive the contention that the throne should be filled, not by hereditary right, but according to the parliamentary title. Thus, in order to recognize the Revolution as really great, it must be viewed in its relations to what went before and with what followed. The theory of unbroken development as applied to the English Constitution is doubtless true enough, but there is a serious psychological objection to it. It is tiresome. It is a great relief to the mind to have somewhere a resting-place. It is fortunate that the events which cluster around the discarding of one family of English monarchs, and the providing by statutes for three distinct families, each under certain specified and diverse contingencies, to take its place, furnish such a resting-place in the study of the English Constitution.

It is, however, a great mistake to suppose that the modern Constitution, as we know it, can be derived from the Great Revolution. If the Great Revolution had been permitted to give the final stamp to the Constitution, it would inevitably have advanced the legislative or the constructive functions of the two Houses to the leading place in the government. This would have resulted in some sort of legal, formal constitution. But we have seen that the unique feature of the modern Constitution is found in the fact that the two Houses act, in a sense, in subordination to the officers of the Crown. The two Houses to-day are imbecile until they can find a Cabinet to direct and control their action.

We can never understand the modern Constitution if we assume that the peculiar view of the Constitution held by the Tudors and the Stuarts wholly disappeared at the Great Revolution. The special, distinctive notions of "divine right" which led to the elaboration of that

theory were indeed then abandoned. But, viewed from the practical side, the sort of government at which Tudors and Stuarts aimed is exactly the thing that survived the Revolution. According to that view, government is a unit; legislation is an incident to government; harmony of action is secured by committing the legislative business to the leadership of the administrative officers. It is the enigma of the modern Constitution that this Stuart view of government has actually been made to harmonize with the practical sovereignty of the nation as represented in the House of Commons. The Executive, while continuing to administer the government, using the two Houses as mere agencies of government, has at the same time become practically subject to the Lower House and to the voting constituency of the nation. James I. could not understand how a Presbyterian, republican Assembly could be reconciled with monarchy. The modern statesman and philosopher are as completely in the dark on that point as was the sage Scottish King. But if the Presbyterian Assembly would consent to divide itself into permanent parties, acting as organs of public opinion, and if it would consent to the constant dictation of party leaders, and if, at the same time, a succession of monarchs could be found who would consent to accept as their sole advisers and ministers these same party leaders, then a means of reconciliation might be seen.

The Great Revolution did not give to England the Cabinet system of government. That has been a plant of slow growth, depending upon a series of fortunate circumstances. It was favourable to its development that the peculiar situation of William III. tended to force an analysis of government into executive and legislative departments. Some foreshadowing of this we have seen in the attempts made under the Commonwealth to form a legal system. The reaction which followed the Common-

wealth caused efforts of that sort to be viewed as republican innovations, and when the King was restored, there was put forth the old idea that government by right and by fact should consist of King, Lords, and Commons. But the Parliament which declared the throne vacant and crowned William and Mary was composed of Lords and Commons alone; and, owing to peculiar difficulties attending a dual monarchy, it was enacted that the administration should rest with William alone.

Bishop Burnet mentions a peculiar case of the analysis of government which occurred in 1701. It was at a time when, after the death of James II., Louis XIV. had acknowledged his son as James III., King of England. An act was introduced into Parliament providing that an oath should be taken abjuring the pretensions of the new King. Various extraneous matters were included in this act. Among others was a clause declaring that the government in King, Lords, and Commons should be maintained. This clause, we are told, was rejected with indignation in the House of Commons; "since the *government* was only in the King; the Lords and Commons being indeed a part of the Constitution and of the legislative body, but not of the government." Burnet calls this "a barefaced republican notion which was wont to be condemned as such, by the same persons who now pressed it."[1] The allusion here is undoubtedly to the republican writers of the Commonwealth, notably Harrington, who did put forward a scheme of government embodying what we now know as the American plan of balancing one department against another. It seems likely that when the Parliament which recalled Charles II. affirmed that government of right consisted in King, Lords, and Commons, the intention was not only to restore the ancient form of government, but at the same time to deny the republican

[1] Burnet's *History of His Own Times*, Vol. IV., p. 552.

doctrine of the division of government into departments. But now it seemed that the Tories and high prerogative Whigs rejected with indignation a clause affirming that the government should be thus maintained. That is, they analyzed it into two parts only; viz. the Executive, which was *the government*, and the Legislature, which was a coördinate part of the Constitution.

There were peculiar experiences for the Tories in 1701. The government of William III. had not been acceptable to them. During the greater part of the time the Whigs had held the chief offices. The appointing of so many foreigners to office was offensive. The Tories expected better treatment under the rule of Anne. So long as Anne had a son with a Tory education to succeed her, their case was hopeful. But when her last son had died and the Tories were forced to contemplate the probability of the early introduction of another family of foreign rulers, they were naturally inclined to revise their notions of the high prerogatives of the Crown. Thus it came about that Tories were also prepared to look with favour upon the two Houses as a means of checking the Executive.

CHAPTER XXXI

THE ACT OF SETTLEMENT

THE Act of Settlement was passed at the time when the Tories had a majority in the House of Commons. Various provisions of this act indicated a disposition to place increased restrictions upon the Monarch. For example, the Hanoverian sovereigns were required to be in communion with the Church of England. They were not to engage in a war on account of their foreign possessions without the consent of Parliament. They were not to leave the kingdom without the consent of Parliament. The pardon of the Monarch was not to be allowed to interfere with the impeachment of ministers. There was also a provision that after the death of Anne no foreigner should sit in Parliament, or be a member of the Privy Council, or hold lands granted to him by the Crown. These various provisions of the Act of Settlement have their chief interest in the fact that they manifested a disposition on the part of the Tories who supported them to join with the Whigs in the policy of placing restrictions upon the Crown. This changed attitude of the Tories is largely due to the actual experience with William as an alien king, and to the prospect of a succession of alien rulers after the death of Anne. None of these provisions were effective in permanently limiting the Crown. Some of them were repealed when the

Hanoverians were crowned, while a change of circumstances rendered others of no effect.

Another provision of the Act of Settlement marks an important change in the government which did greatly affect the power of the Crown. It is a provision making the tenure of office on the part of the judges permanent, or during good behaviour, and making them removable upon an address to the Crown passed by both Houses of Parliament. With the judges removable by the King, the courts had been the chief agencies of arbitrary government. The courts were still faithful and compliant to James II. when he was driven from England. If such conduct on the part of king and courts could have continued after 1688, the Revolution could not have been in any sense great. This provision in the Act of Settlement marks a change which the conduct of James and Jeffreys had made inevitable. It is fortunate for the orderly development of the modern Constitution that the change took the form of an independence of the Judiciary.

There were still other provisions in the Act of Settlement which are of much interest to one who would understand that development. One of these required that matters of State should be discussed in the Privy Council, and that the ministers who approved the policy should sign their names to the resolutions adopted. This was a blow at the custom which had grown up in the time of Charles II., and had been continued under William III., of consulting only a few of the ministers in secret meeting. The public was not informed what advice was given in these secret meetings, or who was responsible for that advice. The new law was intended to remove this apparent defect. It will be seen that if the new law had taken root and had controlled the action of the government, the Cabinet system of government would never have been developed. The law made those acts which finally resulted in the es-

tablishment of the Cabinet system illegal. It was found upon trial that the ministers would not give advice freely if they were to be held personally responsible for it. Early in Anne's reign the law was repealed and the secret meetings of the Queen and a few chosen ministers continued.

Still another provision in the Act of Settlement permanently affecting the conduct of public business pertains to the exclusion of officers from Parliament. When a minister of high rank now accepts office, he resigns his seat in Parliament and appeals to his constituents for reëlection. This custom arose out of a clause in the Act of Settlement which originally forbade all pensioners and holders of places at the hands of the Crown to hold seats in the House of Commons. The object of the law was to prevent the King and leading ministers of the day from controlling the action of the House of Commons through the bribery of office. Early in the reign of Anne, the law was modified and given its present form. The holders of certain lower offices were still forbidden to sit as members of Parliament, while the acceptance of one of the high offices vacated the seat in Parliament and necessitated a new election. The result is that the holders of about sixty of the highest offices must, according to modern understandings and modern law, be members of Parliament, while the holders of all the other offices may not be members of Parliament.

It should be observed that at the time of the passage of the Act of Settlement the Cabinet system had not become established. There were, however, certain customs which contributed to the development of that system. The act forbidding office-holders from having a seat in Parliament, like the act requiring ministers to give open advice in Privy Council, was intended to alter those customs. If these laws had been retained and enforced, the Cabinet system could not have been developed.

The Act of Settlement may be regarded as the parting of the ways between two distinct types of free government. The spirit of the act was clearly against the Cabinet system. It was decidedly in the direction of subordinating the administrative agencies to the will of the Parliament. Had this latter tendency continued and become permanent, there might still have grown up a free Constitution, but there would have been a separation of legislative and administrative functions. And if the growth of freedom had coincided with the continuance of monarchy, the administrative officers would have been, more and more, placed under legislative restraints. In that case there would have been no necessity for a system of contradictions between the Constitution and the laws. It was because these attempts at legislative restrictions upon the monarch and the ministers proved feeble and ineffective that the wholly new and unheard-of way of securing ministerial responsibility was found in the modern Cabinet, chosen and removed by the will of the nation expressed at a general election. At this parting of the ways, the legislature, notwithstanding the parliamentary triumph in the Great Revolution, succumbed to the administrative agencies created by Plantagenets and Tudors, and preserved by Stuarts. Failing to secure liberty at the hands of the legislature, the nation, by a slow process of establishing precedents and arriving at understandings, either without law or contrary to law, has created out of the King's ministers its most effective agency of free government. The nation now practically chooses the Prime Minister and the Cabinet, and these exercise in the name of the nation full executive and legislative powers. By refusing or failing to act when the time served, the Parliament as a legislative body was doomed to act in subordination to the Cabinet.

CHAPTER XXXII

THE COMPOSITION OF POLITICAL PARTIES

THE fact that both Whigs and Tories united in the Act of Settlement passed the year before the death of William III. may fairly raise the question why the ruling classes should continue to divide themselves into two political parties. Certainly the old issue about the high prerogatives of the Crown no longer existed, or, at least, was in abeyance at the time. The Whig policy of toleration for Protestant Dissenters had been in part adopted early in the reign of William, and was no longer an issue. Both Whigs and Tories were always Protestant. They were equally at enmity with the policy of the King of France. If we are compelled to justify the continued existence of political parties solely on the ground of actual political issues, we are obliged many times to confess that the parties ought not to exist. At the close of William's reign there were no important issues between the parties, but their leaders felt that their own personal and political interests were at variance. They were in the habit of working against each other in politics. The "spoils of office" had a tendency to keep up the division into parties irrespective of any differences in political policy. During the first part of William's reign he gave offices to members of both parties, but later he found it more convenient to give the offices to Whigs, and votes in the House of Commons were secured by means of offices

and pensions. Only those received favours who would consent to act with the Whig party. This fact alone tended to unite all opposition to the policy of the government under the leadership of the Tory statesmen. The disfavour with which William's government was regarded, notwithstanding the liberal use of patronage, caused the House of Commons to pass into the hands of the Tories during the last four years of his reign.

The modern Cabinet system could never have come into existence if permanent political parties had not preceded its development. It will help us to understand how the parties became permanent if we notice the classes found in each of the two parties at the death of William, and compare them with the ancient classes and factions.

The leaders of the Whig party were chiefly from among the great land-holders of England. These became known as the great Whig families. Generations of men were born Whigs. Their estates were Whig possessions and descended to Whigs. It is necessary to go back a long way in English history to find a time when the few great land-holders held so prominent a place in politics as did the Whig proprietors of the time of the last of the Stuarts. Such times there were before the Wars of the Roses, and during that struggle the landed proprietors fought and destroyed each other. The early Tudors carried forward the work of humiliating and effectively destroying the political leadership of the great landed proprietors. In the time of Elizabeth and the early Stuarts the great proprietors stood with Crown and bishops against the claims of the lawyers, the country gentlemen, and the middle-class folk as represented in the House of Commons. In the time of the Civil War a large proportion of the middle classes who had given support to the parliamentary contention leading up to the War, united their forces with the Cavaliers. Especially

is this true of the country gentlemen and the clergy of the Established Church.

Upon the restoration of Charles II. the political aspirations of the towns and cities were, for the time, crushed. Charles II. and James II. could destroy the ancient charters of towns and cities, beginning with that of London, and could change their voting constituencies from Whigs to Tories and from Protestant Tories to Catholic. But these same kings could not protect the Dissenters, who made up a large part of the population of towns and cities, from the cruel persecutions of a House of Commons composed of country gentlemen, representing in its policy towards Dissenters a narrow and bigoted Church. The commercial classes in towns and cities were in need of powerful friends to protect their commercial interests against the arbitrary interference of tyrannical kings; and the Dissenters in the towns were equally in need of friends to protect them against the lawful oppressions of a bigoted Parliament. Both found their friends in a few great land-holders led by the Earl of Shaftesbury.

The formation of the Whig party may be viewed as a sort of restoration to the great landed proprietors of the independent political leadership which they had lost in the Wars of the Roses. These lords became the leaders of those in the nation who felt themselves most aggrieved; that is, the Dissenters and the wealthier classes in towns and cities. The Whig party thus became the means of uniting in a common political organization classes which had in former times been farthest apart. The great lord became the patron and leader of the radical in politics. The rank and file of the party were traders and townsfolk. Only that part of the rural population was Whig which was under the immediate control of the Whig landlords.

The Tory party was composed of elements much more

homogeneous. It should not be understood that none of the great landed proprietors were members of the Tory party. During the reign of William III. a majority of the members of the House of Lords were Whigs, but a goodly number were Tories, and they were naturally the leaders of their party. But the great body of the party was made up of the smaller landed proprietors and the clergy of the Established Church. The upheaval of the more popular element of the nation under the leadership of Oliver Cromwell had resulted in a division of the middle classes who had before the Civil War borne the brunt of resistance to royal encroachments. One half of this middle-class element found itself after the Restoration in the Whig party under the leadership of certain great lords; while the other half was in the Tory party under the leadership of other great lords.

It will be seen that the rank and file of both of the political parties were composed of the middle-class folk which gained political coherency during the time of the Tudor monarchy. This middle class may be described in two divisions. There were, first, the country gentlemen, or squirarchy, and they nearly always had the hearty coöperation of the country parsons. In the second part were the townspeople, — merchants, manufacturers, and those learned in the law. The various elements of the middle class both in town and country were represented in the House of Commons, and made up the party of resistance to the first Stuart monarchs.

Let it be remembered that there was in the parliamentary party before the Civil War no element which could in any proper sense be called popular. Viewed with the modern democratic perspective, each part was narrow and privileged. The battles waged by the House of Commons against the claims of James I. and Charles I. were contests for the maintenance of privileges; they

were not contests for liberty in the modern sense. When, in the heat of the conflict with Charles I. just before the beginning of the eleven years of tyranny, one of the leaders proposed that they should champion the cause of the ordinary tax-payer against the King's arbitrary exactions, the proposition was rejected.[1] The party preferred to follow the beaten track and to put forward the claim for privileged exemptions as members of Parliament.

At the meeting of Parliament in 1640 the parliamentary party was still distinctly a party of privilege. The most easily observed division in this old parliamentary party which admits of definite date is that which occurred on the eve of the Civil War in 1641. At that time the more conservative element in the party went with the King, and it may be said, without any straining of language, that ever since that date there has existed a distinctively conservative party devoted to the maintenance of the Crown, the Church, and all the ancient stable institutions. The Civil War and the Commonwealth did not result in the creation of a corresponding radical party, but the ideas and doctrines which have since given rise to a radical party did find expression during that period in such form as to affect profoundly the mind of the nation. There arose powerful sects which, if they could have had their way, would have destroyed all ancient ecclesiastical institutions. Democrats arose who would have brought to naught venerable political institutions; and books were written boldly advocating the republican form of government.

With the restoration of the monarchy, men of radical opinions were left wholly powerless in the hands of a hostile Parliament. There was no radical party, and no effective organ of expression. The poor Dissenters

[1] Gardiner, *The Personal Government of Charles I.*, Vol. I., p. 83.

were so horrified at the thought of being patronized by a popish king that they preferred the lawful persecution of Parliament rather than the acceptance of such royal favours. The radicals could, however, accept the patronage of the great Whig leaders. But the Whig leaders were not themselves radicals; they had no radical tendencies, nor were their views and tendencies one whit more democratic than were those of the Tories. If they gained greater moral support from men of advanced opinions than did the Tories, this arose from the mere accident of the division of political interests among the ruling classes. Though the rigorous execution of the persecuting statutes against Dissenters and Catholics ceased when the Whigs got control of the government, yet those laws were not repealed until nearly a hundred and fifty years after the origin of the Whig party.

Looking again at the two parties as they appeared in the time of Queen Anne, it will be seen that in respect to the quality of homogeneity the Tories enjoyed a decided advantage in their constituency. The squirarchy, of which the party was largely composed, had been wont to act together in politics for many generations. It was the most stable element in the parliamentary party before the Civil War, and after the war this class was reinforced by the greater part of the clergy of the Established Church, all being led by certain great Tory families. The Whigs, on the other hand, were dependent for support upon the more aggressive and changeful classes of tradesfolk, while the great body of the people had no share in the government and did not belong to either party.

CHAPTER XXXIII

OTHER ACTS FOLLOWING THE REVOLUTION

AT the time of the Act of Settlement, about one-twentieth of the adult men of England were Tories; about one-twentieth were Whigs; the remaining nine-tenths were neither Whigs nor Tories, but were simply the people to be governed and to furnish the revenues to support the government.

It is impossible to decide whether, after permanent political parties have once come into being, the continued existence of party division arises from the fact of continued differences of opinion about the policy of the government, or whether the men of the two parties cherish different political opinions simply because the parties exist. From the time of the flight of James II. there were always some in England who wanted him to come back and again be their king. There were even statesmen in the service of William who contemplated the possibility of such an event, and took measures to secure their own safety if it should happen. Some of these were Whigs; probably a larger number were Tories. In the nature of the case, the Tory party had to bear the blame of Jacobitism in England. The party whose very origin grew out of a struggle to prevent the crowning of James II. would not be likely to take the lead in an effort to restore him. When James died, and Louis XIV. acknowledged his son as James III., there were still a few Jaco-

bites in England. It was simple, ordinary politics for the Whigs to take advantage of this fact and to strive to bring the Tory party into disrepute by accusing all Tories of being Jacobites. When the Tories found from experience that even with a Tory queen for a ruler they were in large part thrust out of office by their political enemies and were forced, whether or no, to bear the odium of being Jacobites, there was a strong tendency for the party to look with favour upon the restoration of the Stuarts. If foreign rulers should succeed Anne, the Tories feared that the triumph of their political enemies would be still more complete. It would seem then that the revival of Jacobitism in the Tory party during the reign of Queen Anne is due largely to the mere fact of the existence of the parties. The identification of Toryism with Jacobitism at the death of the Queen caused the government of England to pass into the hands of Whigs, where it remained for half a century.

There are two or three acts of the time of William III., preceding the Act of Settlement, which throw light upon the development of the modern Constitution. The laws removing some of the disabilities of the non-Catholic Dissenters have been already referred to. It is not the English way to do a righteous thing outright, but rather to come to the righteous end by indirection. The laws against Dissenters were not repealed, but they were made less stringent. The Dissenters were put in the way of growing into liberty by custom or by neglect.

In like manner, the great constitutional principle of the freedom of the press was allowed to drift into English law without its being clear to any one just how it came about. Before the Civil War, the press had been placed under restraint by royal prerogative; that is, by Orders in Council. During the time of the Long Parliament and of the Commonwealth the restriction of the press had

been continued by executive order. While Charles II. ruled, the press was under strict surveillance by act of Parliament; but the act thus restricting the right to print took the form of licenses for a term of years. At the end of the term the license was renewed. In 1694 the statute for licensing expired, and, apparently without a clear knowledge of what was being done, the press became free, or was permitted to drift in the direction of freedom.

Another illustration of the English method of securing a great constitutional result by an indirect process is seen in the Mutiny Act of 1689. In that year a serious mutiny occurred in the English army, and it was alleged that, according to a provision in the Petition of Right, the Executive had no power to punish by martial law. Parliament passed a statute conferring this power for a term of six months. Since then Parliament has been accustomed to renew this statute annually; and by this method, and by the habit of voting supplies annually, the annual assembling of Parliament is secured, and the discipline of the army is thus made to depend upon the will of Parliament. The old Triennial Act of the Long Parliament required the King to call a session of Parliament at least once in three years. After annual meetings were made sure through the means stated above, a new Triennial Act was passed requiring that Parliament should be dissolved at least once in three years. In America the fixing of the date of the election of members of the Legislature is viewed as an essential feature of the written Constitution. No such notion can be attached to a parliamentary statute regulating the time of parliamentary elections. In 1716 a Parliament prolonged its own existence four years by changing the Triennial Act to a Septennial Act. This later act is still in force, but it may be changed at any time by act of Parliament.

These various acts were passed during the earlier years of the reign of William III. Just before his death there occurred an incident which throws light upon the current views of the members of Parliament respecting their relation to their own constituents. The people of Kent were living in fear of an invasion from the French army and sent a petition to Parliament requesting the members to vote supplies for the defence of the country. The members of the House held that a petition of this sort was an undue interference with their privileges; that their constituents had exhausted their duty when they had elected the members. The men who signed the petition were therefore arrested and thrown into prison by order of the House of Commons. The House of Commons had long ago vindicated its right to originate a vote of supplies as against the House of Lords. By imprisoning the Kentish petitioners the Commons resented interference on this subject even by the men who elected them. We entirely lose the point of this Kentish case if we do not carefully distinguish it from a movement originating in the unrepresented English nation. It was in no sense a popular movement which the House resented. The Kentish petitioners who were sent to jail were of the wealthy class who had a right to vote for members of Parliament. One who is accustomed to note the workings of the present English Constitution cannot fail to perceive that it differs essentially from the Constitution at the time of the Kentish petition and the Act of Settlement.

The general impression made by the legislation of the time of William III. is that the Houses of Parliament were becoming absolute. They disposed of the Crown at will; they were most emphatic in the assertion of a control over the army; they legislated as if they intended to control the King's ministers; and the one House which

may be suspected of a tendency to subordinate its action to the wishes of its constituents vindicated its independence by imprisoning such of those constituents as presumed to ask the House to act in a certain way. It is through the mystery of the Cabinet system that this same Parliament came to act, first in subordination to the ministers of the Crown, and afterwards in subordination to a Cabinet whose membership is practically determined by the voters of a fully represented nation. The Cabinet system arose because the two Houses failed to do the things which they undertook to do. Though endeavouring to restrain the King's ministers, they suffered the statutes directed to this end to lapse or to become ineffective.

CHAPTER XXXIV

ORIGIN OF THE CABINET

THE Cabinet is the most thoroughly English of all English institutions; it is the core of the modern Constitution; its explanation is an explanation of the essential features of the Constitution. It is not really known just when the Cabinet originated, or just what it is. As soon as an expounder of the English Constitution begins to use words with exact and unchanging meaning, he begins to be a teacher of positive error. A fully developed democratic Cabinet such as was described in the first part of this work does not yet exist, because the English government still lacks something of being democratic. Nothing is gained in trying to trace the modern democratic Cabinet to an earlier date than 1832. If we mean by the word "Cabinet" a few of the chief officers of the State, accustomed to consult in secret on matters of State, then there never was a time when the Crown was without a Cabinet. The word "Cabinet" was probably first used to designate the few members of the King's Council whom King James I. was accustomed to consult in secret. The term "Cabal" was applied to a like body before and during the time of Charles II., and the secret advisers of William III. received at one time the appellation of "Junto."

It will throw light upon the origin of the Cabinet if we first raise the question, How did the other institutions now associated with the high powers of State originate? These

institutions are the Crown, the House of Lords, the House of Commons, the Privy Council, the three divisions of the High Court of Justice, and the Convocation of the Clergy. We can fix with tolerable definiteness a time when some of these terms were first used, but it is not possible to give a precise statement of the time and manner of the origin of the institution which the words designate. The origin of English institutions is shadowy and indefinite. The Crown, or the Kingship, grew up gradually out of the wars of the ancient tribes. With the Crown there was always associated an assembly of influential men who had a share in the government. Out of this one assembly have been evolved the various governmental institutions. Freeman says that the House of Lords is a continuation of the ancient national assembly. We have seen that before there was a House of Lords called by that name, the High Courts of Justice had been formed out of the national assembly. This was not done at any one time by a conscious act of constitution-making; but gradually portions of the assembly were set apart for special judicial and administrative business. In course of time the smaller groups of officers came to be occupied with judicial business alone, and thus were formed the high courts of the realm.

As stated in former chapters, the classes who composed the House of Commons were at one time and another attached to the ancient national assembly. And when these representative members were added to the national assembly, it is not known whether they met and acted with the old assembly, or whether they met separately, forming two, three, or four assemblies; or whether it was sometimes one way and sometimes another. It is known, however, that sometime before or during the earlier part of the reign of Edward III. the newer members had formed the habit of meeting by themselves, and

were called the House of Commons. This made it desirable to have a special name for the older part of the assembly, and the name chosen was House of Lords.

An American would naturally suppose that after the old national assembly had become merged into the two Houses of Parliament, the old assembly in the old forms would entirely cease. But in England a governmental institution does not thus terminate its existence. It may wear out with the lapse of time, but it comes to no sudden end. It would seem that after the representative Parliament was fully inaugurated there were still occasional meetings of the old assembly according to the older forms. In course of time the full meeting of the old council disappears, and all that is left is the smaller meeting called the Common Council or the Ordinary Council. This was composed of the high administrative and judicial officers of State. It should be observed that the King with any one of these various bodies exercised sovereign power. That is, the King with the old assembly which became the House of Lords was sovereign; and the King with a smaller body, composed in whole or in part of members of that assembly, was likewise sovereign. When a committee of justices came to decide cases at law without the King they were not sovereign, but an appeal was reserved to a higher sovereign body. It should also be observed that there was no sharp line of distinction between legislative, executive, and judicial powers.

At first a petition which had been presented by the House of Commons and granted by the King became a law. It took a long time to establish the understanding that it required the King and the two Houses of Parliament to make an act binding. Even after this understanding had been attained it was still possible for the King to legislate by the use of the older Council by means of proclamation and dispensation. Until James II. was

driven out of England, the King and his judges, and his chosen tools in the Council, could change a law of Parliament. In 1872, when Mr. Gladstone's Ministry had failed to carry a law abolishing the purchase of offices in the army, the abuse was abolished by an Order in Council. This was simply exercising the legislative power of the old national assembly now represented by the Privy Council. The name "Privy Council" was introduced in the place of the older term, "Ordinary Council," in the time of Henry VI. The judicial business of this Council is also a remnant of the original judicial power of the King in Council. We see the same principles illustrated in the judicial power of the House of Lords. During the "high monarchy" period of Tudors and Stuarts, the Council held a prominent place in the government.

When it is said that the English Cabinet had no definite beginning, but was a gradual growth, the meaning is that in this respect the Cabinet was quite in harmony with other governmental institutions. Various occasions have been noticed when there were attempts made to create definite governmental institutions with precise powers, and these attempts were seen to have invariably failed. Such was the case with the efforts made by the Provisors of Henry III. and the Ordainers of Edward II.; so also with Cromwell's "Instrument of Government" during the Commonwealth. Custom has ever been too strong to admit of the establishment of the hard and fast constitutional lines known to Americans.

At the time of the Great Revolution, the composition of the two Houses of Parliament had long been in one sense quite sufficiently definite. They were composed of so many members chosen in a well-understood legal way. But the relations of these two Houses to each other were more shadowy; and especially were the relations of the two Houses to the King and the King's ministers as

indefinite as could well be imagined. A hundred years of strife over this very question had contributed little to its definite settlement. The King was still at the head of the business of administration. Parliament could still claim that it was the duty of the King and his ministers to obey the laws. Charles II. and James II. proved that it was still possible for kings, ministers, and judges to disregard the laws of Parliament. Parliament could still impeach ministers, but no way had been devised for preventing the King from filling their places by others of a like disposition.

A measure introduced by Sir William Temple, in 1679, throws a good deal of light on the subject of the King's ministers, and is of especial interest in the history of the origin of the Cabinet. Temple's plan was to reduce the number of members of the Privy Council, which was fifty or more, to thirty, and then to require that all the administrative policy of the Crown should be determined by the deliberations of this full Council, in which each member should be free to give advice, of which a record was to be made. In matters pertaining to the separate departments the advice of the minister of the department was to be followed, while in other matters of general concern the advice of the greater number was to be followed. One-half of the Council was to represent the administrative side of the government, and to be made up of the heads of departments; the other half was to be composed of the wealthiest and most influential members of Parliament; his idea being to harmonize the working of the administrative and political agencies of the government with the interests of the ruling classes of the nation. This measure was adopted by King and Parliament. But notwithstanding his definite promise to observe its requirements, Charles II. paid little attention to them, and continued the policy of consulting a few chosen ministers in secret,

and secretly agreeing upon a policy, using meetings of the Privy Council only so far as they could be relied upon to ratify the secret policy of himself and his trusted secret advisers.

Comparing this measure of Temple with laws and customs of past generations, there appears to be nothing of importance about it. It is quite like an act of the government of Henry VI. when the Privy Council was recognized as taking the place of the older Ordinary Council. When the King, or the government of the day, could without inconvenience pack the Houses of Parliament, as well as his courts of every name, and his entire Council, it was but the natural and easy thing for him to follow a policy similar to that embodied in the measure of Sir William Temple. But when the King could no longer pack Parliaments, and when the Parliament and the dominant classes in the nation viewed the actions of the King with suspicion, then a Council meeting in which a record was kept of the advice given by each member became quite another thing, both for the King and for the minister who advised him.

If Temple's measure had become a permanent part of the Constitution, there would have been no place for the modern Cabinet system. According to his plan the Privy Council was to be a definite, legal check both upon the King and upon Parliament, but the tendency of such a system would have been to subordinate the administrative agents to the legislature. The success of such a system would have involved sharp and sudden changes in the spirit and methods of Parliament on the one hand, and of the kings on the other. Such a system could not have coincided with the rancorous and brutal party strife which has characterized English politics during much of the time since that date. It would have involved a greater restraint in the disposition to use the power of impeach-

ment than had been manifest at that date. In general, the working of Temple's plan would have implied a greater degree of conscious and persistent rationality than had been attained.

Much has been made of that Ministry of William III., formed 1695, in its relations to the origin of the Cabinet system. Whigs, Tories, and Trimmers, or Compromisers, had taken part in the crowning of William and Mary, and William naturally chose his ministers from men of various political opinions. There was already a majority of Whigs in the two Houses of Parliament, and an election in 1695 made the House of Commons still more strongly Whig in composition. At this point William yielded to the advice of Sunderland, who had been a member of Sir William Temple's council, and began to choose his chief advisers from the Whig leaders. It is easy to see in this act much more of the modern Cabinet system than the act itself implied. It was simply a device to secure the more constant support of Parliament. Offices and pensions were freely used to secure votes for the government. There was no select body of ministers who were known as forming a Cabinet, in the modern sense. William, it is true, habitually consulted with four or five leading ministers, as former kings had done, and these were called the Junto. There was no understanding that the ministers were mutually responsible for each other's acts. Each minister attended to the affairs of his own office independently of other ministers. William was his own Foreign Secretary, and the King was viewed not merely as the formal, but as the real, head of the government. There is nothing to indicate that any one had any perception that an important change was being wrought in the government by the choosing of the Whig Ministry of William. All there is in the act to suggest a modern Cabinet is that offices were used to secure votes in Parliament, and that by

taking the officers from the same political party, greater harmony was secured in executive business.

At this time all sorts of offices and pensions were used for party purposes. There was much alarm lest an oligarchy of office-holders and pensioners should be fastened upon the country. It was this fear which led to the insertion in the Act of Settlement of a clause forbidding officers and pensioners from holding seats in Parliament, and other clauses requiring ministers to give advice in writing, while all executive deliberations were required to be in Privy Council with a record kept of the advice of each member.

After a few years the Junto Ministry of William became unpopular. Measures of the government began to be defeated in the House of Commons. It seems that at this time no one had thought of the modern principle that when a Ministry is defeated in the House of Commons it ought to resign. The Whig Ministry remained in office after continued defeats. Opposition to the Ministry increased. An election occurred in 1698 which had the effect of increasing still further the opposition to the government in the House of Commons. Some of the ministers resigned. For a time William resorted to a mixed Ministry. Finally, after another election, the House of Commons became decidedly Tory in its composition, and William was induced to accept a Ministry which was chiefly from that party. In the light of what happened later it is easy to see in these events movements in the direction of the modern Cabinet.

CHAPTER XXXV

QUEEN ANNE AND THE CABINET

DURING the reign of Queen Anne the movements in the Executive resembled in many respects those in the time of William III. The Queen, like William, was all the time partial to a mixed Ministry, and during the first few years of her reign such a Ministry administered the government. But the exigencies of a great foreign war which tended to dominate all other issues led later, as in William's reign, to the establishment of a Whig Ministry. Still later, a turn in domestic politics caused a change in the House of Commons, and a Tory Ministry was chosen. It was understood that as between Whigs and Tories, the personal choice of the Queen favoured the Tories. She was earnestly devoted to the interests of the Church, and was unfriendly to Dissenters. William's choice rested rather with the Whigs, and he was favourable to toleration.

The Duke of Marlborough was commander of the English armies and leader of the allied armies in the war against Louis, until the formation of the Tory Ministry in 1710. Marlborough had an accommodating conscience, and, to please the Queen and to gain a more complete control over the resources of the country, he professed himself a Tory. He was thus able to control the Tory-Whig Ministry of 1702. About 1705 Marlborough and the war party, finding their policy insufficiently supported

by the Tories, began gradually to change the personnel of the Ministry from Tory to Whig. In 1708 a Whig House of Commons forced the Queen to accept a pure Whig Ministry, and Marlborough now declared himself a Whig. After two years the Queen and the Tories gained possession of the House of Commons and formed a Tory Ministry. The Whigs having a small majority in the House of Lords, twelve new peers were created, and thus the Tories gained both Houses of Parliament.

It is not easy to fix upon any new and definite contribution to the development of the Cabinet system in the events of the reign of Anne. Yet those events taken as a whole show a marked tendency on the part of the Executive to drift into the hands first of one political party and then of the other, according as the one or the other party had a majority in the House of Commons. The Queen's act in changing the party majority of the House of Lords by the use of the royal prerogative has in recent years served to suggest to the modern democratic Cabinet a practical method for harmonizing the two Houses. Anne is accounted a weak monarch, and hence these various changes and adjustments are held to be less the acts of the Monarch than those of the political leaders. Yet it will not do to carry this distinction between the Queen and the leading ministers too far. The Queen did have a mind of her own; she thought she was ruling. It was only for a little while that she was virtually coerced into the acceptance of a Whig Ministry. The creation of the new peers was distinctly the act of the Queen.

Throughout the reign of Anne the two parties remained in nearly even balance. Notwithstanding the great war, party strife grew more rancorous. When the Tories came into possession of all the governmental offices, in 1711, they passed an act requiring members of the

House of Commons to be possessed of real estate of the value of two hundred pounds. The object of this law was to make it possible for the Tories to control the House of Commons perpetually. The Whig party being composed of the great landowners who had seats in the House of Lords, and the wealthy trading classes in the towns and cities, many of whom owned no real estate, it was believed that that party would be placed at a decided disadvantage by the passage of such an act.

Having secured the dismissal of Marlborough and opened up secret communications with Louis, the Tories brought the Whig war to a close by signing the treaty of Utrecht. With the Queen on their side they had now a firm hold upon political power. But the Queen's health was failing, and it was understood that the incoming house of Hanover would favour the Whigs. In this emergency the leading Tories turned their thoughts to the Pretender, the son of James II. If the Pretender had consented to renounce the Catholic religion and accept the Church of England as by law established, it would not have been a difficult matter to secure his succession. His refusal to do this brought division and confusion into the ranks of the Tories. In the midst of this confusion and indecision Queen Anne died, and the Elector of Hanover was immediately proclaimed king, as George I.

Before coming to England, George I. removed the Tory ministers and filled their places with Whigs. It was his original intention to take an active part in the business of governing, but as he was not able to understand the language, the business was made exceedingly disagreeable for him, and he was induced to leave the details of administration in the hands of his ministers. George I. formed the habit of not attending the Cabinet meetings. It will be observed that this is of primary importance in the development of the modern Cabinet

system. The modern democratic Cabinet could not have arisen if the Monarch had continued to be a part of it. For a period of nearly fifty years after the death of Anne, England was favoured with kings who took comparatively little interest in English politics, and during that time some of the most important and characteristic features of the Cabinet system became firmly established.

Contradictory as it may seem, this same half-century which witnessed the establishment of the essential features of the Cabinet system, also witnessed the continuous triumph of one political party. The coöperation of two political parties is necessary to the working of the modern English Cabinet, but the existence of two permanent political parties by no means accounts for that system, nor does it in itself explain the origin of the system. That which above all others needs an explanation in the English Cabinet system is, how it has come to pass that all the powers of the Crown, all the high prerogatives of the King, should be preserved and made operative independently of the personal will of the Monarch, while the Monarch at the same time maintains a dignified and honourable position. During a greater part of the reigns of the first two Georges the power of the Crown dominated the English government as effectively as it did in the time of Henry VIII. But this power was exercised, not by the King, but by a Prime Minister and a few chosen political friends whom he was accustomed to meet in secret conference. Without this separation of the King and his chief ministers, a separation continued for a sufficient time to become institutional, it is difficult to see how the modern Cabinet could have originated.

The continued dominance of the Whig party during the reign of the first two Hanoverian monarchs is due, in large part, to the fact that there was fastened upon the Tory party the odium of keeping alive an effort to restore

the Stuart succession. The effective power in the nation was opposed to such a restoration, and until the Tory party could rid itself of all suspicion of such an intention, it was not permitted to come into power. It was fortunate for the development of the Cabinet system that it was the Tory party which was subjected to this continuous strain of prolonged existence without office. The Whigs could probably not have endured such a strain at that time. The Tory party was compact; its members continuously enjoyed substantial power in the management of the local affairs of the counties. A party composed of country gentlemen and country parsons was not dependent even upon the hope of office in order to maintain the party spirit. They could still believe the Church to be in danger, and the accumulation of wealth in the hands of Dissenters in towns and cities seemed to them to be reason enough for the defenders of the ancient and established order of Church and State to hold firmly together for their political interests. The Tories of course knew that the Whigs were using the royal prerogative in a corrupt way to keep themselves in power. But so long as this power was exercised in a moderate, conservative way, so long as the Church was not attacked, it did not seem the part of wisdom for the Tories to favour a revolutionary political agitation. The Tory doctrine of non-resistance doubtless had some tendency to keep them quiet so long as they were let alone.

While the Tories did not need office in order that they might hold together as a party, so much could not be said of the Whigs. Their party was made up of diverse elements. The great land-holders who made or controlled the majority in the House of Lords did not differ in social position from the great body of the Tory party. Naturally their political views differed little from those of their Tory contemporaries. But in order to gain con-

trol of the House of Commons, they were forced to depend largely upon the commercial classes in the towns and cities. Thus the Whig party included elements which required a positive political bond to keep them together. If the Whig party so soon after its origin had been consigned to two generations of exclusion from office under the odium of treason to the reigning house, it is difficult to see how the party could have held together. The Tory party survived this test and was ready to assume control of the Government upon the accession of George III.

CHAPTER XXXVI

WALPOLE AND THE CABINET

SO far as the modern Cabinet system admits of being attributed to the genius of any one man, that man is Sir Robert Walpole. It is usually a fruitless question to consider what would have been the course of history if a particular personage had been left out. It certainly would be most futile to attempt to prove that the Cabinet system would not have arisen if it had not been for Sir Robert Walpole. Yet it was during the leadership of that statesman, in the time of George I. and George II., that many of the essential features of the Cabinet were established.

England was now rid of all the Stuarts. There had been a hundred years of wrangling over the relations of the Crown to the two Houses of Parliament and to the nation. Nothing had occurred to settle those questions finally. But the new kings relied wholly upon an act of Parliament for the right to rule, and during the greater part of the reigns of the first two kings of the house of Hanover there was a disputed succession, involving danger of civil war, and there was an expectation in the minds of a portion of the ruling class that the Stuarts would yet be restored. The new kings were unpopular, and they held the allegiance of the nation through its dread of violent revolution and through the political interests of the Whig party, rather than through the active loyalty of the peo-

ple. We have, in this period, an illustration of continued kingly rule apart from the kings; that is, without the will of the monarch being made prominent. There is a sort of institutional separation between the power of the Crown as represented by the monarch and that power as represented by the ministers.

In the long rule of Sir Robert Walpole there is much to remind us of the type of statesmanship usually attributed to the Tudor rulers. The three great Tudors lived in constant dread of certain powers in the nation. The great concern of Walpole was to keep the nation quiet, lest ruin should come upon his government and the country. The Tudors respected the nation far more than they respected the Parliament; yet their respect for the Parliament showed a steady increase. It is likely that Walpole feared and respected the unrepresented nation more than he did Parliament, despite his knowledge that he was wholly dependent upon Parliament as an agency of government. With weak and dissolute monarchs, reverenced by no class in the nation, with the courts of law made independent of the Executive by a statute of William III., making the judges irremovable by the King, it was out of the question for the minister to think of governing by other than parliamentary agencies. By the use of royal prerogative, Henry VIII. secured a subservient House of Commons, and by its means humiliated the House of Lords and made himself absolute. By the combined use of royal prerogative and personal influence Walpole secured a subservient House of Commons, and for twenty-one years made his own will the ruling force in the government.

It is easy to carry too far this analogy between the rule of Walpole and that of the Tudors. A century of fierce debate and revolutionary movements had intervened. These had forced the various classes to contemplate a

segregation of political institutions, such as would have occurred to no one in the Tudor century. The people had been obliged to think of the two Houses apart from the King. The courts of law, the great bulwark of royal prerogative, and the last recourse of James II. before he was driven from England, had been taken out of the hands of the King twenty years before Walpole became Prime Minister. The peculiar relations of William III. and Anne to the ministers of State had tended to create, in the minds of the ruling classes, a new distinction between the person of the Monarch and the efficient Executive. This distinction was still farther emphasized when Walpole became the first minister of a despised and foreign king. Walpole is to be compared to the Tudors in that he secured to himself all that was left of royal prerogative, and by means of it made himself master of England, and ruled for a whole political generation. He got hold of the administrative agencies of government, which had been perfected by the Tudors, and had survived the conflicts of the Stuarts. Through them he organized an Executive institution, which has since gathered to itself all the powers of the Crown, and has continued to make the two Houses mere subordinate agencies of government, while at the same time the members of the Executive hold office at all times subject to the approval of one of the two Houses.

Wolsey was for a time the first minister of Henry VIII., but the will of Henry ruled Wolsey. Later, Thomas Cromwell was Henry's most efficient minister; but both Wolsey and Cromwell were sacrificed to the King's desires. Walpole and his Whig supporters were not in the same way subject to the will of the Sovereign; they could at any time have secured the banishment of the house of Hanover. Walpole was in a certain sense as absolute as was ever Henry VIII. After all the con-

flicts, after all the analyses of government into separate and apparently conflicting institutions, harmony of action was finally secured by making all the agencies of government yield to the guidance of a single will.

Henry VIII. used his packed House of Commons to overawe the House of Lords. Walpole found in his House of Lords a constant and effective supporter. Anne had packed the House of Lords in order to secure its support for the Tory Ministry. When the Whigs came into power a bill was introduced to remove from the Crown the power to create an unlimited number of peerages. This bill did not become a law; the royal prerogative remained unchanged; and we have seen how important it has become in the development of the modern democratic Constitution. Walpole was not forced to rely upon the power to create new peers in order to enjoy the continued support of the House of Lords. This House had been controlled by the Whig aristocracy at the time of the Great Revolution, and it remained Whig until the later years of Anne. The division in the Tory party incident to the bringing in of the House of Hanover again gave the Upper House to the Whigs, and Walpole enjoyed the continued support of the Whig aristocracy. This is a fact of great importance in accounting for the origin of the Cabinet. On various occasions, finding it inconvenient to accede to the wishes of the House of Commons, Walpole relied upon his faithful supporters in the Upper House to shield his government from the odium of non-compliance. Since 1832 it has been more difficult for a minister to shield himself in that way. But in the time of Walpole the doctrine of the constitutional subordination of the House of Lords had not been developed. It was of immense advantage to the Prime Minister to be able to make his permanent supporters in the Upper House a scapegoat for unpopular votes.

The great principle which Walpole may be said to have fully recognized and to have permanently established in the English Constitution is, that the House of Commons and the executive officers of government should at all times be in apparent harmony. In his view it was not essential that the House of Lords should be in apparent harmony, because he himself used that House to destroy measures which he had appeared to favour in the Commons. In this way he kept his government in apparent harmony with the House of Commons. This, it will be observed, is one great principle of the modern Cabinet system. There was indeed a suggestion, or a foreshadowing, of this principle in some of the acts of the government in the time of Charles II. There were various acts in the reign of William III. and in that of Anne, which indicate a tendency to harmonize the Executive with the majority in the House of Commons. Yet a complete harmony between them was the exception rather than the rule before the Ministry of Walpole. He may be said to be the first statesman who fully recognized this principle and consistently acted upon it.

How could a Prime Minister enjoy for so long a time the uninterrupted support of a majority of a frequently elected House of Commons? It was by the exercise of certain royal prerogatives. The safety of the kingdom required that a certain amount of money should be spent secretly, for which no account was rendered to the public. There is a common belief that Walpole used a large amount of public money to pay members of Parliament for their votes. According to this view he purchased his privileges with hard cash. A more careful study of Walpole's administration leads, however, to the conviction that he did not gain votes in the Commons by the direct payment of money, though he undoubtedly used the bestowal of pensions and the patronage of office to that

end. Again, when it became necessary to elect a new House, he exercised the royal influence in order that a subservient or a manageable House should be chosen. We have seen that Charles II. reorganized the boroughs and cities and transferred the voting constituency from Whigs to Tories. James II. reorganized them again and made the voting constituency Catholic instead of Protestant. With such pliable constituencies at hand it was not strange that Walpole and his party supporters should see to it that the voting constituency in boroughs was so constituted and managed that loyal Whig supporters were sent to the House of Commons. In this work he was greatly aided by the leading Whig magnates, who gained control of the boroughs in the vicinity of their estates. Thus the continued support of the Commons was secured by a judicious exercise of royal prerogative and party influence.

A careless reader of English history is likely to get the impression that Walpole was the original briber and manipulator of parliamentary elections. No historian, indeed, says anything of the sort, but so much emphasis has been given in general political literature to the corrupt practices with which the name of Walpole has been associated, and so little attention has been paid to the similar practices of the earlier statesmen, that he is made to bear an undue share of the odium. I have endeavoured to give emphasis to that which others have neglected. I have tried to make it clear that, till the time of Elizabeth and the early Stuarts, the use of royal or arbitrary power in the selection of members of the national assembly had been the ordinary practice. In a certain sense, Walpole simply reverted to the ancient method of securing harmony in the government when he used the royal prerogative to determine the membership and to control the action of the national assembly.

This analogy should not, however, be carried too far. When, in the time of the Lancastrian kings, the House of Commons was filled up by nominees of members of the House of Lords, it was an instance of the control of a weak and ill-developed branch of the national assembly by the older and fully developed branch. When Walpole and his Whig supporters in the House of Lords controlled the election of members of the House of Commons, they knew that they were, in a sense, choosing their own masters, for the Commons had long since ceased to hold a subordinate place in the government. The Executive controlled the action of the Commons largely through the use of royal prerogative, and the Commons controlled the Executive by its votes of necessary supplies. In a certain sense each controlled the other, and this is a part of the mystery of the Cabinet system. In the ancient control of the national assembly through royal prerogative, there was absent from the minds of men the distinct idea that one branch of the assembly, the Commons, apart from the Monarch, represented the dominant power of the nation.

With all their bribing and manipulation of constituencies, the Whig leaders under the guidance of Walpole did not, after all, secure harmony. They were confronted at every stage by a vigorous and persistent opposition, and were obliged constantly to use the power of persuasion to keep their supporters together. Men equally skilled in the power of persuasion were pitted against them. The Tudors secured support with little effort at persuasion. If such critics of the government as Walpole at all times encountered had appeared in the time of the early Tudors, they would have been beheaded. But Tory leaders in the time of the Hanoverians could criticise the Whig government without incurring the penalties of treason. Walpole knew that when his patronage

and persuasion and management should fail to secure him majorities in the Commons he must give up the reins of government. When this did finally happen, at the end of twenty-one years, he at once resigned office, and others succeeded him whom the Commons would support.

In a former chapter five distinct acts have been pointed out which have to do with the selection of a modern Cabinet. First, the Queen appoints the various members. Secondly, the House of Commons must give its approval to the appointments by sanctioning the measures proposed by the Cabinet. Third, when the Commons refuse to approve of the policy of the Cabinet, before resigning office the Cabinet may dissolve Parliament and appeal to the voters. If the voters return a majority of Cabinet supporters, then the members of the government remain in office. In this way the voters may be said to choose the Cabinet. Fourth, the two political parties are accustomed to select each a party leader who shall be Prime Minister when his party comes into power. The Prime Minister must associate with himself statesmen high in the favour of the party. In this way the political parties may be said to choose the Cabinet. Finally, in a certain sense the members of the Cabinet may be said to choose themselves. Before being recognized as party leaders they must make themselves leaders in fact by superior ability and industry.

We may learn how far the Cabinet of Walpole was from the later Cabinet by discussing its relation to each of these five acts.

First, the Monarch must appoint. There are certain emergencies in which it is still maintained that the Queen may have some influence in the determination of the membership of the Cabinet, but in general the action is a mere formal matter. In the time of Walpole this was very different. If George I. or George II. had with-

drawn his support from the government of Walpole, the minister could not have remained in office, however faithful may have been his majority in Parliament. This fact greatly complicated the position of Walpole. He was compelled to manage the King as well as the Parliament. There was a rancorous quarrel between George I. and his son. While Walpole was forced to be the friend and supporter of the first King he incurred the enmity of the second. When the first George died the minister was under the necessity of winning the favour of his former enemy. Had he failed in this, the retention of his position would have been impossible. It was not then a part of the English Constitution that the King should accept as his chief minister one whom he did not personally favour. True, the fact that there was a disputed succession and that the kings were foreigners and not greatly absorbed in English politics, made this part of the work easier than it would otherwise have been.

The second point in the comparison has already been somewhat fully discussed. It was the most important original contribution which Walpole made to the modern Cabinet system that he fully recognized and acted upon the principle that the Cabinet must at all times have the support of the House of Commons. In this respect Walpole's Cabinet was in strict accord with the modern Cabinet.

In respect to the relation of the constituents to the choosing of the Cabinet, a marked contrast may be observed between the time of Walpole and the present day. Or, it may be nearer the truth to say that there was no direct relation between them in the time of Walpole. Government in the eighteenth century was still of the nature of a conspiracy against the unrepresented nation. Outside of a few country constituencies, in which there were many small free-holders who would not be coerced,

there was no class of independent voters to whom the two parties could appeal in case the Cabinet was defeated in the Commons. There were certain country constituencies which were controlled by the country gentlemen and the clergy. These were Tory by position and heredity, and it would have been folly to think of changing them. There were other constituencies in the hands of the Whig aristocracy; others were Whig on account of their commercial interests; still others were controlled by the Executive government, and while Walpole was in power these were Whig by royal prerogative. Counting all who pretended to vote in all these constituencies, they were but a small fraction of the adult male population.

It was a peculiarity of Walpole's rule that he did not suffer himself to be defeated in the House of Commons. When at the end of his long rule he was finally defeated, he resigned office. He did not dissolve Parliament and appeal to the constituencies on the specific measure upon which he was defeated. Walpole, like the Tudors, showed a wholesome fear of the unrepresented nation. He avoided war. He was careful not to tax any one who would make a serious disturbance about it. He conciliated the country gentlemen by a reduction in the land tax. When his excise bill threatened to produce serious disturbance, he withdrew it. Walpole constantly respected the feelings of the nation, but he could not, like a modern Prime Minister, make a direct appeal to the nation to save himself from a hostile House of Commons. He kept himself at peace with the nation by constantly controlling the action of Parliament and by not permitting the Commons to become hostile to his government. As formerly stated, he was assisted in this by his ability to make the House of Lords a scapegoat for certain odious votes.

The fourth item in the comparison pertains to the choice

of party leaders by the respective political parties. In the time of Walpole, nothing of the sort could have occurred. Both parties were divided into factions. Walpole made himself the leader of his party through the triumph of a faction among the Whigs. When George I. was crowned there still remained as leaders of their party a few of the original Whigs of the Revolution. The younger and more aggressive faction in the party was led by Walpole, and after a few years his faction triumphed. Then, in 1721, Walpole, having gained the favour of the King, was made First Lord of the Treasury and was generally recognized as the first minister of the realm. He was not, however, such a minister because a political party had definitely chosen him to the position of leadership. In this respect the modern Cabinet differs from that of Walpole. The constitutional position of the political party as now understood was not fully developed. Political parties then resembled the ancient class factions as the modern party does not. Class and class interests then controlled the political parties to an extent to which they do not and cannot now.

In the time of Walpole there were special party divisions growing out of the circumstances of the time. Some of the Tories were confessed Jacobites, and it was to the political advantage of the Whigs to make it appear that all the Tories were either secretly or openly in sympathy with them. As time advanced, the Jacobites diminished in numbers and in influence. There were Tories, notably Bolingbroke, who during the later part of the rule of Walpole, laboured to break down the distinction between Whigs and Tories. Bolingbroke strove with some degree of success to unite Tories and disaffected Whigs against the government. But Walpole encountered his greatest difficulty with disaffected leaders in his own party. There were always Whigs who opposed him; some on purely personal grounds, others because they did not approve of

the policy of his government. There were Whigs who opposed the government on account of its corrupt practices; Whigs who opposed details of the financial policy; and finally it was a faction of Whigs which, leading the opposition to the continued peace policy of the government, drove Walpole from office. From these facts it is clear that the close and intimate relation which now subsists between the Cabinet and the political party did not subsist in the time of Walpole.

The fifth and last item in the comparison between the earlier and the later Cabinet system is in respect to the relation of the members of the Cabinet to their own promotion to Cabinet rank. Certainly there has never been an instance in which a Prime Minister more clearly chose himself, and by industry and native ability maintained his position, than in the case of Walpole. He entered Parliament in 1700, at the age of twenty-four. Joining himself to the Whig party, he held important offices in the Ministry from 1705 to 1710. It was fortunate for Walpole that when the Whig Ministry became involved in the South Sea speculations he belonged to the section of the party out of office and openly opposed to the government. Thus he escaped the odium which was visited upon the other leaders of the party upon the bursting of the South Sea Bubble, and was in 1721 advanced to the first place in the Ministry. It will be remembered that at this time he was already an experienced statesman, having had twenty-one years of active political life. From 1721 he continued to govern England till 1742, because he had the industry and the personal qualities which enabled him to manage each of the two kings whom he served in such wise as to centre in himself all the powers of royal prerogative. He was able at all times to control the votes of the House of Commons and to direct those of the Lords. He so manipulated the influential forces in

the voting constituencies that at each election a tractable House of Commons was chosen, which enabled him to formulate and carry into effect such policy, financial, religious, domestic, and foreign, as would keep the nation quiet and yet would not greatly offend any powerful class therein. He continued to rule because under all circumstances he possessed and exercised the ability to grasp the reins of government and hold them against all other leaders and all factions in the land.

Walpole may be said to have created the modern office of Prime Minister. That officer secures the coöperation of the Monarch in carrying into effect the policy determined upon by the Cabinet in secret conference; he apportions the offices to the various leaders in his party; he composes all quarrels and is the disciplinarian of his party. Walpole fulfilled all of these high functions of the modern Prime Minister. Yet there was in his case no beaten track, no well-understood precedents to aid him in the delicate work. The Prime Minister of to-day has the benefit of a long-established political party, which in the minds of the people has taken the form of a corporate existence. In this corporate body there is at all times a group of men who have made themselves leaders. To become such a leader one must subject himself to discipline; he must defer to the wishes of others; he must control his temper. The modern Premier has but to temper and modify the discipline which has already been wrought out in the natural working of the political party. There was no such disciplined group at the service of the first Prime Minister. In Walpole's case discipline was an exceedingly personal business. It is reported that on one occasion he actually used physical force in a case of Cabinet discipline.[1] In general, however, he selected

[1] See references to Coxe's *Life of Walpole*, and *Memoirs of Lord Hervey* in Knight's *Popular History of England*, Vol. VI., pp. 61, 62.

men who would obey him. Men of inferior ability are more tractable than men of conspicuous gifts. Townshend was a man of little less note than Walpole himself. They remained in office together for nine years; then they quarrelled, and Townshend was forced to resign. It added not a little to the difficulty of Walpole's position that he was under the necessity of maintaining discipline in the Ministry by the exercise of arbitrary power.

The duties of the Prime Minister are now greatly simplified and facilitated by the public recognition of the office. Walpole exercised nearly all of the high prerogatives and duties of the modern Premier, while at the same time no such office was recognized. Immense prejudice naturally existed against the concentration of so much power in the hands of one man supported by a few secret advisers. There was then no recognition of the corporate existence of the Cabinet, none of the principle that the Cabinet is as a whole responsible for the acts of each member. A favourite form of attack upon Walpole was to accuse him of exercising those very powers which in more recent times are seen properly to pertain to the Prime Minister; and such attacks were met by denial of the charge.[1] To avoid prejudice Walpole assumed to be merely one of the King's ministers. Though his position required him to exercise all the duties which now belong to the office of Premier, it obliged him at the same time to deny the existence of the office.

From the foregoing comparison it appears that the following changes were necessary for the development of the modern Cabinet from that of Walpole: First, the removal from the monarch of the power to exercise his personal choice in the selection of the Prime Minister. Second, the perfection of the party organizations so that at all

[1] Morley, *Walpole*, pp. 163, 164.

times there should be two well-organized parties, each with a group of party leaders, one of whom has been definitely chosen as the leader of the party which stands ready at any moment to take charge of the executive business of the government. Third, the enfranchisement of the nation and the making of the enfranchised nation instead of the nominal monarch the source of power.

The one change of fundamental importance is the transfer of the choice of the ministers from the monarch to the nation. This has been effected in an indirect way through the development of the party system. Walpole ruled through royal prerogative derived in large part from the preference of the King. Salisbury and Gladstone have ruled, successively, as the choice of the enfranchised nation. Yet it is difficult to see how it would have been possible for all the high powers of State to become centred in a modern Premier if there had not been first a succession of Premiers who ruled, not by the conscious choice of the nation, but rather by the actual choice of the monarch. It is this gradual and imperceptible transfer of the power of choosing from the monarch to the people which has made it possible for the undivided and absolute form of government perfected by the Tudors to be transmuted into a modern, absolute democratic Cabinet. By this mysterious evolution the ideal of James I. and the ideal of his hostile House of Commons are both, in a sense, realized in the same government. To accomplish this, both the King and the Parliament have been compelled to forego their personal preferences, and to make of themselves deliberate and conscious agencies for carrying into effect the will of the nation.

Walpole did not rule in a democratic way, yet he was all the time controlled, or greatly influenced, by the will of the nation. While he resembled the Tudors in general, he resembled Elizabeth in particular. The one great

effort of his rule was to keep England quiet, and to give time for apparently insuperable difficulties to settle themselves. This, it will be remembered, was likewise the great mission of Elizabeth. There is in each case a doubt as to whether it was the deliberate intention of the ruler to accomplish these high and patriotic ends. There can be no doubt, however, that in both cases the effect was to give to the nation a new sense of unity, and to prepare it to endure the prolonged struggles and trials which were to follow. After the death of Elizabeth England was involved in continual civil strife and foreign wars until the time of Walpole. Almost continual war and civil strife followed the end of Walpole's rule until the battle of Waterloo.

Between the death of Elizabeth and the rise of Walpole there had been great progress in the spread of democratic ideas; the theory of democracy had been born; yet it may be doubted whether any real progress had been made in the development of the forms of the modern democratic Constitution. There had been an infinite amount of strife over the privileges of office-holders; there had been fierce contentions between different religious sects; yet there had been a narrowing rather than a widening of the franchise. Except in the minds of a few discredited and uninfluential persons there had been no thought or purpose of taking into the government the unrepresented nation. Great progress had indeed been made in the settlement of the relative positions of parliamentary privilege and royal prerogative. It may be said to have been as thoroughly settled as anything can be settled in the English Constitution that royal prerogative may not override Parliament. It would be, however, a great mistake to assume that the triumph of Parliament involved, in itself, any progress towards the modern democratic Constitution. Parliament, in itself, was not one whit more democratic than was the Crown.

The development of the Cabinet system, so far as it was developed under the guidance of Walpole, was not in itself a movement in the direction of democracy. Walpole feared and dreaded democracy, as did the other members of the ruling classes. He made use of the terrors of the unrepresented nation to frighten the privileged classes into submission, as did his Tudor prototypes. If Walpole's ideal had been fulfilled, harmony between the privileged classes would have been achieved, and the nation would have been forever shut out from participation in the government. If real harmony could have been reached, and if the nation had been led to submit to the rule of a harmonious aristocracy, then England would have moved in the direction of what we are wont to call Asiatic civilization. On account of the perpetual strife between the ruling classes the people had enjoyed many of the fruits of democracy without its annoyances and responsibilities. Harmony in the ruling classes, with the nation still unrepresented, would have been a greater revolution in the English government than any it has ever experienced. Such a supposition, however, is absurd. It involves the assumption that the English nation might possibly become something else ; that they might become a people such as they had never been, a people able to draw sharp lines of distinction between the rulers and the governed. Nothing is more characteristic of the English than the fact that they have never been capable of drawing sharp lines anywhere.

There was never a time when there were not ample grounds for relentless strife between the rulers and the governed. We may readily believe that the spirit of strife between the people and the government had been fostered and encouraged by the quarrels of the ruling classes among themselves. It may be equally true that the fierceness of class against class and the exigencies of foreign wars have

tended to obscure and delay the inevitable contest of the people against their government for the control of that government. Through the device of the Cabinet, a quarrel of a hundred and fifty years' standing was settled. Walpole's Cabinet did adjust the relations of the Crown to the Parliament, and this prepared the way for the final contest between the people and the government. A state of foreign warfare is not a favourable condition for such domestic strife. Continued wars for seventy-five years after the rule of Walpole delayed and tempered the contest of the people for a share in the government; but they did not prevent the issue from being joined, nor prevent the people from making substantial gains.

CHAPTER XXXVII

WALPOLE'S SUCCESSORS

THE test of an institution which seems to have its origin largely in the personal qualities of a single statesman comes when the working of it passes into other hands. Walpole had gone into the war against Spain to prolong his power; but notwithstanding this, he was defeated in the election of the Chairmen of Committees in 1742, and a little later an adverse vote on an election petition caused him to resign. If at this time there had been a fully developed modern Cabinet, the other members would have resigned with their chief. This did not take place. Walpole's successor was found in his own Cabinet. Wilmington was nominally the head of the government for a year. Henry Pelham then became Prime Minister and held the position until his death, in 1754. The chief opponents of the Walpole Ministry were disaffected Whigs. Some of these were taken into the new Ministry, and thus the fierce critics of Walpole's government consented to become a part of that formed by his associates.

With the disappearance of Walpole it became more difficult to manage the King. Granville, an ancient enemy of Walpole, was taken into the new Ministry. He quarrelled with the leaders, and was forced by them to resign. Pitt and Chesterfield, who had been conspicuous among Walpole's critics, were kept out of the Pelham Ministry on

account of the personal disfavour of the King. Granville won the favour of the King and used his influence against the Ministry. When, in 1746, the ministers demanded that Pitt and Chesterfield should be admitted into office, the King refused to comply, and the ministers resigned. The King then called upon Granville to form a new Ministry. He undertook the task, but found after three days that with the greater part of the Whig party against him it was impossible. The King then acceded to the demands of the Pelham Ministry, and restored them to power with Pitt and Chesterfield admitted to office.

The constraining of George II. to admit to the Ministry men whom he disliked has some resemblance to the events which induced William III. to accept a Tory Ministry, and to those which induced Anne to accept a Whig Ministry, but the resemblance is altogether superficial. In the time of William and Anne the monarchs were viewed as the responsible heads of the administration; but after the long rule of Walpole decided progress was apparent in the direction of the view that the Prime Minister and his supporters were responsible for the administration. It was the stress of war that induced William and Anne to accept ministers whom they did not like. George II. was induced to accept such because his ministers had resigned in a body, and at the same time had so controlled the action of Parliament as to prevent the King's friends from forming a government. Here was a group of leading ministers holding secret meetings apart from the King, and at the same time holding such a close relation to Parliament that, so long as they received the cordial support of the two Houses, they could force the King to a choice between having no government at all, and complying with their demands. We see in this an essential feature of the modern Cabinet. There is no earlier instance of such action than that in which the Whig leaders obliged

George II. to dissolve the Granville Ministry and admit Pitt to a place in the Cabinet. The last rising in support of the Stuart claimant for the throne occurred a few months before this ministerial crisis, and was no doubt a strong argument in the mind of the King in favour of submission to the demands made upon him.

The new method of changing ministers avoids the necessity of impeachment. Formerly, obnoxious ministers were disposed of by bills of attainder or by impeachments. Impeachments accompanied the changes of ministers in the time of Charles II., as also under both William III. and Anne. During all this time a criticism upon the Ministry was, in a certain sense, a reflection upon the monarch. But when George I. ceased to attend Cabinet meetings, and when there was a Prime Minister who stood ready to bear the full force of hostile criticism, the government could be criticised without special reflection upon the King. The arena for hostile criticism was chiefly in the House of Commons, where the necessary supplies were voted. Walpole set the example of always controlling that House. And as soon as that became impossible he vacated his position in favour of another Premier who could control it. When Walpole resigned, a committee of investigation was appointed by the House of Commons, but there was no impeachment. Under the new order of governmental responsibility it seemed quite sufficient that a minister should be compelled to bear the burdens of government in the face of full and free criticism. And when he ceased to be able to control the action of the two Houses, it seemed punishment enough that he should be forced to resign. Under the new methods, the ministers and the two Houses became more thoroughly identified. Those men become chief ministers who can control the Houses. A change of ministers is effected through political influence and through an indirect action of the Parlia-

ment. Thoroughly political methods displace the older legal methods of changing the Ministry.

When Henry Pelham died in 1754, his brother, the Duke of Newcastle, was made Prime Minister in his stead. There was difficulty in getting a leader in the Commons. One war had been brought to a close by the Pelham Ministry, and when the leader died, England was on the point of being involved in another great European war. The Duke of Newcastle was unable to lead during such troublous times, and after three years was led to resign the Premiership.

William Pitt had been growing in popularity for twenty years. He was generally recognized as the ablest statesman of the time. Upon the resignation of Newcastle, Pitt was made Secretary of State for Foreign Affairs with the real powers of Prime Minister. He was still disliked by the King, and on this account the nominal Premiership was given to another — first to the Duke of Devonshire, and later to Newcastle again. The elevation of Pitt arose from a popular demand, and because of a sense of his fitness on the part of leading statesmen. His Ministry was one of the most brilliant in English annals. Corruption and incompetency at home were rebuked, and the arms of England became triumphant abroad.

In the midst of the triumphs of Pitt, George II. died, and his grandson, George III., became king. Immediately there was felt a decided change in the spirit and tone of kingly power. The new King manifested from the first a determination to have a personal share in the business of government. Pitt now found that he could not control the policy of the government, and refused to be responsible therefor. He resigned his position in 1762.

With the resignation of Pitt, an important chapter in the evolution of the Cabinet system came to an end. There were still men in Pitt's Cabinet who had served in

that of Walpole. But leadership now passed to new men. There was no longer a disputed succession. The last effort of the young Pretender to gain the Crown of England was made in 1745. The Tories had ceased to be suspected of treason to the house of Hanover. The resignation of Pitt ends the long Whig rule. During the greater part of the time for the next seventy years the offices of the government were in the hands of Tories.

According to the theory of the fully developed modern Cabinet it ought not to be possible to state which party receives the most cordial support of the monarch. But it is evident that the last two Stuarts were Tories; William III. possessed Whig sympathies; Anne was equally inclined to the Tories; the first two Georges were Whigs; while George III. and George IV. were both Tories.

CHAPTER XXXVIII

TAXATION AND THE UNREPRESENTED NATION

IT should never be forgotten that during the early part of the eighteenth century Whigs and Tories formed only a small fraction of the nation. The great body of the people were neither Whigs nor Tories. They had no direct share in government, but they could at any time furnish the brute force to destroy it. In ordinary party politics the will of the nation was not regarded. Government was still of the nature of a conspiracy against the people. It was an easy matter for the political philosophers of the last half of the Stuart century to derive from the patent fact that the people in England could at any time rise up and destroy their government, the theory that the government was, after all, a sort of compact between rulers and ruled. But the fact remained that the people were almost wholly shut out from the business of government. In 1775, the Englishmen who lived in America raised the standard of rebellion because of an attempt on the part of the government of George III. to collect a duty of three pence a pound on tea. Some of the English statesmen of the day expressed astonishment that the colonies should make such a fuss about so trifling a matter. These colonists, they said, were just as much represented in the English Parliament as were nine-tenths of the tax-payers in England. The common English tax-payer had never been represented in Parliament. When

the ancient kings were wont to send the sheriffs and other administrative officers directly to the county courts and other local governments to secure supplies, there may have been, and there probably were, in these acts more of the elements of popular representation than ever existed in the House of Commons previous to 1832. With the creation of the House of Commons in the fourteenth century, the common tax-payer ceased to be represented in the government which taxed him. He thenceforth had no recourse but to submit to extortion or to make war upon the tax-gatherer. When, in 1774, the Englishmen in Boston, Massachusetts, boarded a ship and threw the taxed tea into the ocean, their action was quite in accord with the actions of Englishmen who in the time of Henry VII. and Henry VIII. had on various occasions made war upon collectors sent to collect taxes voted by a Parliament in which they were not represented. Elizabeth seemed to believe that taxing by means of Parliament was a dangerous business. It was the policy of the parliamentary party during the time of the early Stuarts to gain some popular support by humouring the English tax-payer.

But in old England questions arose which obscured and tended to displace the issue between the English government and the English tax-payer. The religious conflict which led to the Civil War; the Civil War itself; the execution of the King; the rule of the Commonwealth; the Restoration; the religious persecutions and the strife with Papal tendencies leading up to the Great Revolution of 1688, were all followed by the long wars with Louis XIV., which lasted almost to the accession of the house of Hanover in 1714. In the midst of such excitements it was not easy to raise the standard of rebellion upon a question of a penny's increase in the rates. The Englishmen who lived in the New World were, however, little affected by the conflicts in the mother-country, and with them the old

English spirit of resistance to the tax-collector survived in all its vigour. The long periods of moderation and of neglect on the part of the home government had by no means weakened that ancient, inherited disposition in the breasts of the colonists. When, therefore, these New-World Englishmen, who had preserved intact the early spirit of opposition to lawful taxation, discovered a clearly defined opportunity for the application of the ancient principle, — as in the case of the Stamp Act of 1765, — they astonished the statesmen of the mother-country by their rebellious temper.

Certain occurrences during the long rule of Walpole shed much light upon the important part which the raising of revenue played in the development of the English Constitution. Walpole respected the British tax-payer, and there is evidence that he had a lively sense of the danger of an attempt to tax the colonies. His motto was, "Let sleeping dogs lie." He had also a strong sense of the injustice and the inequality of the burdens of taxation, and did many things to lessen the injustice, while he justified continued inequality by the plea that a shifting of the load would threaten civil war. Against the Scotch brewers, however, he persisted in a measure of taxation in the face of prolonged resistance at the cost of some shedding of blood.

But the most important of his acts bearing upon the subject in hand are those connected with the Excise Bill of 1733. That is a measure which has always commended itself to students of finance. Walpole himself looked upon it as a great and beneficent reform, and was not at all daunted by the formidable opposition which it encountered in the Houses of Parliament. He even looked without dismay upon diminished majorities in the Commons. When the opposition had done their worst there still remained a respectable majority in each

of the two Houses. The King was unflinching in his support, and was highly commending the courage of his minister. There was, however, a threatened rising of the English tax-payers against the bill. The Queen urged that troops should be called out to put down the mob, but Walpole replied, "I will not be the minister to enforce taxes at the expense of blood." And, while still enjoying the support of the two Houses and of the Crown, he determined to withdraw a measure which his judgment heartily approved, wholly out of deference to the English nation which was represented by neither Crown nor Parliament.

In this series of events the action of the Prime Minister well illustrates the supremacy of that inspired mediocrity of common sense and moderation which has so many times been the saving factor in the history of political crises. Here also may be seen another instance when the spirit of the Constitution finds a more adequate expression in the person of a single ruler than was found in the legally constituted institutions. These occurrences show likewise that, notwithstanding that the old English habit of resisting the government had been weakened by distracting religious conflicts and foreign wars, yet the spirit of resistance still survived. Events of later years illustrate its persistence and growth; for, stimulated no doubt by the successful example of their undismayed brethren over sea, the English of England have finally vindicated for themselves the constitutional principle that taxation and government shall be only by and through representatives of their own choice.

The "sleeping dog" respected by Walpole was the unrepresented English nation. No view of American history is more erroneous than the notion that the American colonists in the early years of the reign of George III. wanted to send representatives to the British Parliament. These Englishmen in America had founded their local

governments at a time when it was still the expectation of the English tax-payer to be called upon to make war upon the tax-collector; that is, when this was the constitutional method of avoiding extortion. They in the New World came into possession of governmental institutions in which the people were really represented, and they were pleased with the change. Even Cavaliers and Tories whose theories were utterly opposed to popular representation in England, developed, when they came to dwell in the colonies, a great fondness for the representative system. Especially was this true after they had experienced the rule of certain tyrannical governors, sent out by Charles II. and James II.

The religious question was never prominent in America. It was arbitrary taxation and not the fear of Popery which maddened the colonists to the point of rebellion in the time of the later Stuarts. After the Great Revolution in England the Whig statesmen who found it to their interests to respect the unrepresented English nation had wisdom enough to let the colonists alone. When the government of George III. passed the Stamp Act, in 1765, it aroused the "sleeping dog" in America. That is, there was aroused in America to an acute wakefulness that same spirit which the Tudors had been induced to respect in the ancestors of the colonists, the spirit which the Stuarts could not be brought to regard, but resisted to their own undoing; the spirit which at all times has furnished the moral and physical force determining the fortunes of the contending factions and parties in England.

It is now a commonplace, both in England and in America, that George III. was the real rebel against the English Constitution. If George III. was a rebel against the Constitution, then the House of Commons and the English courts were likewise in a state of rebellion against it. In the same sense, all of these high gov-

ernmental agencies had been in a chronic state of rebellion against the English Constitution for several centuries. If the Englishmen who lived in America represented the real English Constitution in their resistance to the tax-collectors of George III., then the Englishmen who resisted the collectors of the taxes voted by the Parliaments of Henry VII. and Henry VIII. represented the real Constitution. The Tudor kings became real constitutional monarchs when they took matters into their own hands and ruled according to the wishes of the unrepresented masses. This of course is using language with utter confusion. Yet this confusion is fitted to shed light upon a most obscure subject in the development of the modern Constitution.

It is within the memory of men who still live that a policy has been adopted in the English government of extending the franchise to the great body of the tax-payers. Preceding and coincident with this movement there has grown up the sentiment that it is unconstitutional, and immoral to resist the officers of the government. The sentiment now prevails that if there is a grievance it should be corrected in an orderly way by the people's representatives. This view when once attained seems so natural and so self-evident that it is readily and erroneously accepted as the view that had always prevailed. It is not an easy matter for a man to repent, to form new habits, and then to forget entirely his former self. But if a nation repents and forms new habits, it is almost sure to lose the consciousness of its former self, — almost sure to get the notion that its existing character belongs also to the earlier times.

The historian ought always to have perceived that until recent times it was just as much in accord with the moral sense of the English nation to resist certain acts of the regularly constituted government as it is now to obey

these acts. If this change in the moral sense of Englishmen could have come to the people without being accompanied with actual popular representation in the government, nothing at all resembling what we now know as the English Constitution could ever have existed. So long as the people were not represented, the duty of resisting regularly constituted government was kept active. The American experience furnishes a good illustration of this. It would have been as absurd for the American colonists to desire or accept representation in the English House of Commons, as it was then constituted, as to have trusted their fortunes to the will of the King. The only representation which the Americans prized was that which they had long enjoyed in their own local governments and colonial assemblies. The intelligent colonists knew that the only recourse for the aggrieved English tax-payer was to make war upon the government.

The only way for an Englishman of that date to give his consent to a measure of taxation was by refraining from taking up arms against the tax-collector. The sense of the moral obligation to unite in a common resistance to acts of government was kept alive from generation to generation largely because of the fact that the governing classes were always contending among themselves and were constantly currying favour with the people. In the olden time, barons, clergy, and kings contended, and the nation favoured one or another as occasion served. The Tudors favoured the nation as against the governing classes. The Stuarts destroyed the personal supremacy of the monarch in a contest with Parliament. When the Great Revolution was accomplished, and the Crown appeared to be placed in permanent subjection to the two Houses, two political parties were formed to keep up the division of the governing classes, and these two parties contended for supremacy until the nation was enfranchised.

CHAPTER XXXIX

GOVERNMENT BY A DIVIDED CABINET, OR BY ADMINISTRATIVE DEPARTMENTS

THE great constitutional feature of the period of the first two Georges is found in the fact that the chief ministers formed the habit of planning the policy of the government in secret meetings, apart from the King, and then, through the Prime Minister, securing the approval of the Monarch to the policy agreed upon. In this way some of the essential features of the modern Cabinet system were developed. During the reigns of the last two Georges the Cabinet system, so far as it had been developed, was thoroughly tested. It was characteristic of the early Georges not to be greatly absorbed in English politics. This gave opportunity for the secret Cabinet to become institutional. When George II. did try to keep Pitt out of the Cabinet, the ministers resigned and forced him to submit. Later, in the midst of the Seven Years' War, a popular demand forced the King and the party leaders to admit Pitt to the first place in the Ministry. A characteristic of the later Georges was an absorbing interest in English politics. They at all times exerted a profound influence upon their Ministers and their Parliaments, and during a part of the time the rule of the King was almost absolute.

It is said that Bolingbroke and other Tory leaders had a hand in directing the education of George III. It is easy

to believe this, because it was largely through the influence of that king that the Tory party enjoyed the advantages of official patronage during the greater part of seventy years. Moreover, George acted as if he had been educated by Tories. If James I. and Charles I. could have reigned in the place of the last two Georges, they would probably have had a peaceable and comfortable time. They would have been continually conscious of the exercise of substantial powers. They would have had an ample field for that exercise of intrigue in which they took great delight, and the success of their intrigues would have been a partial compensation for the high pretensions of divine right which they would have missed. James I. could have seen, without difficulty, how such a Church and such a House of Commons could be made to agree with monarchy.

George III. is never called a great man, yet he possessed the faculty of doing the things which he wanted to do. Even during the intervals of his prolonged insanity the King's policy was, in the main, respected and carried into effect. The elder Pitt was in the full tide of a most brilliant career when George III. was crowned. The new King obliged the Cabinet to receive his personal friend, Lord Bute, and through him he so manipulated the policy of the government as to drive Pitt out of office in a few months. The question naturally arises, Why should the new king have so much power when the former king had so little? George II. began his rule by changing his politics and submitting to the leadership of Walpole, whom he had, as Prince of Wales, opposed. He continued the policy, adopted by his father, of leaving the business of government to the ministers and to the women of his household, postponing a trial of strength with his Ministers until after the death of Walpole. By that time his habit of yielding had become confirmed; his Ministers gained an easy victory and held their supremacy to the

end of his reign. George III. began his reign with a fixed determination not to be a tool in the hands of his Ministers, but to make them a tool in his own hands, and in this he achieved a high degree of success.

After Pitt and Newcastle had been virtually driven from office through the interference of the King, the formation of a new Ministry was committed to the hands of Lord Bute. The new Ministry, though some of the Whig leaders were induced to join it, was nevertheless essentially Tory in composition. It was evident to all classes that the King was the real director of the government and the dispenser of patronage. By the use of Walpole's methods, that is, by various acts of royal prerogative, the King found little difficulty in securing harmony of action in the two Houses. But the sudden change of policy, whereby the King instead of the Ministers dispensed the patronage and directed the policy of the State, raised such a storm of criticism in the country that Lord Bute was frightened into the resignation of his office.

Three ministries then followed each other in quick succession. When the King's Ministers would not do as he wished, he was accustomed to organize an opposition to his own Ministers and secure their defeat in the two Houses. The King, being the dispenser of patronage, could command more votes than the Ministers. Bitter feelings were aroused against the Monarch on account of this secret influence. It was during this period that the Letters of Junius appeared and that the conflict with the American colonies began. George III. saw that, although some of his statesmen called his influence Satanic, he was really succeeding in bringing all classes in England under subjection to his will. It seemed to him a slight thing that he should rule the feeble fragment of his empire in the New World. Pitt furnished by far the greatest obstacle to the success of this policy; but

just at the time when his services were most needed his health failed, and he was induced to accept a peerage. This removed him from the House of Commons and greatly lessened his influence.

After three unsuccessful attempts to get a Ministry to his mind, the King found in Lord North a man after his own heart. North became Prime Minister in 1770 and remained in office till 1782. During this entire period England was governed by the King; the Cabinet did not profess to have a policy of its own. By means of bribery and patronage, by the creation of boroughs and peerages, and by other acts of royal prerogative, it was an easy matter to secure practical harmony with the two Houses. During much of this time the nation seemed to be well satisfied with the policy of the government. For twelve years the will of the King was almost absolute. The aristocratic Whig Constitution created by Walpole seemed to be brought to utter ruin. The King held in his own hands those agencies for securing votes which the Whigs had formerly held. There remained only a few Whig constituencies.

For a time after the King had begun the war against the colonies, the few Whig members of the House of Commons absented themselves from Parliament as, in their own view, the best means of expressing their opposition to the royal policy. Moreover, not the voters only, but the great body of the unrepresented nation gave their support to the King's American policy, and it seemed to the intelligent Whigs that if the King should succeed in reducing the colonies to submission he would at the same time succeed in fastening upon England a permanent despotism. They saw in the triumph of the colonies the only hope of escape from absolutism. Americans have difficulty in understanding how it is that almost the entire English nation of that day was at the time

united in the support of George III. in his efforts to subdue the colonies, while the English nation of to-day is united in the reprobation of that policy. Almost the entire English nation now, regardless of party affiliations, takes the same view of the course of George III. that was held by the remnant of the Whig party at the time. The policy of the King was subversive of the Constitution of England as now understood, and the success of the colonies was an important step in preventing the new form of royal despotism from being fastened upon England.

It is a mistake, however, to suppose that there was in England any sudden and effective revulsion against the policy of the King. It is only since the development of the democratic Constitution in recent years that the policy of George III. has come to be universally condemned by Englishmen. At the time, the attempt to subdue the colonies was confused with hostility to France, and antipathy toward the French tended to unite the nation in support of the war against the colonies. Yet, as disasters multiplied, and the failure of the King's policy became apparent, the Whigs gathered strength in Parliament. In 1780 a resolution was carried in the Commons "that the power of the Crown has increased, is increasing, and ought to be diminished." The next year Cornwallis surrendered to George Washington. Upon the news of this disaster a motion in favour of peace lacked only one vote of receiving a majority, and Lord North's Ministry resigned.

With the resignation of Lord North in 1782, the twelve years of absolute kingly rule came to an end. This period is peculiar in that the Ministers did not profess to have a policy of their own. They were simply the King's Ministers to execute the King's policy. Notwithstanding the disastrous failure of his policy, George III. had no inten-

tion of surrendering his right to rule. He was obliged, however, to accept a Whig Ministry with Rockingham as Prime Minister. The Whigs naturally expected after such a failure of kingly rule to succeed in making the power of the Crown less, in accordance with the resolution which they had previously carried in the Commons. They did pass some laws which tended to lessen that power. In 1782, for instance, a law was enacted depriving government contractors of the privilege of sitting in Parliament, and another statute, passed at the same time, deprived revenue officers of the privilege of voting for members of Parliament. It is said that seventy seats had been controlled by the votes of revenue officers.[1] Yet even in this Whig Ministry the King succeeded in maintaining in office some of his friends who openly opposed the measures of the Cabinet. By carefully fostering the dissensions among the Whigs and by the exercise of royal prerogative in opposition to the policy of the Ministers, the King greatly weakened the Cabinet, and upon the death of Lord Rockingham was able to form a Ministry controlled by men friendly to himself.

No sooner had he achieved this signal triumph than a coalition was formed between disaffected Whigs led by Fox, and disaffected Tories led by Lord North, and the Ministry was defeated. For twenty-three years the King had succeeded in governing by promoting party factions among his enemies and by uniting his friends with the bonds of selfish interest. But now factions naturally most hostile to each other formed a union on the basis of antipathy to the King, and defeated his government. The Ministers, being out-voted in the Commons, resigned. The King was determined not to form a Ministry of those leaders who had combined for his defeat. In this emergency he strove to induce the younger Pitt to form a Cabi-

[1] Hearn, *The Government of England*, p. 405.

net. Pitt discreetly refused to do so. For thirty-seven days the King ruled without Ministers, but was then forced to submit to a coalition Ministry formed in March, 1783. The new Ministry remained in office till December of the same year. At this time William Pitt, the son of the great Whig statesman of that name, who had carefully noted the trend of public sentiment, yielded to the King's desire for deliverance from the Coalition Ministry, and undertook the task of organizing a Tory government. Thus, by intrigue and by availing himself of hostile factions in the Whig party, after a trial of three Whig and Coalition Ministries, the King secured, in less than two years, a Tory Ministry with the son of Lord Chatham, at its head.

Pitt remained Prime Minister for seventeen years. It cannot be said of him, as it was said of Lord North, that he had no policy of his own. He had a policy, and for the most part he carried his policy into effect. Pitt was a statesman of the first order. He yielded much to the prejudices of the King, but he yielded that he might rule. He began his career as a Whig. In the confusion of the Whig and Coalition factions, however, he came into office and formed a Ministry having in it both Whigs and Tories. But the prejudices of the King and the exigencies of party politics induced him to rely for his chief support upon the Tories.

The first few months of Pitt's Ministry are memorable for a contest which exhibits the peculiar relations of the Cabinet to the King, to the two Houses, and to the voting constituency. No dissolution of Parliament occurred at the time of the change of Ministry. The Prime Minister had the support of the King and of the House of Lords. A large majority in the House of Commons was against him, and he believed that the voting constituency at the time was hostile to him, though he expected that it

would in a few months turn in his favour. If he dissolved Parliament at once, he would, as he thought, be defeated by the voters. If he remained in office, he had to brook a hostile House of Commons. This last he determined to do. Twelve votes were passed by the Commons, each of which, interpreted according to modern constitutional ideas, ought to have caused the Ministers to resign or to dissolve Parliament. They did neither. Yet the majority against them diminished in the Commons, and when the House was dissolved, Pitt secured a large majority in the new Parliament.

It will be observed that this conduct of the Premier was in violation of the principles of Cabinet government as established by Walpole — principles which did not permit the House of Commons to retain a hostile majority. Walpole used an obedient House of Lords to shield him from the hostility of the Commons and the people. Pitt had also an obedient House of Lords, but he saw no way of immediately securing the subserviency of the Commons. He was afraid to appeal at once to the voters, and preferred to defy the Commons until the sentiment among the voters, which he believed was setting in his favour, should have time to mature. The opposition was not compact and harmonious. It was composed mostly of the extreme factions in the two parties. Having succeeded in reducing the hostile majority to one vote, Pitt dissolved Parliament. Because of the success of his plan for bringing the nation to his support, Pitt's conduct is usually looked upon as in substantial harmony with the spirit of the modern Constitution. He violated the Constitution in appearance rather that in reality. If in the Victorian age a Cabinet should thus defy the House of Commons, the fact itself would tend to rally the nation to the support of the Commons, and the Cabinet would be defeated. It should be remembered that at the date

under consideration membership in the Commons was in large part determined by the exercise of arbitrary power in the hands of the King. Under such circumstances, it could not seem to be a grave offence arbitrarily to delay an election for a few months.

The contest between Pitt and the House of Commons lasted from December, 1783, until March of the following year. It is evident from all the facts that the triumph of the Prime Minister was also the triumph of the King over his chief enemies. It was, in a certain sense, a victory of the Crown over the House of Commons.

This contest between the Ministry of Pitt and the House of Commons is likewise of constitutional interest because of the special prominence which was given to the House of Lords. The King, as we have seen, was intensely hostile to the Coalition Ministry. He threatened to go to Hanover and leave England without a king, rather than submit to it. He used all his powers to defeat the measures of his Cabinet. He authorized Earl Temple to say to the Lords that whoever should vote for an Indian Bill which the Cabinet had introduced would be considered his enemy. The Lords understood this to mean that unless they voted as the King directed them to vote, their friends would be dismissed from office and they would also be punished in other ways. The Indian Bill was thus defeated in the Lords, and immediately upon the adverse vote the King forced the Ministers to resign. The Coalition Ministry was therefore driven from office by the will of the King and by a hostile vote in the House of Lords obtained by means of a royal threat. Though the Ministers still enjoyed the confidence of the Commons, they were forced to resign, and a new Ministry was formed under the leadership of Pitt, who, as stated above, defied the Commons for a few months and then, on an appeal to the voters, secured a large majority.

CHAPTER XL

PITT AND THE CABINET

DURING the reigns of the first two Georges, the Ministers were accustomed to agree upon measures in secret meetings apart from the King, and then to secure his formal approval. In the few cases in which the Cabinet differed from the King, the latter was induced to yield. George III. at no time really yielded to his Ministers. If he appeared to submit, it was that he might gain time to accomplish his object in some other way. During the earlier reigns the Cabinet usually acted together as a unit, or, if there were quarrels among the members, the King had little share in them. If George III. could not have a Premier who represented his views, he could always have some member in the Cabinet from whom to secure secret information, and he employed secret agents to thwart any Cabinet measures which he did not approve. Previous to the Ministry of the younger Pitt, George III. strove to govern not through the united responsibility of the Cabinet, but through independent administrative departments. This, as we have seen, was especially manifest during the Ministry of Lord North. If the King's policy could have been thoroughly carried into effect, one of its results would have been to bring to naught or to forestall the development of the secret Cabinet meeting.

The seventeen years of Pitt's Ministry undoubtedly

tended to the restoration of some of the features of the Cabinet system which had been effaced during the earlier years of George III. The circumstances of his induction into office placed him in an advantageous position in his relations to the King. He furnished to the King the only visible means of escape from the hands of the dreaded Coalition Ministry. Under such conditions George was not free, as he had before been, to use his full prerogative for thwarting the will of his Cabinet. Pitt was not a man of a character so impressive as his father, or of qualities so spectacular. Yet he had conspicuous ability as a politician and a statesman. He was manifestly a greater man than George III. He could not, indeed, remain in office without the permission of the King; but while he was in office, he could not avoid giving the impression that it was the Minister who was ruling rather than the King. A Cabinet meeting with Pitt at its head could not be other than an institution of importance.

While in opposition, Pitt had committed himself to various measures of reform, and when he came into office he felt bound to fulfil his pledge to reform Parliament. He accordingly introduced a bill for reforming the voting constituencies which provided for the destruction of many of the rotten boroughs and the distribution of their seats to the counties and to London. King George was decidedly opposed to these changes. The rotten boroughs had been his chief dependence in securing a subservient House of Commons. Pitt knew that it had been the habit of the King to use his influence to defeat those measures of his Ministers which he did not approve, and to forestall this result he sought the King's acquiescence before presenting the Reform Bill to the Parliament, and expressed a wish to receive a definite assurance that the royal influence would not be used to defeat the bill in the Houses. The King replied in a letter which manifested

his disapproval of the measure. He also denied the truth of certain rumours to the effect that he had used secret influence against Pitt's Ministry. Although promising not to use his influence to defeat the bill, he yet forewarned the Minister that the bill would be defeated; and the bill was defeated. According to modern constitutional notions a Ministry, after such a defeat, would usually resign or dissolve Parliament. In this case the Ministry simply gave up the bill and remained in office. The King's expressed views had here prevailed against a Cabinet measure. Yet it is a positive step in the direction of the recovery and the establishment of Cabinet responsibility that the Prime Minister made a definite issue with the King on the policy of using royal influence against the Ministers, and secured from him a promise that such influence should not be used.

Early in his reign, George III. had been afflicted with temporary insanity. In 1788, the malady returned. At this time the Whig opposition was currying favour with the Prince of Wales. There had been a feud between the King and his son. The Whigs saw no way of returning to power unless they could secure a monarch who would favour them. If the King should become permanently incapacitated, it would be necessary to set up a regency; and in the natural course of events the Prince of Wales would be made regent. It was apparently conceded by both parties that if the Prince should become regent, the Tories would be turned out of office, and the Whigs would be restored. Hence a bitter party contest arose over the regency. Fox, as leader of the Whigs, maintained that the "heir apparent" had an indefeasible right to assume the reins of government. This was a rather curious Whig divine-right theory growing out of the exigencies of party politics. With George III. as king, the Whigs were as hopelessly out of office as were the Tories dur-

ing the two former reigns. In this political emergency the Tories with Pitt as leader maintained that Parliament had a right to settle the regency. A bill was accordingly brought in, conferring the regency upon the Prince of Wales, subject to certain restrictions. First, the Regent should not be permitted to exercise the prerogative of creating peerages; second, he should not grant pensions other than such as were permitted by law; and third, the custody of the King should remain with the Queen. Before these arrangements could be carried into effect the King recovered.

While such a contest as this about the regency revealed the dominant power of the Crown over all other governmental agencies, yet the natural effect of such events was to strengthen the position of the Tory Ministry under the leadership of Pitt. In the next century, after the death of both Pitt and Fox, when the King had become permanently insane, Pitt's regency bill was revived, and, subject to its provisions, the Prince of Wales ruled as regent until his father's death in 1820. But before this time the Prince had himself become a Tory, and the Whigs secured no favour from him either as regent or, later, as king.

The French Revolution broke out in 1789, about the time of the recovery of George III. from his illness. On the national policy towards France the Whig leaders became hopelessly divided and confused. Burke's attitude towards the revolutionists was that of extreme hostility. Fox was as decidedly in their favour. Pitt, for a time, held to a position of neutrality towards France. Only a few years before, George III. had carried England into a most ignominious war against France, which involved the loss of the American colonies. After this inglorious experience it was but natural that the King should defer to his able Premier in matters of foreign policy. Un-

questionably the recovery of the independent position of the Cabinet was due in no small degree to the supreme importance of foreign affairs from 1789 to the battle of Waterloo. In the conduct of foreign affairs the King was an acknowledged failure, and the Ministers reverted to the habit of themselves formulating State policies and merely securing the King's assent thereto. The wars continued long enough for this habit to become fixed. It was not true, however, that the King consciously yielded any of his power to his Ministers, even in matters relating to the war with France. Upon that subject his views and those of his Ministers usually coincided with the preferences of the ruling classes in the nation. The Ministers were able and effective leaders, and they naturally drew to themselves the chief attention of the nation. Yet the King persistently insisted upon taking part in all the affairs of State, foreign as well as domestic. He was shrewd enough to see that his Ministers were receiving the larger share of public attention, and he grew more and more restive under the leadership of Pitt. When, therefore, an opportunity arose for ridding himself of the strong hand, George was but too glad to avail himself of it.

In connection with the expulsion of Pitt from office, at the end of the seventeen years of his premiership, there were events of the utmost importance to an understanding of the genesis of the modern Cabinet system. Early in his Ministry, Pitt had inaugurated a policy for the conciliation of Ireland, which had resulted, in the year 1800, in the fusion of the Irish Parliament with that of England. As a part of this Irish policy, a promise had been made of the removal of the political disabilities of English Roman Catholics. As early as 1793, the Catholics of Scotland had been relieved of various disabilities, and Catholics had been admitted to places in the English army. In

1795, the King became aware of a still more liberal tendency in the Cabinet towards Catholics and Dissenters, and strenuously set himself to resist it. His judges gave some support to his desires by giving an opinion that the King was restrained by his oath of office from giving assent to measures of relief to Catholics. Pitt had determined to signalize the union with Ireland by a bill removing all the political disabilities of Catholics. For several months the Cabinet had the measure under secret consideration. The King, through secret communication with the Ministers, was apprised of their plans, and openly declared himself unalterably opposed to the measure. Before receiving any official communication from his Ministers on the subject, he began to organize an opposition for their defeat. He let it be known that he would consider any man his personal enemy who should support the measure of his Cabinet. He even stated that the framers of such a measure might be brought to the gibbet. Before he had been consulted by his Ministers, he sent a letter to the Speaker, requesting him to "open Mr. Pitt's eyes" on the subject of Catholic emancipation. The Speaker undertook the task, and, for a time, it seemed that an understanding might be reached. Pitt, however, was advised by some of his Tory friends that it would be disastrous to the position of the Ministry to yield to the King under such circumstances; and upon mature consideration the Cabinet reached the decision that they would formally ask the King's advice on the bill, expecting, at the same time, that he would refuse to yield to their wishes.

Here was a case where the Cabinet was secretly maturing a bill. The King, having been made aware of their purpose through some unauthorized secret channel, attacked their policy before the Cabinet had asked his advice. When the Cabinet finally determined formally to con-

sult the King, they did so with the expectation that he would refuse to be governed by their advice. Upon the advice of Addington, a Tory unfriendly to Pitt, the King made answer to the Cabinet that a "principle of duty must prevent him from *discussing* any proposition tending to destroy the groundwork of our happy Constitution." The King and the Cabinet both held firmly to their positions, and Pitt resigned. Thus the Minister who had been inducted into office by the will of the King was likewise driven out of office by the same will. In neither case was the will of Parliament consulted or regarded.

From a superficial view the conclusion might be reached that, since the King appeared as powerful as ever there had been no constitutional progress during the Ministry of Pitt. But looking beneath the surface, a decided advance may be discovered. Upon Pitt's accession to power the government was in the hands of executive departments which were independent of each other, and each of which was manipulated and managed by the King, while the secret Cabinet meeting had disappeared. When he retired from office, the secret Cabinet had been restored. It is a matter of great constitutional importance that the issue had been definitely raised between the King and the Cabinet as to whether or not the Sovereign should be guided by the advice of his Ministers. Statesmen of all classes were compelled again to consider the ancient question of absolute government. When this question was rife, in the Stuart period, the battle ground was the House of Commons. But it had now become evident that both Houses of Parliament were subject to the control of the Executive through the exercise of royal prerogative. If the Ministers should likewise become permanently subject to royal dictation, there would seem to be no escape from absolutism.

The mere raising of such an issue and the introduction of such a discussion is of more consequence than any defeat or any victory over the immediate question in dispute. The creation of the Cabinet under Walpole coincided with the systematic control of the two Houses by royal prerogative. In the early part of the reign of George III., he controlled not only the two Houses by royal prerogative, but his Ministers as well. But, determined as he was, the King was overshadowed by the Minister whose long and able rule gave new life to the Cabinet as a force apart from the Monarch. The resignation of Pitt's Ministry upon an issue joined between the Cabinet and the King called attention to the Cabinet as the most hopeful means of escape from an absolute government.

It is of constitutional importance, also, that the secret Cabinet was restored by a Minister who refrained from the corrupt practices of the early Whig oligarchy. Pitt was consistently opposed to corruption. He relied upon the continued support of the ruling classes. The divisions in the Whig party, the support of Burke, and the exigencies of the war with France, all tended to made it easy for the Premier to maintain his position. The fact that the secret Cabinet was restored by a Minister who relied upon the opinion of a considerable number of the ruling classes tended to make the Cabinet itself the chief organ of public opinion. We shall see, further on, that it was the Cabinet, as an institution apart from the King, which was finally made the agency for effecting the great reforms that prepared the way for the democratic Constitution of the Victorian Age.

Mr. Addington, who advised the King in respect to the policy which led to the resignation of Pitt in 1801, was placed at the head of the new Ministry. The King manifested great pleasure upon his deliverance from the strong

government of the great Minister, and exhibited in his official utterances unusual affection for his new Premier. The nation, however, saw in the new Ministry a weak government, while the state of affairs on the Continent demanded vigour and power. It was possible to form a strong government by putting the Whig leaders in office, but the King stubbornly refused to form a Ministry of which Fox should be a member. Rather than do this, he preferred, in 1804, to restore Pitt to power. This led to a reconsideration of the question of Catholic Emancipation. Three years before, when this subject was under consideration, Pitt, upon being informed that the introduction of that measure by him had caused the illness of the King, had promised that he would not again bring forward the bill during the life of George III. But the King now demanded as a condition of his return to office, that he should pledge himself to abandon the project absolutely and forever. Pitt evaded the pledge, but exercised special care to avoid the question and restrained his friends from broaching the subject.

During Pitt's second Ministry, from 1804 to 1806, Addington appeared in Parliament at the head of a party of sixty or seventy members who openly posed as the "King's friends." They were so formidable that the Prime Minister felt obliged to conciliate them by admitting the leaders to places in the Ministry. The King continued to take an independent part in the government, using for the purpose secret or unauthorized agents. In less than two years Pitt died. Affairs on the Continent were in an alarming condition. Napoleon had just won his great victory of Austerlitz, and England remained the only nation of Europe capable of resisting his power. The emergency forced the King to call the Whigs to office. His antipathy to Mr. Fox disappeared upon more intimate acquaintance. Lord Grenville was made Prime

Minister. He too felt himself obliged to provide offices for the "King's friends," who were still under the leadership of Addington, now known as Lord Sidmouth. This, it will be seen, involved the union of Whigs and high Tories in the same Cabinet. The Whig Ministry, however, did not escape conflict with the King. A question arose about the supervision of the army, and the King put forward the astonishing claim that the Cabinet had no right to interfere with the control of the army. In his opinion, control of the army rested directly with the King, through the commander-in-chief. Lord Grenville got over this point by drawing up a minute stating that no changes would be effected in the management of the army without the King's approval.

At this stage of the history whenever a question was raised involving conflict of authority between the Cabinet and the King there was an inevitable tendency to transfer authority from the King to the Cabinet. This was true whoever won the victory as to the immediate question raised. Such a tendency grew out of the logic of the Constitution. There had been two hundred years of debate, all of which tended to establish the conclusion that England was not governed by an absolute despotism. In the earlier part of this conflict it was supposed that if only a government by the use of the two Houses of Parliament should be attained, absolutism would thus be avoided. In the later years of George III. it had become evident that this was a mistake. Parliaments had become accustomed to submit without resistance to royal dictation. The conclusion seemed more and more evident that, if the King was to be restrained at all, it must be through his responsible Ministers. Conflict between the new Whig Ministry and King George resulted in its resignation. In secret Cabinet meeting the Ministry matured a measure which involved a further removal of disabilities

from Catholics and Dissenters in the army. This measure was submitted in the regular way by the Cabinet to the King for his approval. The Ministers understood that the King gave his assent, and they accordingly introduced it into Parliament. Whereupon the King manifested violent opposition to the bill, and his friends in the Ministry, who had acted with the Cabinet, openly opposed the measure in Parliament.

The Tory party saw in this conflict between the Whig leaders a chance to regain office, and a vigorous canvass was made to this end. The King was induced to put forth a statement to neutralize the claim of the Cabinet that he had given his assent to the bill before it was presented to Parliament. The Cabinet saw that they were reduced to the alternative of withdrawing the bill or incurring defeat, and they determined upon its withdrawal. But the formal announcement to the King of their action was accompanied with a remarkable minute of the Cabinet, in which the Ministers declared that in case a petition should be presented to Parliament for the emancipation of Catholics, they reserved the right to act upon it in accordance with their own convictions; and they also made formal declaration of the right to submit to the King, from time to time, such advice as they should deem fit. This threw the King into a furious rage, and he demanded that the minute should be withdrawn and that the Ministers should submit a written pledge that they would never under any circumstances propose to him further concession to Catholics, or offer him any advice whatever upon the subject. The Whig Cabinet refused to accede to this demand, and George required their resignation.

All these facts are of great interest to one who would understand the genesis of the modern Cabinet. A number of the characteristics of this struggle strongly sug-

gest a return to the ancient constitutional grooves. The two Houses of Parliament had again become mere appendages to the Crown such as they had been for centuries before the great Stuart debate. There was no longer any thought of looking to Parliament as a protection against absolutism. And after all the discussion of two hundred years, and after all attempts to use one legal institution as a check upon other legal institutions the real government was again becoming simple, personal, and undivided. In the case immediately under discussion we see a Whig Cabinet which had been induced to admit to its membership certain whilom Tories known as the "King's friends." We see also that this motley Ministry reached and preserved for a time what may be called a corporate union upon most of the political contentions of the day; and such was the general conviction of the necessity for united harmonious action, that, for the time being, even George III. gave his assent to a measure which he abhorred, removing the disabilities of Catholics and Dissenters. It is true that in this particular instance the corporate union of the opposing elements in the Cabinet carrying with it the acquiescence of the Crown was temporary and ineffectual, yet it pointed toward that feature of the Constitution which a little later became well established and permanent.

It will be remembered that during the long rule of Walpole the Cabinet was a constant scandal and reproach. The Prime Minister was continually under the necessity of denying or explaining away the fact that he was at the head of a secret, unauthorized body which was responsible for the government of the country. But before the coming in of the last Whig Ministry of George III., the secret Cabinet with the Prime Minister at its head had come to be openly recognized as the only rightful adviser of the King. When the Sovereign sought advice from men out-

side the Cabinet or from men within it who were disloyal to corporate Cabinet responsibility, he was looked upon by leading statesmen in both political parties as a violator of the Constitution. The secret Cabinet of Walpole with its sense of corporate responsibility had won, or was winning, complete political or constitutional recognition, while all other advisers of the Monarch were condemned as unauthorized, injurious, and unconstitutional.

The dismissal of the Whig Ministry and the formation of a Tory government by royal dictation gave rise to an important debate in the House of Commons. The debate was upon a resolution introduced by Mr. Brand "that it is contrary to the first duties of the confidential servants of the Crown to restrain themselves by any pledge, expressed or implied, from offering to the King any advice which the course of circumstances may render necessary for the welfare and security of the empire." This was of the nature of a direct censure upon the conduct of the King. A debate at such a time over such a question could not be other than edifying. It was old familiar ground that the King cannot be punished, that whatever a king does he must do through a minister, and that the minister must assume the responsibility and bear the punishment for any wrong-doing. It appeared that the King had driven his Ministers from office. In this act he must have had advice. Mr. Percival, who was Chancellor of the Exchequer in the new Ministry, denied that the King had conferred with any secret advisers before he had dismissed his former Ministers. If this was true, the King had done a thing which, according to the theory of English law, was impossible. In any case, if he had acted upon advice, it was from a secret, unauthorized source which tended to the subversion of the government. Members of the Privy Council who formed the Cabinet were regarded as the authorized

advisers of the King. It was urged that the Privy Councillors are bound to advise the King on all matters pertaining to the welfare of the State. If a Privy Councillor should pledge himself to refrain from advising the King on any matter that might become of interest to the State, he would thereby violate his oath as a Privy Councillor. Some of the speakers went so far as to state that if the Ministers should make such a pledge as the King demanded, they would be guilty of a high crime and misdemeanour.

There was one item in the Cabinet minute which was severely criticised. That was the intimation on the part of the Cabinet of an intention to support a measure which might come before Parliament by petition, but which, through deference to the King's wishes, the Cabinet had itself withdrawn from Parliament. This, it was claimed, would have the effect of placing the King and his Ministers in open conflict before Parliament, and it was held that the attitude of the Ministers was unconstitutional. The King's Ministers ought not to place the King in a position in which, through his chosen advisers, the Cabinet, he should in Parliament seem to favour a measure, and then, through the advice of the same Ministers, should exercise the veto against the same measure.

This point in the debate throws much light upon the process of eliminating the formal veto power from the prerogatives of the Crown. The elimination of the veto was involved in the working out of the doctrine that the King must perform all his official acts through his Ministers, together with the now recognized theory of united Cabinet responsibility. The Monarch must not employ secret or unauthorized agents. He must act through those members of the Privy Council who constitute the Cabinet. These being the sole advisers of the King, Parliament

and the nation have no difficulty in fixing the responsibility for his acts. According to this theory the King, through the Cabinet, recommends legislation, and, having thus signified approval, he gives his final sanction to the measures adopted as a matter of course. According to this theory the Cabinet should direct and control the action of the two Houses. Whatever measure the Cabinet promotes or permits is assumed to be likewise promoted or permitted by the King; because, according to the forms of law, the Cabinet is simply the King's advisers. For the King to refuse to sign a bill after it had passed the two Houses would be to refuse to give effect to a measure which, through his Ministers, he had already recommended or approved. The debate over the minute of the Whig Cabinet showed plainly that the logic of the modern Constitution had become clearer. It showed likewise that neither the King nor the Cabinet was in the habit of acting in strict accord with the theory of the Constitution as it then existed.

At the end of the debate in the two Houses over the conflict between the King and his Ministers, George dissolved Parliament, and sought at the hands of the voters a vindication of his position. He obtained a triumphant victory, and again found himself in harmony with a Tory Ministry. This triumph was won by an appeal to the old anti-Catholic prejudice which had been available for such purposes ever since the reign of Elizabeth. It is nevertheless true that the ultimate effect of such a contest was in the direction of a transfer of power from the King to the Cabinet.

In 1810 George III. became permanently insane; his reign may, therefore, be said to end at this time. His rule had already been longer by four years than the time covered by the reigns of the first two Georges. Those reigns were characterized by the dominance of royal pre-

rogative exercised not by the King, but by a secret Cabinet; whereas that of George III. was characterized by the continuance of royal prerogative exercised by the King, often in direct conflict with the wishes of his Ministers. Yet before the stubborn will of George III. ceased to dominate English politics, the controversy had arisen which was to result in the transfer of the royal power, first to the Cabinet, and finally to the voting constituency of the nation.

CHAPTER XLI

THE CABINET UNDER GEORGE IV.

THE Prince of Wales was made regent in 1811. As it had been understood that the Prince was a Whig, it was generally expected that the Whigs would be called into office. It seemed at this time to be a settled principle of the Constitution that a Ministry whose politics differed from those of the Monarch could not remain in office. For fifty years George III. had ruled through Tory ministers whom he approved, or through unauthorized "King's friends." The Regent began his rule by consulting with the leaders of the Whigs. He became incensed at Earl Grey, and did not like the haughty bearing of other Whig leaders. In anticipation of the coming Whig rule a vote was carried in the Commons favouring a change of ministers. Certain Whigs were invited to join the Tory Ministry, but this they refused to do. Whereupon the Regent determined to continue the Tory Ministry, and the pliable House of Commons was reconciled. Lord Liverpool was made Prime Minister in 1812, and continued in the office till his death in 1827, when he was followed by another Tory Premier. There was thus an uninterrupted Tory Ministry throughout the regency and kingship of George IV.

It is interesting to observe that one of the questions which led to the rejection of the Whigs by the Regent was a dispute about the places in the royal household.

The Whigs insisted upon having the King surrounded by persons who would not act against them. This they may be supposed to have learned from the various failures of Whig Ministries in the reign of George III. This issue was again raised when Robert Peel attempted to form a Ministry at the beginning of the reign of Victoria.

During the nineteen years of the rule of George IV. as regent and as king there was a growing dissatisfaction in the nation. Resolutions favouring a reform of the Parliament were frequently introduced. George IV. had, as a Whig, previous to his regency, been supposed to favour the extension of religious liberty to Catholics, but, as regent and as king, he was as earnest in his opposition to those measures as his father had been. Yet, in 1829, the year before his death, a Tory Cabinet forced him, against the most violent objections, to give his assent to the bill for Catholic Emancipation. The manner of carrying this act of justice, which had been delayed for two generations by the obstinacy of kings, was an important object lesson in respect to the modern doctrine that the monarch must act upon such advice as may be determined upon by the Cabinet.

An earlier dispute had arisen in respect to which the King was forced to make concessions. A bitter quarrel long existed between the Regent and his wife. During the regency, Caroline remained on the Continent. By the Regent's own order her name was omitted from the Litany, and he demanded of his Parliament the granting of a divorce. Canning left the Cabinet rather than be responsible for the King's proceedings against his wife. When the Regent became King, Queen Caroline came to England and demanded her rights. The King forced his Cabinet to proceed with the bill for divorce until there arose such an agitation in the nation on the Queen's behalf as threatened a revolution. Both the King and

his Cabinet were compelled to recede from their position and to make terms with the Queen.

It will be remembered that in 1780, when George III. had carried England into a disastrous war which was threatening the loss of the colonies, a resolution was carried in the Commons to the effect that the power of the Crown was increasing and that it ought to be diminished. In 1822 Brougham introduced a resolution declaring that the influence of the Crown was destructive of the independence of Parliament. In his speech in support of his resolution, Brougham asserted that the power of the Crown had increased since the passage of the Dunning resolution in 1780. Such a statement ought to be taken with a grain of allowance. The speaker was making a political argument, and was under the ordinary temptation to state his case strongly. Yet up to the date of the Brougham resolution it is difficult to fasten upon an act which indicated any loss of power on the part of the Crown. We can say that controversies arose which, in the light of what happened later, tended to diminish that power. Yet, in the case of nearly every contest between the King and his Cabinet, the Monarch won a temporary victory over his opponents. The Queen had indeed compelled her husband to recede from his position, but the dispute involved the rights of royal persons only. It was not until several years after Brougham's resolution had been brought forward that the King was forced against his will to sign the bill for Catholic Emancipation. With the death of George IV., in 1830, the seventy years of almost uninterrupted Tory rule came to an end.

As stated by Professor Dicey, when the will of the Monarch has been the chief factor in the choosing of Ministers, royal prerogative has added to the power of the Crown. Certainly during the reigns of the last two Georges, royal prerogative exercised by the free will of

the monarchs did, for the most part, determine the selection of Ministers, and royal prerogative exercised in the same way did give to the Ministers their needed votes in Parliament. During the reigns of the first two Georges, Ministries were made up, not so much by the free and independent will of the Monarch as by the dominant faction in the Whig party. During this period a secret Cabinet was formed and became institutional. At the death of George IV. this same secret Cabinet was still preserved and became the mouth-piece of the nation in the subjection of the Monarch, and in the subjection of the House of Lords to the will of the nation. Before attempting to trace the development of the Constitution during and after the great reform of 1832 it is desirable to show how the state of political parties, the industrial situation, and the growth of public opinion had made reform inevitable.

CHAPTER XLII

POLITICAL PARTIES PREVIOUS TO 1832

MANY of the relations which now subsist between the Cabinet, the Crown, and the two political parties were wanting previous to the Reform Act of 1832. Until an independent voting constituency was created, parties could not be held together by common beliefs and opinions. They were controlled rather by mere factions which contended for the spoils of office.

The distribution of the spoils of office has never been a peaceful and agreeable business. There are sure to be those who think that they do not get their full share. During the entire period in which Cabinets were maintained and majorities were secured by the use of patronage there were constant feuds and divisions in the political parties. The long rule of Walpole was terminated by factions in the Whig party, and the continuance of such differences enabled the later Georges to gain easy victories over the Whigs. There were also factions among the Tories. Lord North, after years of abject submission to the will of the King, led a section of the Tories who united with a section of the Whigs under Fox, and for a brief space forced upon the King a hated Coalition Ministry. Burke greatly strengthened the Tory Ministry of Pitt by leading a section of the Whigs to its support. Canning was all the time on the point of deserting the Tory party during the last twenty years of its rule. When he was

made Premier, in 1827, the Duke of Wellington and other leading Tories refused to join his Ministry, and the followers of Canning were ready to join the first Whig Ministry which was formed after the death of George IV.

The prevalence of these divisions made it impossible for Cabinets to hold together according to the modern ideal, and rendered necessary frequent readjustments in Ministries. In the contests between the Cabinet and the Crown during the later years of the reign of George III. there was developed a strong sense of Cabinet unity and responsibility, though its members were not yet felt to be all mutually responsible for each other, in the modern sense, and so related as to stand or fall together. Walpole having been defeated by a vote in the Commons in 1742 resigned office, while his associates remained in the Cabinet until, twenty years later, they were driven out by George III. For a hundred years from that time we note gradual changes in the position of the Cabinet, but the modern notion of the corporate responsibility of the entire Cabinet has been perfected only since the reform of 1832.

During the first ten years of the reign of George III. it was his declared policy to choose "good men" as his Ministers, regardless of their party affiliations. It was observed, however, that a good man who was a Tory was more likely to receive favour than one who was a Whig, though the Whigs were at this time too strong to be entirely excluded from the royal service. But a Ministry which was wholly subject to the King's will was known as a Tory Ministry, and George no longer looked to the Whigs for officers or pensioners. So long as the King governed according to his own notions he entirely dispensed with the secret Cabinet meetings. Each minister was directly responsible to him. The government was administered by means of departments independent of one another. It was thus a personal government of the Mon-

arch, who used the royal prerogative to carry elections and to secure votes in Parliament.

From the standpoint of the Whig doctrines, the rule of George III. in the time of the Ministry of Lord North seemed manifest proof of the sacrifice of all that had been gained by two hundred years of contention. The case, too, looked all the more hopeless because the ruling classes in the nation were in accord with the King. The King was in possession of the agencies for harmonizing the two Houses and the constituencies, — a power which for the two generations previous had been wielded by the great Whig families. Walpole's political machine had now passed into the hands of George III. The Whig party was humiliated and placed in a hopeless minority. The Tory party had come after long waiting into full possession of the government. From the Whig standpoint the only escape from absolutism was through an appeal from the government of the King to the unrepresented English nation. The Englishmen who lived in America took the first brunt of this conflict in the case of the Stamp Act of 1765; and the early resistance of the American colonies coincided with popular uprisings in England encouraged by Whig leaders.

The Coalition Ministry of 1782 is of interest not alone for the contribution it furnishes to the study of the relations of the Crown to the Ministry and to the two Houses, but also because of its relation to the political parties. It is impossible to maintain healthy party life without an independent voting constituency to which the parties may appeal. The distribution of patronage naturally promotes faction. Within about a year after the resignation of Lord North and the formation of a Whig Ministry, on account of divisions in the Whig party and the manipulations of the King, no party was strong enough to command a majority in the House of Commons. This was a state

of affairs which the King was wont deliberately to create in the earlier years of his rule because it enabled him to combine in the Ministry men from different factions in such a way as to control their action, or, at least, to prevent them from uniting in a secret Cabinet and enforcing a policy which he disapproved. But in 1783, the King was astonished when a section of the high Tories under Lord North united with a section of the radical Whigs under Mr. Fox and thus gained control of the House of Commons. This union of the extremists in opposing parties was, however, a rather natural result of the King's policy of selecting the officers of government from "good men" regardless of party.

The people were scandalized to see men united in the Ministry who had been bitterly opposed to each other only a few months before, and even the King was now induced to profess an abhorrence of such an unholy alliance. In order to dislodge this Coalition government, an agitation was started against it which continued for several months. In this the King took an active part. The movement was based upon the high moral assumption that it was *wrong* for Tories and Whigs to be united in the same Ministry. The public was led to believe that, for the spoils of office and to gratify worldly ambition, these statesmen had sacrificed their political principles. This, it will be observed, squarely contradicted the earlier claims of the King. It was his boast that, regardless of party, a king would make use of suitable men to fill the offices of State. The campaign which resulted in the humiliation and defeat of the Coalition Ministry may be held to have been an important step in fixing in the minds of the people the conviction that there is a real difference between a Whig and a Tory, and that to unite leaders from the two parties in the same Cabinet is inconsistent.

This campaign against the Coalition Ministry led to

the triumph of Pitt, whose Ministry restored the secret Cabinet to a place of importance, and raised and defined issues between the Cabinet and the King which tended to transfer power from the King to the Cabinet. The same Ministry was also especially important because of its relation to the political parties. Pitt was not a Tory by birth nor by political convictions, but rather by accident or by circumstances. He had been passed by in the formation of the Whig Ministry of 1782, when he might have been admitted, but became a member of the Shelburne Cabinet which the Coalition Ministry drove into opposition in 1783. One could oppose the Coalition Ministry without defining his party preferences, and Pitt was induced to take the leadership in that opposition. The Coalition agitation was, however, unfavourable to the idea of a mixed Ministry. The King and Pitt were at one in their desire to overthrow the Coalition. By the force of these circumstances Pitt found himself at the head of a government, the great body of whose supporters were Tories. Yet he never professed to change his political principles. He still strove to promote reforms which he had advocated as a Whig; and he led into the Tory party many men of like opinions with himself.

Before the Ministry of Pitt, Dissenters had been Whigs. Some of them now followed that leader into the Tory party. Nearly all of the commercial and manufacturing classes had likewise been Whigs. Pitt won the confidence of these classes also to a remarkable degree. The Tory party could never, after his Ministry, be quite what it had been before. It ever after contained a larger share of the independent statesmen of the country. Some authors have gone so far as to maintain that the relative positions of the parties changed places during this period.[1]

[1] For discussion of the position of parties, see Lecky, *England in the Eighteenth Century*, Vol. I., p. 2, also p. 512.

It is difficult, however, to make good such an assertion. Although it was a Tory Ministry which abolished the Test Act and the Corporation Act in 1828, it remained true that the majority of the Dissenters and of the trading and manufacturing classes held with the Whigs, while a majority of those opposed to change in Church and State remained with the Tories.

A transfer of population and a reorganization of industries took place between 1750 and 1832 which greatly affected political issues, and had a marked effect upon political parties.[1] The value of coke in the reduction of iron ore was discovered about 1750. Coal and iron are found in the Midlands and in the north of England. In the absence of cheap transportation, the location of the workers near the heaviest materials for manufacture was a necessity, and the development of iron manufacture was accompanied by a transfer of population from the south of England to the north. The farm labourer became a worker in the factory or the mines. The case for parliamentary reform was strong even before the transfer of population and the changes of occupation. But with the creation of great manufacturing centres wholly without representation in Parliament, while the forsaken boroughs were left quite vacant, or with but a very small population, though they still sent two members each to Parliament, the case for reform was greatly strengthened.

The wonder is that the government could have so long withstood the demand for reform. The Whig "machine," which had been created and used by Walpole, was anything but an agency for reform. Walpole's chief endeavour had been to keep the country quiet. He would let no disturbing agitation arise. It is true that some of the Whigs, — notably the elder Pitt, — who were active in driving Walpole from office, held views adverse to

[1] Toynbee, *Industrial Revolution*, Chap. II.

his on questions of reform; yet these were not able to control the party. The Whigs expected the Dissenters who had votes to cast them for their candidates; yet they would not repeal the offensive acts of Parliament passed in the persecuting days of Charles II. The Walpole plan of keeping things quiet controlled the Whig party in its domestic policy till George III. drove them from power.

The party had done nothing which was fitted to win the support of the unrepresented masses of the people. The original Whig programme was to limit the Monarch, and to bring to naught the Tory claims of the divine right of kings. It did not include the extension of political power to the unrepresented English nation. The Whig leaders did as barons and bishops had done in earlier times: they promised favours to discontented classes in order to get the physical force necessary to accomplish their ends. When the Stuart family was excluded from the throne, and kings were installed who left the government to the Whig aristocracy, the original Whig programme had been fulfilled, and no new one was formed. The negative policy of the Whig aristocracy, which followed the accession of the house of Hanover, tended to render the party unpopular. The first Georges did not win the favour of the people. If the deposed Stuart family could have furnished a candidate for the throne who was not personally objectionable, George II. might have been easily removed. George III., however, was, apart from his political opinions, at least a worthy man. He was also an Englishman, and he certainly won the lasting regard of a large part of the nation.

It was not until the Whigs had been driven into opposition by the revived Tory party under the leadership of George III. that the reforming portion of the party became its controlling element. The triumphs of Wilkes

were due in large part to the patronage of Whig leaders. Wilkes won the last of his great triumphs in 1774, just at a time when the King and the Tories were becoming absolute in the control of the government. These triumphs did not, however, turn to the immediate advantage of the Whig party. Wilkes was a successful leader of mobs, but he was not a statesman. Two years after Wilkes was in undisputed possession of his seat in the House, the Whig leaders were so discouraged that they seceded from Parliament. The Wilkes incident proves that there was sufficient discontent in the nation to drive the King and his party from power, if only it had been organized and utilized. The Whig party could not lead the mob. Wilkes could lead it with telling effect only so long as he was persecuted, and so long as he held up to view a tangible result to be attained; for the English mob does not usually take effective action until it has a stopping-place in view. The seating of Wilkes and the securing to printers of the right to publish parliamentary proceedings were convenient stopping-places. For the accomplishment of these objects the mob was irresistible. The Whig leaders knew that England was being governed by the will of the King; and they knew that in former reigns government had been according to the will of the Whig aristocracy. It was not possible to get the English mob to take a lively interest in this distinction.

The difficulty of effective political leadership was undoubtedly increased by the fact that the population was shifting. The physical power which was gathering in mine and factory was not organized as a political force. Wilkes secured his most effective mobs in London and the adjacent region to the south — the ancient haunts of riot and revolution. The London mobs were supported by demonstrations in other parts of the country, but they

received little help from the people in the new centres of population. A few years later the capitalist classes in the new industrial centres were quite content with the policy of Pitt and the Tory Ministry. The long wars with France created a market for goods. Merchants, contractors, manufacturers, and the wealthier classes generally, grew richer as a result of the wars. These were content to support a government which suppressed riots at home and prosecuted the war abroad. Beginning with the Ministry of Pitt, the Tory party was the gainer because of the almost undivided support of the wealthy classes. The poor, the wage-earners in the new industries, who were the greatest sufferers from the wars, being without organization and without leaders, could only express their views by brutal riots which were easily suppressed.

It was something new in English history to see the influential classes so nearly united against the poor and the helpless as was the case for twenty years from the beginning of the French Revolution. It had been of the very essence of the constitution of English society that the powerful classes should be divided, and that the rival forces should become accustomed to gain support by promising favours to the less fortunate. The first effect of the French Revolution upon the English government was to unite the powerful classes. This brought about, for the time being, a state of affairs in England similar in kind but not in degree to that which produced the Revolution across the Channel. In France, society had divided horizontally, and the burdens were shifted upon the helpless under-stratum until the day of vengeance was matured. In England, a powerful class had always been pitted against other powerful classes, and the less fortunate had not been hopeless because they had always enjoyed the favour of some of the stronger

orders. The vertical division of society did not utterly crush the lowest ranks.

It was forty years after Mr. Burke had joined the Tory party and had become a supporter of the policy of repression, before a popular movement became strong enough to force upon the government a new political policy. Except for a few months, this was a period of continuous Tory rule. Yet the Whig party was not disbanded. Many of the hereditary Whig families remained faithful, and the Whig opposition exercised at all times a modifying influence upon the government. Certain doctrines became known as Whig doctrines. For example, the party became committed to measures for removing disabilities from Dissenters and Catholics. The Whigs were in favour of the control of the King by the advice of his Cabinet; that is, they were opposed to the irresponsible action of the King through secret, unauthorized advisers. And, above all, the Whigs, while out of office, became thoroughly convinced that a reform of Parliament was desirable. Pitt, as we have seen, was liberally disposed in respect to many of these questions. It was only from deference to the King and from sympathy for his unfortunate condition that he had ceased to urge his measure for the relief of Catholics. Other Tories formed habits of independent leadership. It was a Tory Ministry that finally removed from the statutes the measures for persecuting Dissenters. It was likewise a Tory Ministry that forced an unwilling King to sign the measure for Catholic Emancipation; and a strong contingent of Tories was ready to join the Whig Ministry in the final demand for the Great Reform.

CHAPTER XLIII

POPULAR MOVEMENTS PREVIOUS TO 1832

THE demand of the Whig Cabinet for the reform of Parliament was strongly enforced by the discontent among the poor. The industrial changes of the previous half-century, the long wars, the recurrence of financial crises, and the wretched system of poor-law administration, had all tended to create a turbulent, suffering class. For a time after the French Revolution, the consciousness of the presence of a dangerous amount of poverty and misery tended to unite the ruling classes in the support of drastic measures for suppressing agitation. But before the death of George IV. unrestrained political agitation had broken forth. The Reform Act was in no sense designed to furnish direct relief to the poor. It did not propose to extend the franchise to any considerable class of wage-earners. Nevertheless, it was a popular movement and received the support of the labourers.

The Great Reform is best understood as one of a series of popular movements extending over a century previous to the passage of the act. If the people of England had been content to live under such a form of government as that of the first four kings of the house of Hanover, they would in time have been compelled to live under a much worse government than that which they had endured while the Stuarts ruled. Scarcely had the government been fully composed under the leadership of Walpole when

there began a great religious revival under the leadership of the Wesleys. This movement profoundly affected the masses. It schooled thousands of the poorest and heretofore the most hopeless of the people in habits of union and coöperation, and we may believe that it had much influence over the more distinctly political agitations which followed.

The placing of the elder Pitt at the head of the Ministry in 1758 was the result of a popular excitement. A little later arose the custom of petitioning the government for a redress of grievances. A cider tax was imposed in 1763, and was the occasion of a popular opposition which continued for three years, when the obnoxious tax was removed. The agitations in which Wilkes was the central figure extended over about ten years. George III. had thrust the Whig party from power and had humiliated its leaders, yet in the midst of his triumphs he was compelled to bow to the demands of a dissolute adventurer who appeared as a leader of the people. At the same time the right to publish parliamentary debates was secured.

In 1780 a meeting was held in the city of York, attended by clergymen and gentlemen of distinction, for the purpose of inaugurating an agitation in favour of retrenchment in expenditures. This was followed by similar meetings elsewhere. Corresponding Societies were formed for the purpose of keeping alive popular feeling in favour of reform in government. In 1792 the Society of the Friends of the People was organized for the purpose of promoting parliamentary reform.

In the earlier years of the reign of George III., Burke had given effective support to the movements for reform. Pitt had likewise aided the cause. But when the Society of the Friends of the People was organized, Pitt was at the head of a Tory Ministry, and Burke had become the

most effective alarmist in England. By a series of repressive measures popular agitation was arrested. If the Ministry of Pitt was somewhat successful in restraining the will of the King, it was even more effective in restraining the will of the people. Popular agitation was brought to an end by force. So complete was the repression that there occurred no great political uprising of the masses with important political consequences until the movement which carried the Reform Bill.

It is remarkable that there should have been previous to the Great Reform so long a period of comparative freedom from popular disturbance. It was as if by common consent the people had determined to convince Burke and his disciples that they were not Frenchmen. They patiently endured most oppressive laws. Men a thousand times more meritorious than Wilkes were cruelly punished because they dared to resist oppressive measures; yet scarce a ripple of popular protest was manifested. If this patient endurance had been greatly prolonged, the people would have convinced the world that they had also ceased to be Englishmen. The agitation for reform was, however, thoroughly English. A definite goal was set up, and the nation moved irresistibly towards that goal.

Macaulay may be an unreliable historian; but in the days of his youth he was at least a reliable sentimentalist; and the sentiments to which the young Macaulay gave utterance in the House of Commons during the debates on the Reform Bill are themselves first-class history. In his speech of December 31, 1831, he said: "All that I know of the history of past times — all the observations I am able to make on the present state of the country — have convinced me that the time has arrived when a great concession must be made to the democracy of England — that the question whether the change be in itself good or bad has become a question of secondary importance." Facts

from the history of the French Revolution, which Burke had used so effectively to suppress agitation, Macaulay used in this speech as warnings to the Opposition of the danger in resisting the demand for reform. He assured his hearers that the yoke which Mr. Pitt had fastened upon the necks of the Englishmen of the previous century could not be fastened upon the men of the nineteenth century. Strafford and Laud and Charles I. were all sad examples of men who had endeavoured to govern the men of one century as if they had been men of the previous century. The reform was inevitable. These are among his closing words: "You may make the change tedious; you make it violent; you may — God in his mercy forbid — you may make it bloody; but avert it you cannot. Agitations of the public mind so deep and so long continued as those which we have witnessed do not end in nothing. In peace or in convulsion, by the law or in spite of the law, through the Parliament or over the Parliament, reform must be carried."

CHAPTER XLIV

THE GREAT REFORM

THE modern democratic Constitution of England may be said to date from the passage of the Reform Act of 1832. The Duke of Wellington, speaking in the House of Lords on the 17th of May of that year, and referring to the threat of the creation of new peers, by which the opposition to the act in the Lords was overcome, used these words: "If this be a legal and constitutional course of conduct, there is no doubt that the constitution of this House and of this country is at an end." In a speech delivered a month earlier against the bill, the Duke declared that the measure would lead at once to a complete democracy. Yet the act was not in itself a democratic measure, and did not lead at once to the full democracy. Nevertheless the passage of the act involved such a shifting of the dominant forces of the government as to render the development of democracy easy and natural. It removed from the rotten boroughs and the over-represented districts one hundred and forty-three members of the House of Commons. Sixty-five of the vacancies thus created were filled by distributing the seats to counties, and the remainder were distributed to unrepresented towns and cities. The act extended the franchise to lease-holders and copy-holders in counties and to tenants-at-will paying fifty pounds a year. In towns the franchise was extended to house-holders paying ten pounds a year. This

still left the great body of the wage-earners in town and county unenfranchised. The act deserves the name of the Great Reform, because in a certain sense it involved the democratic measures which have been since passed and which are yet to be passed.

The Act of 1832 involved a radical change in the relations of the Cabinet to the Crown. This proposition requires elucidation, since many facts may be alleged in support of the view that nothing essentially new was introduced into those relations at that time. All will admit, however, that something really new was introduced when George I. ceased to attend the Cabinet meetings, leaving Walpole and the other leading officers in the Ministry to form the habit of determining upon the different items in the policy of the government before securing the formal approval of the King. If the custom followed by the first two Georges of giving assent to whatever their ministers advised had lasted to the time of the Reform Act of 1832, it would be impossible to make good the contention that that act involved an important change in the relation of Cabinet to Crown. But we have seen that the custom did not endure.

George III. employed what Burke called the double Cabinet system. When the King lacked ministers who were willing to do his bidding, he used a "Cabinet" of his friends to thwart the purposes of the Cabinet of ministers. The later Georges for the most part had their own way in matters of government. They acted through the Cabinet of ministers when these were subservient, and when they were not, they acted through the "King's friends." It is often asserted that the kings thus violated the Constitution. They did indeed violate what has since 1832 been accepted as the Constitution. They likewise violated what their political enemies maintained to be the Constitution of that time. Yet George

III. and George IV. had for the most part the loyal support of the English nation. There is much more reason for saying that the sort of government which they maintained received the approval of the nation than that the government of the Whig oligarchy received such approval during the time of the first two Georges. The Whig government previous to the Ministry of the elder Pitt was notoriously unpopular and tended to grow more and more so. The later Hanoverians simply gained possession of the "machine" which the Whig oligarchy had created and used it to their own advantage. They were entirely constitutional in their relations to Parliament. The old battle between the Stuart kings and the Parliament had been brought to an end, leaving the outward form of victory with the two Houses, while the substance remained with the King. In the time of George III. the nation had apparently rejected the sort of Cabinet government which Walpole had introduced. No national enthusiasm was ever aroused over a proposition to restore the Whig oligarchy to power.

When the issue was joined between the Ministry of the younger Pitt and George III., in 1801, there was little general interest in the contest. Likewise in the similar contests a few years later between the Whig Ministry and the King, there was no indication that the nation was favourable to the Whig contention. The King then appealed to the country and secured a subservient Parliament, and his easy victory over the Cabinet in these contests served to convince the statesmen that under the existing Constitution they were doomed to perpetual submission to the will of the King. When, ten years before the Reform Act, Brougham started an agitation against the power of the Crown, it awakened little enthusiasm either in Parliament or in the country. It was not until a united Cabinet made

itself the mouth-piece of the unrepresented nation in its demand for an extension of the franchise, that a method was discovered of permanent deliverance from the power of the Crown.

The opposition of King William IV. to the Reform Act tended directly to the subordination of the power of the Crown to the dictation of the Cabinet. The Whigs had been contending for thirty years that the King should act upon the advice of his Cabinet ministers. When a conflict arose between these two powers, it was, according to this newly developed Whig theory, the duty of the King to yield. There is reason to believe that Lord Brougham really enjoyed the situation when it was evident that the Cabinet was unanimously determined upon appealing to the country upon the rejection of the Reform Bill by the House of Lords in 1831, and when it was equally clear that the King was opposed to the dissolution. At this time occurred the supposed conference between the King and Lord Brougham, then Lord Chancellor, which is so entertainingly reported by Mr. Bagehot. The Cabinet had concealed its intentions from the King until the preparations for the ceremony of the dissolution were completed. Then the Prime Minister, accompanied by the Lord Chancellor, went before the King to notify him that his presence was instantly required to give effect to the advice of the Cabinet. The Lord Chancellor had even ordered the King's Life Guards to be in readiness. Technically that was a treasonable act, and when the King reminded his lordship that he had committed an act of high treason, Brougham replied that he was perfectly well aware of that, and was quite willing to bear in his own person all the blame. He nevertheless admonished the King, as he valued his crown and the peace of his realm, to follow the advice of his ministers. There seems to be some

doubt about the exact accuracy of this story, but there is no doubt whatever in respect to the constitutional principle which the story is fitted to illustrate. From that time forth it was fully settled that the Monarch must give effect to the advice of a united Cabinet supported by the nation; that is, by a majority of the voters.

The question may still be asked, How does the yielding of the Monarch to the advice of the Cabinet since the Reform Act differ from the yielding of George I. and George II. to the advice of their ministers? To this it may be replied that, with a few exceptional incidents, there was no conscious yielding to ministerial dictation on the part of the first two Hanoverians. George I. and George II. both believed themselves to be ruling according to their own wills; and not only so, but their ministers were for the most part of the same opinion also. Walpole knew perfectly well that he could not hold his power for a day except with the loyal support of the Sovereign. When George I. died in 1728, Walpole fully expected that his own rule would come to an end, because in the quarrels between the King and his son, the heir, he had offended the latter. The idea of Cabinet dictation in the modern sense is utterly absurd as applied to the early Hanoverians. How could a secret and suspected Cabinet, which was constantly under the necessity of denying its own existence, dictate a policy to the Monarch? The one apparent exception to the dominance of the royal will was in the case of the forcing of George II. to admit Pitt and Chesterfield to the Ministry. But that is to be viewed merely as an incident in a factional strife among Whig leaders and their Tory rivals, which is all it was. It illustrated no principle of the Constitution recognized at the time; neither did it raise a discussion directly tending to develop any new principle. The promotion of Pitt to the first place in the Ministry, in

1758, was because of a popular and not of a Cabinet demand.

The power behind the throne which secured harmony between the first two monarchs of the house of Hanover and their Whig ministers was another throne and another royal family more ancient, more sacred, and supported by an influential body of English citizens, some of whom had still a lingering fondness for the theory of the divine right of kings. In the face of a prospective restoration of the house of Stuart, the Brunswick King and his Whig ministers were of necessity at one; and the question as to whether ministers ought to yield to the King or the King to his ministers could not be raised while the issue which involved the very existence of the dynasty confronted them. But when William IV. yielded to the advice of his Whig Cabinet, all idea of disputed succession had long since passed from the minds of men, and the question whether a now openly avowed and corporate Cabinet should constitute the King's only advisers, and hence control his official acts, had been distinctly raised. It had been vigorously debated for a generation. The issue in favour of a united Cabinet as the sole channel of executive conduct had been first made by a Tory Ministry and received the support of influential members of that party. The Whig party had also given its adherence to the new doctrine. Under such circumstances the yielding of the Sovereign was more than a fact; it was the recognition of a principle. The power behind both throne and Cabinet was not now another throne; it was what Macaulay has called the Democracy of England.

Such language could not have been used much earlier in any country without manifestly weakening the position of the party employing it. Even Thomas Jefferson and his political associates did not call themselves Democrats.

They chose the less offensive term, Republicans, and were called Democrats only in reproach by their enemies. Sometimes, indeed, Jefferson and his followers gave a measure of countenance to democratic ideas by using the diluted form, "Democratic Republicans," as descriptive of their party. Just when or how the old Republican party of which Jefferson was leader became the Democratic party with Grover Cleveland at its head, it is difficult to show. In some way not easily explained the name "Democrat" had been gradually displacing the name "Republican" for several years before the beginning of the administration of Andrew Jackson in 1828. Mr. Jackson is by common consent known as a Democrat, and there is no longer any thought of reproach connected with the term.

The prejudice against democracy had been weakening in England, as in America, and in the light of what has happened there since 1832, one may say that it was the democracy of England which then compelled the obedience of King and Parliament, though in the light of all that had gone before in English history, that power was seen to be, rather, the English mob. It was the ill-defined, ill-organized but ever-sensitive English people. It was the same force which had obliged the English government to cease its legal persecution of Wilkes and other printers in the early years of George III.; the same that had kept Robert Walpole and the Whig obligarchy in what may be called a constitutional state of mind, for two political generations. It was the patient but stubborn English people who had been for centuries ready to take up arms, even against the legal exactions of the government, and had compelled the continued respect of the great Tudor monarchs. It was they who defended the Norman kings against the attacks of their barons, and who, of their own accord, crushed out a rebellion against

the first Plantagenet, and freed him from all fear of baronial uprisings; they who, a little later, had stood by barons and clergy when they forced King John's unwilling signature to Magna Charta, and were ever after ready to favour whatever sovereign or faction, church or party, seemed at the time to best fulfil their wishes or to meet their sense of right.

It is clear that even previous to 1832 the influence of the people upon the government had been at all times real and important, but there had been in it nothing which conforms to the idea of democracy. Popular influence was exercised chiefly through illegal channels; that is, through a rebellious army or a mob. Since 1832 this ancient power has been recognized more and more, and its methods of expression have been harmonized with the law and the Constitution. The government has been becoming, consciously and progressively, a government of the people, by the people, and for the people. Burke was wont to say that the Revolution of 1688 was a revolution prevented, and not a revolution accomplished. In his view, that Revolution was properly called Great because it restored and preserved ancient and venerable institutions in their ancient and venerable relations. Had Burke been true to the instincts of his race, he would have said in plain English, "The Revolution was Great because it was small."

The Revolution of 1688 may be said to have ended the great Stuart debate, — a debate which did tend to destroy the ancient unity and simplicity of the English government. After the Revolution that unity and simplicity of government were gradually restored through the device of the modern Cabinet; but as an incident to that restoration, the ancient dependence of the two Houses of Parliament upon the Executive was likewise restored. When the Whig statesmen solemnly

declared, as they did on many occasions throughout the reigns of George III. and George IV., that the power of the Crown was increasing, they were telling the truth. The power of the Crown was increasing. Government was reverting to ancient and well-tried grooves. The Crown was gathering to itself all effective sovereign power. There remained but one question to be answered, and that was, Who shall exercise this power? The answer given by the Act of 1832, and by the acts which have followed, and the national sentiment which has become prevalent, is, that this simple, undivided, effective sovereign power shall be exercised by a body of men chosen by the people, and responsible to the people, and who at all times avowedly seek to fulfil the wishes of the people. If we call the Revolution of 1688 great because it prevented a threatened change in the government, we ought to call the Act of 1832 a real and a great Revolution because it effected a profound change in the government, and a change which presents thus far all the appearance of permanency. This is the result of that change: a Cabinet has been formed which has gathered to itself all effective power, and this power has been, or is being, handed over to the English people.

It was not until the Whig Cabinet was placed in virtual possession of the royal prerogative that it was possible to coerce the House of Lords. The Lords furnished much more strenuous resistance to the Reform Act than did the King, and it was in large part because that resistance was so determined that the triumph of the Cabinet and the nation was so complete. When the House of Lords and the House of Commons were alike controlled by the exercise of royal prerogative, it was a matter of indifference to the unrepresented nation which of these two Houses was in the ascendant. There was a time in the early years of the younger Pitt's Ministry when the Lords

seemed more nearly in accord with the nation than the Commons. But when it became evident that a large part of the nation was to gain representation in the Commons, it was of the utmost consequence to the harmony of the Constitution that the House of Lords should be subordinated to the House of Commons.

Mr. Bagehot gives to the Duke of Wellington much of the credit of effecting this change in the Constitution. The Duke was at first strenuously opposed to the Reform Bill, and was also earnest in the assertion of the doctrine that the House of Lords had coördinate authority with the Commons, and that the coercion of the Lords would be a flagrant violation of the Constitution. Yet when it was made evident that if the Lords did not yield new lords would be created, the Duke directed his energies to persuading the Lords to yield ; and in after years he took much pains to educate the Peers to the acceptance of their new position in relation to the Constitution.

A thoroughly united Cabinet now placed itself at the head of a national government, while, as the representative of the nation, it gathered into its own hands the exercise of the royal prerogatives, and by the use of royal prerogative compelled the House of Lords to submit to its will. This position of the Cabinet was so new and so important that it may be said to be the beginning of the modern Cabinet system. No previous Cabinet had ever held such a position. Walpole had no conception of an institution called a Cabinet which could voice the sentiments of the English nation.

The difficulty which led to the insertion in Magna Charta of that provision whereby twenty-five barons were appointed, whose duty it should be to make war upon the King in case he should disobey the charter, was never solved until the passage of the Reform Act of 1832.

History lends support to the view that an oligarchy is

more brutal and more intolerable than a monarchy. The transfer of power from the King and the House of Lords to the Cabinet would have led to no improvement in the government, had not agencies at the same time been created for keeping the Cabinet subject to the will of the nation. This the Reform Act did. The rotten boroughs were destroyed, and it thus became impossible to name members of the House of Commons through royal influence. This exercise of royal prerogative did not pass from the King to the Cabinet; it was forever destroyed. The franchise was so extended as still further to increase the difficulty of influencing elections. By these changes the House of Commons for the first time in its history became a representative institution of a truly national character.

When the House of Commons was made a national representative body, it became possible to form political parties based upon public opinion. We have seen that this was before impossible. Parties were controlled by class interests, by factions, and by royal patronage. Since the Reform Act, parties have been chiefly dependent on the power of persuasion. While liberal Tories were united with the Whigs in the agitation for the reform, there were conservative Whigs who were alarmed at the movement; and this beginning of a new era in party history is marked by a change in party names. The members of one party are thenceforth called Liberals, and those of the other party, Conservatives. Nor was the change one in name merely; thenceforth the party leaders looked not to the monarch for power to control the House of Commons, but to the voting constituency in the nation. The Cabinet controls the monarch and directs the policy of the government; but the Cabinet is itself controlled by the voters acting through the House of Commons.

CHAPTER XLV

LATER REFORM MOVEMENTS

IT is difficult to prove that any new principle has been added to the Constitution since the Reform of 1832. Certain accepted principles have, however, been enforced with fresh emphasis. When Robert Peel undertook to form a Ministry, early in the reign of Queen Victoria, he insisted upon the right to appoint the ladies who should attend the Queen in her household. The Queen refused to yield to the demand of her minister. Mr Peel then declined to be responsible for the government. The point at issue here was the old question of a double Cabinet. The Queen was surrounded by the wives of Peel's political opponents, and he feared that secret influence from the Monarch would tend to thwart the purposes of the Cabinet, as had been the case in the time of the later Georges. A few months later a compromise was effected upon the question at issue, and Peel became Premier.

The principle involved in this feature of the Constitution is that the sovereign shall be guided in all political acts by the advice of the members of the Cabinet, and shall not be permitted to do anything which tends to thwart the policy of the Cabinet. As Mr. Bagehot has said, the Monarch has a right to be informed, and he has the right to persuade; and, having enjoyed these rights, it becomes his duty to give loyal support to the will of the Cabinet. This principle is absolutely essential to the maintenance

of the present democratic Constitution. If a monarch should arise who, after the manner of George III., should refuse to give loyal support to the decisions of the Cabinet, it would then become necessary either to give up the present democratic Constitution, or to remove the monarch, or to secure a decision that the monarch was insane, and place the Crown in regency, or to invent some other way to nullify the royal influence.

The Reform of 1832 is great because it included or rendered possible and logically necessary other changes. The franchise was extended, yet the great body of the citizens was still unenfranchised. The nation could not be satisfied with such a condition unless the people could change their nature. The labouring men knew that they were not to be enfranchised by the Act of 1832; yet they furnished the show of force which overawed the King and the House of Lords. The English, as we have seen, have never permitted hard and fast lines to be drawn. It would have been wholly "un-English" if the unenfranchised had been content with the arbitrary line which was fixed by the Statute of 1832. Within six years from the date of the Reform, an agitation was inaugurated which had for its object the removal of arbitrary distinctions. This is known as the Chartist movement. The Chartists demanded: 1. That the franchise should be extended to all males of twenty-one years of age. 2. That there should be equal electoral districts. 3. That voting should be by secret ballot. 4. That Parliaments should be annually elected. 5. That there should be no property qualification for members of Parliament. 6. That members should be paid for their services. It will be noticed that items 3 and 5 in this list have been attained, and that the others, with the exception of annual elections, are in process of attainment.

The Chartist movement grew rapidly and had every

appearance of an irresistible national uprising; but it was arrested in its course by division in the ranks of the agitators. New questions arose and absorbed the attention of the people. The poor were starving, and an attempt was made to remove the tax on food. The great Corn Law debate tended to divide the interest in the effort for the new charter. Scarcely had the victory in favour of cheap bread been won when revolutions broke out on the Continent. A French revolution seems to have a peculiarly paralyzing effect upon the mind of the English workingman. The Chartist movement died out after the Continental revolutions of 1848. Then ensued the Crimean War and the Indian Mutiny to absorb the national interest, and a little later the American Civil War. Following these, and without waiting for a popular agitation, the Conservative government doubled the voting constituency of the United Kingdom by the Act of 1867. In like manner the Liberal government again almost doubled the number of voters by the Act of 1885, and the remaining limitations upon manhood suffrage are likely soon to be removed. "One man, one vote" is now an accepted principle in the Liberal programme.

After the Reform Act of 1832, the Cabinet, being in possession of the royal prerogatives, was still under some temptations to use its power to influence elections. Elections could no longer be controlled in the old way. Yet when the two political parties came to be pitted against each other as competitors for votes, and the voters came to be nearly equally divided, it was observed that the party in power still had an advantage on account of the patronage of office. To remove this inequality, an act was passed in 1857 requiring that admission to the civil service should be by competitive examination, and that removals should not be made except for delinquency in the service. The object and the effect of this act were to

bring to an end the ancient and time-honoured practice of influencing elections through the bribery of office. Since the reform in the civil service, the party in power enjoys no important advantage in its ability to influence voters over the party in opposition.

It will be observed that in this respect the people of England enjoy greater freedom than do the people of the United States, although in recent years great progress has been made in the direction of Civil Service reform. The "spoils system" as it has prevailed in our cities and in the federal government resembles in a striking manner methods of the government of England previous to the Reform Act. Elections are controlled by a limited class who have the offices, and they so exercise the prerogatives of office as to shut out the masses of the people from a share in the government. It happened that just at the time when England was taking the great step which admitted the unrepresented nation to an actual participation in the government, the United States was introducing into the civil service of the federal government the spoils system which tends directly to exclude the great body of the people from their rightful share in the government. And this most undemocratic, most oligarchic movement in America was likewise effected in the newly paraded name of democracy.

As stated above, the Act of 1832 took away many seats from boroughs having few voters, and gave them to the newer towns and cities in the great manufacturing centres. There had been for centuries a demand for reform in the government of the municipal corporations. The chief obstacle in the way of this reform had been the fact that the kings, the great lords, and the bishops found it easier to control the House of Commons when a majority of the members were elected by close corporations in towns and cities, or by close corporations supple-

mented by a limited number of freemen. Members of Parliament had not been chosen by the tax-payers in towns and cities. On the contrary, they had been chosen by the few whose relations to the local government were such as to enable them to live upon the resources of the unrepresented people. In this respect the local government resembled the general government of king and Parliament. In many cases a corporation filling its own vacancies enjoyed a monopoly of trade in the towns. This same corporation exercised the power of taxing the inhabitants of the town and appointed the members of the House of Commons. In this way, the great body of the tax-payers were shut out from any share, either in the control of local taxation, or in the election of members of Parliament. It was this abuse in local government which intensified the popular furor and made the demand for the Great Reform irresistible. The Municipal Corporations Act of 1834 is an integral part of the Great Reform. By this act the close corporations, with the exception of that of the City of London, were destroyed, and the government of the towns and cities was placed in the hands of a mayor and council elected by the rate-payers.

The other important acts affecting local government in recent years are: the act passed in 1834, creating areas for the administration of poor-laws; the act of 1870, providing for the election of school boards; the act passed in 1888, providing for the government of counties; and the act of 1894, providing for the government of parishes. The importance of the relation of the modern democratic Constitution to local government will be better understood after a brief review of the relations of local government to the central government during the preceding centuries.

CHAPTER XLVI

LOCAL GOVERNMENT AND THE CONSTITUTION

DURING the time of the Norman kings and the early Plantagenets the English people, as represented in their local governments, were the chief reliance of the kings against their feudal lords. During this period the closest possible relation subsisted between the king's government and these local, popular institutions. This combined power of people and king probably reached its highest development in the time of Henry II. Henry had his hands upon the people through the members of the Great Council, who visited the county courts as judges and administrative officers; through his sheriffs, whom he appointed and ruled; through the local militia, who were drilled by officers of the King; and through the jurors in the local courts of county, hundred, and town.

These local, popular institutions were thoroughly loyal to the King because he protected them from the local tyrants among the nobility. This fact was vividly illustrated in the time of the Barons' War, which occurred towards the close of Henry's reign. The rebellion was led by Henry's own son. Yet the people in the north of England arose under their own local leaders, without waiting for a formal call from the King, and completely subdued the King's enemies. Henry felt so secure in his position that he did not even take the trouble to punish any of the leaders of the rebellion. He continued to com-

pel the rebellious barons to attend the meetings of his Great Council and to take part in the government of the realm. Henry II. ruled the members of his Great Council with a rod of iron, and the main strength of that rod was found in the local institutions of the English people. The barons became convinced that they were permanent victims in the hands of the King and his administrative agencies among the people, unless they themselves should succeed in winning the people from their allegiance to the King.

It was more than a hundred years after Henry II. had perfected the compact system of kingly government which included the local governments in counties and towns, before Edward I. called upon the counties and certain towns and cities to send each two delegates to attend the meeting of his Great Council. This intervening century includes the contest over the Great Charter. The barons succeeded in making a break in the King's government only when they had united with the clergy, and aided by them had succeeded in winning over the English people to their support. After John and Henry III. had suffered the barons and the bishops to divide with the King the allegiance of the English people, the kings of England never again secured such effective and undivided support from the people as represented in their local governments. Edward I. strove to win back the allegiance of the nation, and he had some success in restoring the administrative connection of the King's government with the local governments. He improved upon the judicial system of the previous reigns and used this to give him a hold upon the local governments. But he could not rely upon the support of these local governments as Henry II. had done a hundred years earlier. It was probably, in part, his sense of failure at this point that induced him to follow the example of Earl Simon and invite these local governments to send delegates to the Great Council.

It is probable that the decline of the local governments dated from the time when the barons and bishops succeeded in gaining popular support in their contests against the King. The process was greatly hastened after Edward I. introduced the policy of having delegates sent to Parliament instead of sending the King's officers to the local governments. The towns seemed to realize that Edward's policy was an attack upon their independence, and they objected to the innovation. At any rate, within two hundred years from the date of Edward's Parliament the towns and cities had fallen into the hands of close corporations which had monopolized the powers of government and the control of industries. As it was easier to pack Parliaments when the voters were few, so it was likewise easier to control the government of a city when the franchise was limited. Both the local magnates and the central government were therefore interested in the restriction of electoral privileges. Certain it is that the independence of the towns did not long survive the time when the town government became the arena for contending factions striving to secure delegates to a Parliament which was to be used as a make-weight in a war between contending factions.

In the counties a radical change likewise took place at the same time. The old county court which was attended by a considerable body of freemen gave place to a Court of Quarter Sessions attended by the justices of the peace and a few jurors. The old popular court of the hundred was displaced by a Justice's Court in Petty Sessions. It should not be maintained that the degeneration of all these local powers was wholly caused by that policy which resulted in destroying the earlier close relation between the King's government and the local institutions. The important fact to be observed is that the decline of the local governments was coincident with the development of the

House of Commons. It was thus that local government as well as general government came to be the privilege of a few, and the great body of the nation was disfranchised.

If the people of England were so thoroughly disfranchised four or five centuries ago, how then does it happen that they retained such a lively interest in the government? While it is true that from the date of the origin of the House of Commons to the Reform of 1832 the great body of the people of England had no legal, formal share in the government, either local or general, and that the government was in the hands of a privileged few, yet it is also true that during all that time the same people enjoyed many of the practical advantages of a democratic government. Without any direct or conscious political power the people had nevertheless to a considerable extent always determined the governmental policy. They enjoyed the fruits of a democracy without its responsibility. This principle may perhaps be illustrated by reference to very recent events in the government of the English counties.

Until 1888 the government of the counties was in the hands of the local magistrates. When the proposition was under discussion to substitute for the ancient institution of permanent magistrates a county board chosen according to democratic forms, there were few who had any criticisms to offer against the magistrates. Their government had been efficient and economical, and had shown a decent regard for public opinion. The demand for the new county councils did not rest upon faults of the old government. But, as an incident to increased demands upon government in general, it was felt that new duties should be placed upon the counties, and it was likewise felt that in the imposition of these new duties it would be more in harmony with modern democratic ideas to fix upon the body of the voters in each county the responsibility of choosing the county rulers.

The magistrates in these counties had for years been expecting this change to be made. They had greatly prolonged their rule by taking pains that their government should be without reproach. These magisterial county governments, therefore, while in form far from democratic, have been such in spirit and substance in that they have expressed the will of the people.

We are warranted in believing that something resembling the relation between the magistrates and the counties in recent years has existed between the people and their local rulers for centuries. There is, at least, this fact to be accounted for: the people for centuries, or ever since the development of the House of Commons, have been cut off from a share in the government, both general and local; and, at the same time, these same people have manifested a spirit and temper characteristic of those who have had constant practice in local government. The people retained the municipal spirit in full force for centuries after they had lost their legal participation in the control of municipal institutions. Something of this is doubtless due to the rise of the numerous voluntary societies, already mentioned, in whose management they shared; but that experience was comparatively brief. Probably the real explanation of this anomaly is derived from the view that the people did not at any time wholly lose their influence upon local government. Despite their loss of all official connection with all government, there is yet much reason for believing that their strong moral and political influence over the government did not die out. According to this theory the legal, formal government always had in it elements of mere fiction. To a modern democrat it appears worse than it really was. In appearance only, the House of Commons, the House of Lords, the King, and a few privileged supporters were an organized conspiracy against the masses of the people. These rulers were never

at any time agreed among themselves. It was only upon rare occasions and for brief intervals, when threatened by dangerous uprisings, that they composed their differences and acted in harmony. In their contests among themselves there was a constant reliance upon the unrepresented people for support.

As it was in the general government, so it must have been in the local governments. In a town or a city the few got control of the offices, but they by no means monopolized political power. There remained the class or the faction which had been displaced. Then we may assume that there were divisions among the local officers. The corporation would be secure only when the various classes were duly regarded in the policy of government. It required two hundred years for the towns and cities chartered by the Norman kings and the early Plantagenets to lose their franchises and become close corporations. These changes were not effected without many combats and many jealous feuds. And when the policy of close corporations had been accepted as settled, it was always possible to supplant one close corporation by another. The local governments were for the most part left to fight out their own quarrels. The governing class in the town, being insecure in its tenure, was kept on its good behaviour.

The Tudor kings were probably the first to grant charters to towns in which the powers of local government and the right to appoint the members of the House of Commons were conferred upon close corporations. Previous to the time of Henry VII., such governments had indeed grown up and had been tolerated; but Henry gave them the sanction of law. This policy of Henry VII. and Henry VIII. was probably not especially offensive to the townspeople. The kings looked to the people of towns and cities and to the middle-class folk in the country for

security against the higher nobility and the higher clergy. They would have failed of their chief purpose if they had not seen to it that the governments which they formed in the towns received the support, or at least the acquiescence, of the disfranchised people. These local governments which were so obedient to the first two Tudors became independent and refractory in the time of Elizabeth, and rebellious in the time of the early Stuarts. All will agree that the local officers in the time of James I. and Charles I. could have accomplished nothing if they had not succeeded in winning the support of the people in large portions of the country.

There were under Charles II. and James II. the most high-handed acts of reconstruction of town and city governments, not in harmony with, but directly against, local prejudice. Charles II. broke up the Whig corporations and put Tories in their places. James II. removed Protestants and filled their places with Romanists. But all of these events were within five years of the Great Revolution, and were without doubt among its causes.

From the Great Revolution to the Great Reform the municipal corporations were divided between the two political parties. Whichever party succeeded for the time in gaining the support of the King was enabled to control the larger number of the borough members of Parliament. Yet at no time were the party leaders and the King able entirely to displace the party in opposition from the control of a portion of the borough members. It was always true that some of the town members were controlled by magnates of the locality. Members of the House of Lords controlled many of the boroughs. Some of the most effective critics of the government were the holders of seats controlled by a Lord. Other seats were simply sold to the highest bidder. The elder Pitt, the purest and most popular statesman of his day, obtained admittance into the

House of Commons through the purchase of a seat by his father. During all this time the idea was undoubtedly kept alive that these privileged local governments were insecure. If party leaders used extravagant language in praise of the rotten boroughs, it was from a conviction that strong language was required to overcome the palpable injustice of the system.

Thus, during all the centuries until the actual enfranchisement of the people, their political sense was kept on the alert through the constant tendency of the ruling classes to appeal to them for support. The prevailing divisions in the body politic were vertical. Horizontal ranks of society were constantly broken up. From top to bottom society was kept sensitive to political influences. And by this long course of training in virtual democracy the people were prepared to assume the responsible control of a most delicate and effective democratic Constitution.

CHAPTER XLVII

ORIGIN OF THE TERM "CONSTITUTION"

SINCE the English Constitution rests upon theory, the origin of the term and its various meanings are important facts in its development. The Constitution exists, in part, because the people of the eighteenth century became possessed of the notion that they were the subjects of a great and beneficent Constitution. How did such a notion originate?

Mr. Lecky refers to the Restoration of 1660 as "a time when the Constitution was still unformed." Over against that may be set the statement already quoted from Hearn, to the effect that Queen Victoria is bound to support the identical Constitution which the Conqueror promised to maintain. It is clear that these two writers use the word with meanings wholly different. Mr. Lecky is surely correct in assuming that at the time of the Restoration the people were not generally conscious of the possession of an important and established frame of government. Efforts made after the death of Charles I. to set up a constitution had failed.

In the second charter granted to the colony of Virginia, in 1609, there occurs the declaration that immediately upon the arrival of the officers of the new company all "Laws and Constitutions" of the former company shall cease, "and all Officers, Governors, and Ministers formerly constituted and appointed shall be discharged."

It will be observed that as here used "constitutions" is simply an alternate term with "laws." In the same document appears the phrase, "according to such Orders, Ordinances, Constitutions, Directions, and Instructions as by our said Council as aforesaid shall be established." Here again the term is one of a number of synonymous legal designations. A corresponding use of the verb "constitute" may be noted in the Plymouth charter of 1620, where occurs the sentence, "We by these Presents ordain, constitute, limit and appoint that there shall be henceforth one body politic." In the charter for Rhode Island, granted in 1643, it is ordained that the Governor and Commissioners shall have power "to nominate, appoint, and constitute" subordinate officers. And in 1681 the King granted to William Penn the power "to make and constitute" fairs and markets; "to make and constitute wholesome ordinances." Such expressions abound in all the colonial charters.

In accordance with the powers conferred upon him, William Penn issued in 1682 what he called a Frame of Government for Pennsylvania, with a preface in which he declares it to be the object of all government "*to support power in reverence with the people, and to secure the people from the abuse of power;* that they may be free by their just obedience, and the magistrates honourable, for their just administration. To carry this evenness is partly owing to the constitution and partly to the magistracy." It would seem that this was using the word "constitution" almost in the modern American sense. The meaning appears to be: The objects of government are attained partly through the Frame of Government, that is, the Constitution; partly by means of the method of execution, that is, the magistracy.

Algernon Sidney wrote his work on Government during the reign of Charles II. He was a staunch believer in

republican government, and the following passage fairly indicates his general theory: "The Israelites, Spartans, Romans, and others, who thus framed their governments according to their own will, did it not by any peculiar privilege, but by a universal right conferred upon them by God and nature: they were made of no better clay than others: they had no right that does not as well belong to other nations; that is to say, the constitution of every government is referred to those who are concerned in it, and no others have anything to do with it." It should be observed that the word "constitution" as used in the above passage does not mean a frame of government; it is merely the verbal noun denoting the establishing or the framing of a government. Sidney used the words "constitute" and "constitution" hundreds of times, and the latter is almost invariably the verbal noun, or is used as a synonym with laws, ordinances, etc., as in the colonial charters. In one place, however, he makes the statement that all human constitutions are subject to corruption, and must perish unless they are "timely renewed," and here the word seems to mean frame of government.

The political works of James Harrington were written about the time of the Commonwealth. He does not make as frequent use of the words "constitute" and "constitution" as did Sidney, but his writings reveal a much clearer conception of what Americans would call a constitution. Harrington had a well-developed theory for balancing legislative and executive powers, and for securing the harmonious action of the people with their various governmental agents. He favoured the Commonwealth, and his works are republican in their tendency. It was probably on account of the teachings of such theorists as Harrington that the Convention Parliament, which recalled Charles II., resolved that "according to the ancient

fundamental laws of this kingdom the government is, and of right ought to be, by King, Lords, and Commons."

It is clear from the frequent use of the words "constitute" and "constitution" in the various charters of the period of American colonization, that they were already in common use, and that the noun was understood to be synonymous with laws and ordinances. Such had been its meaning throughout English history. The Constitutions of Clarendon of the time of Henry II. furnish a familiar example. They were simply a body of laws. But during the great debate of the Stuart period, both from its etymology and because it was somewhat less frequently used than the words "law" and "ordinance," "constitution" came to be regarded as a suitable and convenient term to designate the more fundamental laws and principles of government.

Those who believed in the divine right of kings were naturally opposed to any theory which admitted or implied the right of the people to constitute or to establish their own government. The idea of divine right and the idea of the right of the people to constitute their own government, are essentially antagonistic.

A passage from Bishop Burnet, already referred to, presents the term "Constitution" in contrast with "Government." When James II. died, in 1701, Louis XIV. acknowledged his son as king of England, — an act which gave great offence to both Whigs and Tories in England. Parliament passed a Bill of Attainder against the Pretender and made it high treason to hold communication with him. A bill was also passed requiring office-holders, teachers, and clergymen to take an oath to support the Act of Settlement, and to abjure all allegiance to the house of Stuart. Many of the Tories resisted this requirement. In the House of Commons an amendment was introduced, "favouring the

maintenance of government in King, Lords, and Commons." This amendment, says Burnet, "was rejected with indignation"; "since the government was only in the King, the Lords and Commons being indeed a part of the *Constitution*, and of the legislative body, but not of the *Government*." Of the doctrine put forward by those opposed to the amendment Burnet says: "It was a barefaced republican notion, and was wont to be condemned as such by the same persons who now pressed it." The idea seems to be, that those who manifested indignation at the declaration, that the government by the King, Lords, and Commons should be maintained, were Tories, who by their opposition to the amendment controverted an ancient, time-honoured Cavalier and Tory doctrine; while the separation of the government into legislative and executive departments was from the earlier Tory standpoint rank republican heresy. Thus it seems that in the time of Queen Anne even Tories employed the word "government" in a restricted sense, and were not averse to the use of "constitution" as the more general term.

By what can be gathered from the literature preceding and immediately following the Great Revolution of 1688, it is made evident that the English were not yet generally conscious of the possession of a great and glorious Constitution. The term had not yet become a word to conjure with in politics. Some of the Whigs possessed a well-defined theory of government, and some of their theories they embodied in the Statutes of the Revolution. Whigs and Tories alike united in the Act of Settlement of 1701. But neither were conscious of the existence of a great national Constitution, in whose development these acts were important stages. Mr. Lecky might still say that as late as 1701 the English Constitution was yet unformed, because what we now know as the Constitution could not

exist without the consciousness in the minds of all classes of English citizens, that they were the subjects of such an embodiment of the nation's will and the nation's authority. How this consciousness was developed is, therefore, an important part of the story of the origin of the Constitution.

It is easy to exaggerate the effect of individual writings. So far as the works of such writers as Sidney and Harrington were read, their tendency was certainly to induce a feeling of individual responsibility for the maintenance of good government — to teach the citizen that if his government was not what it ought to be, it was his duty to unite with others to make it such; and they sought to show how this could be done. It will be seen that such writings were quite in harmony with the American notion of a constitution as a form of government constituted, set up, or adopted, by the people. But this is altogether diverse from the English idea, and it may be doubted whether these writers really contributed anything of importance to the development of either the American or the English Constitution.

Thomas Hobbes published his *Leviathan* in 1651, and Harrington's *Oceana* was written in part as a reply to that work. Hobbes was fortunate in that the theory which he put forward could conveniently be made a subject of conversation without increasing one's sense of political responsibility. According to his theory, man in all of his political relations is a victim. In a state of nature he was a victim of perpetual violence. In order to avoid this intolerable violence man escaped from a state of nature into a state of government. "Leviathan" is the term applied to the State, which, as Hobbes defines it, is an artificial man. But, in his view, the citizen becomes completely a victim of the State. Government is in its very nature despotic. Man may indeed destroy the Levi-

athan which he has created, but he then becomes again the victim of a state of nature. It will be seen that this theory involves the essential ideas of the famous contract or compact theory of government.[1]

Philosophers of a less sombre cast of mind constructed afterward from those same ideas a much more humane and kindly view of organized society. To them the ideal state of nature became more tolerable. It was indeed made so comfortable that men would not leave it unless palpable inducements were offered. And after men had consented to forego a state of nature for a state of civil government, if that government should become tyrannical they could without remorse revert temporarily to the primeval state.

John Locke wrote his *Civil Government* after the Great Revolution. He used the phrase, "a state of nature," but greatly changed its meaning. To his mind it did not imply a condition of universal individual warfare. Even in a state of nature, a sort of society existed. "And were it not for the corruption and viciousness of degenerate men, there would be no need of any other, no necessity that men should separate from this great and natural community and associate into lesser combinations."[2] For the better protection of property, Locke maintains that men would consent to pass from the society of nature and become members of a particular, local civil society. That is, they would give up one positive good for another in becoming members of a body politic. Should the body politic be suspended or destroyed, men would revert not to a condition of warring individualism, but to the society of nature. Locke's view of the state, therefore, differed much from that set forth in the *Leviathan* of Hobbes.

[1] For an account of the origin of the theory, see Borgeaud, *Rise of Modern Democracy*, Chap. III.

[2] *Civil Government*, p. 257.

He says, "The constitution of the legislative is the first and fundamental act of society whereby provision is made for the continuation of their union under the direction of persons and bonds of laws, made by persons authorized thereunto by the consent and appointment of the people, without which no one man or number of men amongst them can have authority of making laws that shall be binding to the rest."[1] Instead of a despotism Locke derives from the contract theory a sort of republic. He proceeds to specify how in the case of a government such as that of England the people were justified in reverting to a state of nature and providing for themselves a new government, if the Prince should act as Charles II. and James II. had acted on various occasions; or if the legislators should endeavour to invade the property of subjects and make themselves masters of the lives and fortunes of the people.

It would be altogether fanciful to try to make out any close connection between the philosophizing of such men as Hobbes and Locke and the actual course of English politics. Yet it is not unreasonable to suppose that the contract theory of government in the various forms in which it appeared did have some practical effect. It presented a definite answer to the divine-right theory. The state of nature which Hobbes described was harsh and forbidding, and was evidently intended to discourage revolution. The state of nature which took shape in the brains of later philosophers tended to stay the mind in view of resolute changes in the government. There is not, indeed, the slightest evidence that any of the philosophers had a clear idea of what the phrase actually meant. But an incomprehensibility which had a name seemed less frightful than nameless chaos and anarchy.

For the hundred and fifty years after Hobbes many

[1] *Civil Government*, p. 302.

of the active statesmen believed in the contract theory of government, and it may be supposed that such a notion might influence actual conduct. Indeed, one of the crimes charged against James II. was that of violating the original compact. In a negative way, at least, the theory must have had some effect in respect to the genesis of the English Constitution. It occupied the minds of men of active brains, and thus prevented them from theorizing along lines less in harmony with that modern Constitution which was in the making. And the long practice in the belief in a theory which was void of objective reality may have been a predisposing cause of the ultimate belief in an actual constitution resting chiefly upon a state of mind.

The writers upon political science of the seventeenth century, being for the most part unconscious of the existence of a great English Constitution, drew their illustrations chiefly not from the history of the English, but from that of the Israelites, the Greeks, and the Romans. But since the birth of the idea it is English history almost alone which supplies adequate illustrations. The experiences of other nations are of little value to a mind possessed of Burke's idea of the English Constitution, unless it be as examples to be shunned.

William Blackstone was made professor of English Law at Oxford in 1758, the year of Pitt's great victories during the Seven Years' War. Seven years later he began to publish his *Commentaries*. There is no evidence that Blackstone originated any important view of the English Constitution or of the English law; he but reported the current views of the jurists of his day. The *Commentaries* reveal the fact that the belief that England was the possessor of a remarkable constitution had permeated the minds of men. Blackstone tells us that the English Constitution is "very different from the

modern constitution of other states on the Continent of Europe, and from the genius of imperial law; which in general are calculated to vest an arbitrary and despotic power of controlling the actions of the subject, in the prince or in a few grandees. And this spirit of liberty is so deeply implanted in our constitution and rooted even in our very soil that a slave or a negro, the moment he lands in England, falls under the protection of our laws, and so far becomes a freeman." Nothing like this can be found in the writings of the previous century.

Blackstone also quotes a passage from Montesquieu in which the French author states that England is the only country in the world where political or civil liberty is the direct end of the Constitution. The comparison favourable to England which had been instituted with the governments of the Continent had deeply affected the minds of all classes in England. Whig and Tory alike gloried in the superiority of the English government.

As the sense of the grandeur of the Constitution grew there was less controversy about the interpretation of early English history. All now by common consent regarded as the lasting glory of England Magna Charta and all the liberal acts and interpretations of all past rulers. Sir Edward Coke, who had been persecuted by the kings of his day, was now accepted by Whigs and Tories as a wise interpreter of law. That general view of English history which had been put forth in the previous century by those who withstood the claims of the Stuarts had, before George III. became king, become the commonly accepted view, and the writings of Blackstone were regarded with especial favour by the Tory ministers of that sovereign, while their author was the recipient of peculiar favours at their hands. The Constitution, as defined by Blackstone, is that whereby the

happy balance has been preserved in the government, and it is his view that this Constitution has existed from the dawn of English history. This it is which has endured amid all the changes of the ages.

Among the various crimes recounted in the charges brought against James II. after his flight from the kingdom was that of endeavouring to subvert the Constitution, and Mr. Justice Blackstone is very happy in the view that he did not really subvert it. Had he done so, then that condition of things described by Locke would almost have ensued, for Blackstone tells us it "would have reduced the society almost to a state of nature."[1] If this had actually happened, the people would have been left at liberty to erect a new state upon a new political foundation. But the Convention Parliament, as he further states, prudently voted otherwise. Their vote asserted that though King James had departed, yet the kingly office remained. "And thus the Constitution was kept entire." It is Mr. Justice Blackstone's opinion that the Constitution could not survive the abolition of so constituent a part as the royal authority. At the same time he pronounces divine and indefeasible hereditary right coupled with the doctrine of passive obedience as "of all constitutions the most slavish and dreadful." "But," he adds, "when such an hereditary right as our laws have created and vested in the royal stock is closely interwoven with those liberties which, we have seen in a former chapter, are equally the inheritance of the subject, this union will form a constitution, in theory the most beautiful of any, in practice the most approved, and, I trust, in duration the most permanent."[2] Then he draws the logical conclusion that it is the duty of every good Englishman to understand, to revere, and to defend this Constitution.

These panegyrics were first published at a time when

[1] Book I., p. 213. [2] Book I., p. 217.

the Whig statesmen were becoming convinced that a despotism was being fastened upon the land through the machinations of George III. But a broad distinction must be made between the political contentions of the day and that view of the Constitution which had then taken root in the minds of all parties. This sentimental glorying in their common heritage was the delight of Whigs and Tories alike, and they thus expressed the prevalent conviction of the especial good fortune of Englishmen as compared, for example, with Frenchmen. Such laudation, likewise, arose from the common view that the history of England had upon the whole been fortunate for all classes.

We have now reached a period when such is the accepted view of the Constitution that it is itself removed from the field of contention. When opposing parties appeal to the same intangible entity which is understood to embody the national spirit and the national greatness, and to secure and protect the liberties of Englishmen and define the spheres of their governmental institutions, and are unanimous in making that unchanging, inviolate Constitution to which all are subject, the object of their equal veneration and affection, they cannot quarrel as to the Constitution itself. They differ rather as to methods for honouring and preserving it, and the most damaging charge which each brings against the policy or the act of the other is that it is "unconstitutional."

CHAPTER XLVIII

BURKE AND THE CONSTITUTION

WRITING in 1791, Edmund Burke said of the English Constitution: "Great critics have taught us one essential rule. . . . It is this, that if ever we should find ourselves disposed not to admire those writers or artists, Livy and Virgil, for instance, Raphael or Michael Angelo, whom all the learned had admired, not to follow our own fancies, but to study them until we know how and what we ought to admire; and if we cannot arrive at this combination of admiration with knowledge, rather to believe that we are dull, than that the rest of the world has been imposed upon. It is as good a rule, at least, with regard to this Constitution [of England]. We ought to understand it according to our measure; and to venerate where we are not able presently to comprehend."[1]

This view, it will be seen, places the Constitution beyond the pale of controversy. Mr. Burke's career illustrates perhaps better than that of any other statesman the power of the Constitution as a sentimental bond of union. In the earlier part of his public life he was an aggressive Whig, a friend of Wilkes, an advocate of the cause of the American colonies, and a popular agitator. After the French Revolution he became the most effective expositor of the conservative view of the English government.

[1] Burke's *Works*, Vol. III., p. 114.

Still he was at all times equally an unquestioned worshipper of what he called the Constitution. Burke's view of the government and of its relations to past history was in substantial accord with that of Blackstone, who was to the Tories an acceptable expositor of the Constitution.

George III. and his ministers had in the name of the Constitution displaced the Whigs and increased the power of the Crown. They averred that the balance of the Constitution had been destroyed by the Whig oligarchy, that the Crown had been abased, and that by the hands of a secret and unauthorized body, a tyranny was being established. Some of the statesmen who acted with the King still called themselves Whigs; and Whigs and Tories alike gloried in the distinctive Whig doctrines of the previous century. Burke ridiculed the Whigs who had attached themselves to the royal side in such terms as these: "To be a Whig on the business of a hundred years ago is quite consistent with every advantage of present servility. This retrospective wisdom and historical patriotism are things of wonderful convenience." "Few are the partisans of departed tyranny." "There was no professed admirer of Henry VIII. among the tools of the last King James."[1] These sayings illustrate the fact that with the new view of the Constitution, controversy about past history had ceased, or had narrowed itself to the claim that the men who were criticised were not acting in accordance with the true spirit of the past. Such charges were brought by each party against its opponents, and each accused the other of violating the Constitution.

Burke admitted that there was no longer a question as to the existence of Parliament. He maintained that the Constitution was now fully matured, and that there was no further danger from such attempts as had endangered its infancy. Danger still threatened from arbitrary im-

[1] Burke's *Works*, Vol I., p. 358.

positions, but such impositions would not bear upon their foreheads the name of *Ship-money*. The orator pointed out what he conceived to be the real danger then threatening the Constitution, which he called *Influence*. The power of the King's prerogative was almost dead, but there had grown up "a backstairs influence and clandestine government," which imperilled the Constitution. With minute detail Mr. Burke explained the process of the formation and working of the secret, irresponsible Cabinet of the "King's friends," showing how the *double Cabinet* was formed and became in time the single Cabinet, when through clandestine influence and corruption the secret body of "King's friends" secured all power.

During the darkest days of the struggle with the American colonies, when the greater part of the Whigs sought to express their contempt for the government by seceding from Parliament, Mr. Burke addressed a letter to the colonists in which he assured them that a majority of the *uninfluenced* in England were in sympathy with them. "We feel," said he, "as you do on the invasion of your charters." He urged the Americans to stand firm for their rights as Englishmen. To him the Americans were not rebels; but those who were against the constitutional rights of Englishmen, whether in America or in England, were "attainted, corrupt in blood." "They are the real rebels to the fair Constitution and just supremacy of England." But their champion then warns the colonists that "none but England could communicate to them the benefits of such a constitution." Said he, "We apprehend that you are not now, nor for ages are likely to be, capable of that form of constitution in an independent state."

Besides these appeals to the American colonists to stand firm for the English Constitution, Mr. Burke expressed on various occasions his hope and expectation that the English people could be relied upon to save their Constitution

from ruin. In an address delivered in 1770 on the Causes of the Present Discontent, he spoke of the Constitution as standing on a nice equipoise, with steep precipices and deep waters upon all sides. So desperate seemed the situation that he was led to exclaim, "I see no other way for the preservation of a decent attention to public interest in the representatives but the interposition of the body of the people itself, whenever it shall appear, by some flagrant and notorious act, by some capital innovation, that these representatives are going to overleap the fences of the law, and to introduce an arbitrary power. This interposition is a most unpleasant remedy. But if it be a legal remedy, it is intended on some occasions to be used; to be used then only, when it is evident that nothing else can hold the Constitution to its true principles."[1]

The same address alludes to the time when the House of Commons was supposed to be no part of the government of the country; when it was considered as a *control*, issuing immediately from the people, and speedily to be resolved into the mass from whence it arose.[2] The House of Commons was, in his opinion, to the higher part of government what juries are to the lower. The true liberty of that House consisted in its servitude to the people — a servitude which is, like obedience to divine law, "perfect freedom." If the House were to fail of this service, it would seek an abject and unnatural servitude elsewhere. And if there were to be a failure in the proper control of the House of Commons, the present confusion would continue until "the people were hurried into all the rage of civil strife, or until they were sunk into the dead repose of despotism."

Ten years later Burke returned to the same subject. At that time he judged the Commons to have failed in their service to the people. He compared them

[1] Vol. I., p. 419. [2] Vol. I., p. 396.

to one who had become the victim of alien affections. They who loved the Commons most were they who were most deeply offended. "A jealous love lights his torch from the firebrands of the furies." Addressing the House, he said: "They who call upon you to belong wholly to the people are those who wish you to return to your proper home; to the sphere of your duty, to the post of your honour. . . . We have furnished the people of England (indeed we have) some real cause of jealousy. Let us return to our legitimate home, and all jars and all quarrels will be lost in embraces. Let the Commons in Parliament assembled be one and the same thing with the Commons at large. The distinctions that are made to separate us are unnatural and wicked contrivances. Let us identify, let us incorporate, ourselves with the people."[1]

These and other passages which might be quoted prove Burke's power of resistance to the encroachments of the Crown. From selected passages a careless reader might get the impression that he had decided leanings toward democracy. Certainly no one has surpassed him in the vivid portrayal of the dangers to the Constitution from royal interference. But after the breaking out of the French Revolution Burke became an equally effective defender of the Crown, the Church, and the House of Lords against what he deemed to be the encroachments of the people. It is difficult for one who is in sympathy with modern democracy to read the utterances of Burke, delivered before the French Revolution, along with those delivered after that period, and not feel that he is strangely inconsistent with himself. One page appears to be the writing of a modern democrat, another that of an aristocrat and a conservative. It is not one of the objects of this chapter to defend Mr. Burke from the charge of

[1] Vol. II., p. 211.

inconsistency, but it may help to an understanding of the English Constitution, and may incidentally throw some light upon Burke's character, if we try to read all his writings as logically consistent.

Burke never professed to believe in democracy. He did profess to believe in the English people, though never in the wisdom of trying to settle political problems by majorities of the people "told by the head." Even when he appeared before his constituents at Bristol as a popular agitator, he told them plainly that he had more important duties to perform than to seek to act in accordance with their particular requests. When Pitt had been installed in office, when the King had been forced to give up his secret Cabinet, then Burke regarded the Constitution as rescued from peril. It was not until several years later that what seemed to him a new menace to its security arose. The doctrines of the French Revolutionists and of the societies in England devoted, as he believed, to the promotion of revolutionary principles, constituted a fresh danger. While avowing his admiration for the English Revolution of a century before, Burke declared that in his opinion the admirable and the distinguishing feature of that great overturning was that it was "a revolution not made, but prevented."[1] A king was then discarded to save the Constitution. The monarchy was not impaired; rather it was strengthened. The Whig revolution was great and beneficent because it kept every part of the Constitution intact.

Coincident with the agitation in France, which preceded and accompanied the Revolution, there had appeared in England those who were disposed to ridicule the English Constitution. Some even maintained that England not only had not a good constitution, but that she had no constitution at all; that there never had been a constitution

[1] Vol. III., p. 15.

in England; that a constitution was yet to be created; that a constitution is a thing antecedent to government, and must come from the people; that everything in England was the reverse of what it should be; that there was just enough to enslave the people more effectively than by despotism; that the House of Lords was a monster, and kings the greatest enemies of mankind; that it is ridiculous to say that power to declare war resides in a *metaphor* (the Crown) shown at the Tower for sixpence, etc., etc.

Englishmen of to-day can listen by the hour to such talk as this without the least concern, but a hundred years ago such language was decidedly inflammatory, and was especially calculated to arouse the mind of such a man as Burke. He set himself to defend with infinite detail every part of the Constitution; to traverse every claim of democracy. Since that day it has been difficult for any Conservative pleader to construct an argument which may not be found in Burke's later writings.

He was a believer in the venerable contract theory of government, but when he had taken a brief to defend the English Constitution from foreign democratic ideas, the theory of contract in its relation to government took ancient and classic shapes in his mind. "The State," he said, "ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee." "It is a partnership in all science and all art; every virtue and every perfection; a partnership between the living and those who are dead and those who are yet to be born." "Each contract of each particular state is but a clause in the great primeval contract of eternal society linking the lower with the higher natures, connecting the visible with the invisible world, according to a fixed and inviolable oath which holds all physical and all moral natures each in their appointed place."

Locke drew from this contract theory of government the conclusion that the people have a right to make or to change their constitutions at will; and now, a hundred years later, Burke derives from the same premises an absolute denial of any such right. He seems, indeed, to recall that he had himself in former days used strong language concerning what people might properly do under given conditions; but he now explains that such popular action could not rightly occur except as the result of a paramount necessity which destroys choice. In such case "this necessity itself is a part too of that moral and physical disposition of things to which man must be obedient by consent or force. But if that which is only submission to necessity should be made the object of choice, the law is broken; nature is disobeyed and the rebellious are outlawed, cast forth, and" [1] — to make a long sentence short — are sent to perdition. A child, he tells us further, as an incident to being born, contracts certain filial relations which he can by no means escape. All men are born subject to the compact binding not only all the members of the State in relations of duty to each other, but the heavens and the earth as well. Men cannot by majority vote to change their relations in the State any more than they can change the common obligations of morality or the laws of nature. Duty is not voluntary. Duty and will are even contradictory. Men are born to the divine order of the State, and it is their duty to submit to that divine order.

John Knox would govern the world by a divinely ordained Presbyterian Assembly. James Stuart would govern by divinely ordained kings. Edmund Burke would govern, England at least, by a divinely ordained English Constitution. To him every part of the Constitution had its permanent place, founded in reason and in

[1] Payne's *Burke*, Vol. II., p. 114.

the everlasting principles of morality which are never subjected to the fickle reason of man. To the Sovereign belongs an unchanging and unchangeable position. It is evidence of almost superhuman wisdom on the part of the statesmen of the Great Revolution that they preserved the Crown intact. Aristocracy is of the very essence of a state of civil society. "To give therefore no more importance in the social order, to such descriptions of men than that of so many units, is a horrible usurpation." The House of Lords is a part of the divine order. The Church is likewise an integral, a natural, and an essential part of the State.

It is after Burke has described and defended each separate part of the government that he is prepared to state explicitly what he means by *the people*. "When great multitudes act together under the discipline of nature [the English Constitution], I recognize the PEOPLE . . . In all things the voice of this grand chorus of national harmony ought to have a mighty and decisive influence. But when you disturb this harmony, when you break up this beautiful order, this array of truth and nature, as well as of habit and prejudice, when you separate the common sort of men from their proper chieftains so as to form them into an adverse army, I no longer know that venerable object called the *people* in such a disbanded race of deserters and vagabonds."[1]

Though it may be difficult to prove that Burke's later writings are in all respects consistent with his earlier utterances, there is yet this much of consistency, at least, in all. Every impassioned word was in defence of what he calls the Constitution. It was because of his fear that the King and the King's friends were about to destroy the Constitution that he exhorted the colonists to resist the royal government. It was also because of his alarm lest

[1] Vol. III., p. 409.

the Constitution should be endangered by French democratic notions that he invented every conceivable argument against democracy.

Let us now inquire what did the word "constitution" mean to Mr. Burke. Like others he used the word with different meanings, but that signification which we need especially to note is this: The Constitution of England is that result of the providential order in English history which has given to England the best government in the world. The Constitution as thus defined was to be understood in the measure of ability; and it was to be worshipped where it was not understood. Peoples of other nationalities have been victims of a belief that events in their past history had fastened upon them intolerable burdens. The English people, on the contrary, became possessed by the notion that their history had worked out for them alone a beneficent development of liberty. To this they gave the name Constitution, and under that name it was apotheosized and worshipped. At that shrine Burke was a worshipper both in youth and in age. In this order of worship there is no difference between Whig and Tory.

In closing his Appeal from the New Whigs to the Old, in 1791, Burke declared that, if a new order were coming on, and all the political opinions which our ancestors have worshipped as revelations must pass away as dreams, he would choose rather to be the last as well as the least of that race of men (the older Whigs) than the first and the greatest of those who have coined to themselves Whig principles from a French die unknown to our fathers in the Constitution.[1]

This apotheosis of the old Constitution, accomplished during the latter part of the last century, has had much to do with the development of the more modern democratic Constitution. A reader of Burke's later writings does

[1] Vol. III., p. 439.

not need to be told that there was nothing democratic about the Constitution which he glorified. Yet had Burke lived in the full possession of his great faculties until the time of the Reform Act of 1832, there is a strong probability that he would have stood with the Reformers. The nightmare of the French Revolution had passed away. The dangers to the Constitution which had so impressed his mind during the earlier years of the reign of George III. seemed to have returned with more real and threatening force than at any previous time; and the only apparent means of escape was by the creation of a larger independent voting constituency. Certainly consistency with his earlier principles would have led him to support the Reform Bill in the hope of securing through its results that beneficent, conservative action of the people upon the government which he had once regarded as so essential a part of the old Constitution.

It should be remembered that in the democratic Constitution of the present day, harmony and efficiency of action are attained by the two Houses consenting to be led by the Cabinet. The delicate equipoise of checks and balances is now found not chiefly in the House of Lords, the House of Commons, the Crown, nor in any legally recognized institution, but in the political parties and in the mind of the people. In the earlier Constitution which Burke described that equipoise did inhere mainly in those legal, visible institutions. Perils from two distinct and widely different sources seemed to him at different times in his life to threaten that Constitution. He was first uneasy lest the nice balance of powers should be overthrown by a permanent executive control over the two Houses; and while under the dominion of that fear, he was ready to give countenance to the English mob led by Wilkes, ready to encourage the rebellious colonies in America, or to appeal directly to the English people to

save their Constitution from ruin. In after years he became a prey to the dread of constitutional ruin through the rise of democracy resulting in the domination of crude popular majorities.

Mark now that the actual Constitution of to-day has been attained by the establishment of both those changes which Burke foresaw and dreaded. At the time of the agitation for the Reform Act more than a hundred years of practically unbroken experience from the accession of the house of Hanover had convinced all statesmen of every name who possessed faculties which admitted of the entertainment of a conviction, that the two Houses were, as a matter of fact, controlled by the Executive. The question which remained unsettled was, Who shall control the Executive? To that question the unbroken experience of the preceding seventy years made answer that the Executive would be controlled by the will of the King. Now we see that the Reform Acts have resulted and are resulting in placing this control in the hands of that other power feared by Mr. Burke; viz. "The People of England told by the head."

CHAPTER XLIX

RECENT EXPOSITORS OF THE CONSTITUTION

FROM Blackstone and Burke to Bagehot, Dicey, and Anson there intervenes a century of time and, what is much more to the purpose in the study of our subject, there has come in an era of scientific research. Mr. Dicey introduces his book by two quotations, one from Burke and the other from Hallam, in which the reader is called upon to worship or to admire the matchless perfections of the English Constitution. Commenting upon these quotations, Mr. Dicey says: "The present generation must of necessity look on the Constitution in a spirit different from the sentiment either of 1791 or of 1818. We cannot share the religious enthusiasm of Burke, raised as it was to the temper of fanatical adoration by just hatred of those 'doctors of the modern school,' who when he wrote, were renewing the rule of barbarism in the form of the reign of terror; we cannot exactly echo the fervent self-complacency of Hallam, natural as it was to an Englishman who saw the institutions of England standing and flourishing, at a time when the attempts of foreign reformers to combine freedom with order had ended in ruin. At the present day students of the Constitution wish neither to criticise nor to venerate, but to understand."

In harmony with this spirit are the works of Dicey and Anson. In the spirit of modern science they explain the English government. They neither commend nor

condemn. They are not at all anxious to point out impending dangers to the community arising from any doctrine, opinion, or custom. Judged by what they do and say, we have reason to conclude that they think it is entirely safe to make known all the actualities of the English government. They are not primarily concerned with the safety of the State, but with the explanation of it.

Mr. Bagehot's work was earlier, and was written in a different spirit, and for a different purpose. He believed that England had hit upon a method of governing which was of immense importance to the human race. He foresaw the coming in of Democracy, and with its too hasty coming he believed this transcendent type of government would be imperilled. Judging by what he wrote, we may conclude that it was his ambition to make it easier to extend the English Cabinet system to countries where monarchy had been already rejected, and to preserve the system in existing monarchies even though monarchy itself should entirely disappear. Mr. Bagehot was an advocate. He advocated the Cabinet system as against the Presidential system as illustrated in the United States. He did not advocate the abolition of monarchy in England because he was convinced that such a policy now would endanger the Cabinet system. But with infinite pains he laboured to convince his fellow-citizens that a non-royal Cabinet would work just as well, and in many respect better than a royal Cabinet. Mr. Bagehot is, however, not a whit behind other recent writers in his disposition to analyze and explain the real English Constitution. His work is addressed to philosophers and statesmen, and he evidently intended that these should understand the real Constitution. He does not worship the Constitution himself, nor does he expect his readers to do so. He is as far from the spirit of Burke, in this respect, as is Dicey. In his view the Cabinet is not ancient; it is not venerable.

It is simply a happy accident. Its importance arises entirely from the fact that it is the best machine that has been discovered for securing the ends of good government.

Mr. Bagehot's fear of Democracy, however, was as real and as active as was that of Burke. Yet, as a disciple of the new scientific school, he could not join in the worship of an ancient and venerable constitution. In his writings there is an illustration of the putting of new wine into old bottles. He writes a book which seems fitted to destroy every feeling of adoration in the British subject, and yet in the same lines he contends that the destructive inrush of Democracy can only be prevented by diligently husbanding and prolonging the spirit of blind adoration and worship on the part of the ignorant masses. He would preserve the ancient and dignified parts of the English Constitution for the purpose of deceiving the English people as to the facts of their government. He would have the privileged ruling classes enter into a sort of conspiracy to perpetuate various useful deceptions.

The peculiar interest in Mr. Bagehot's book arises from the fact that he saw as clearly as any expositor the real nature of the Constitution of his day with its tendency to Democracy, and with relentless courage described it without disguise. At the same time, he saw with equal clearness the ancient Constitution based in large part upon sentiment, adoration, and a belief that certain things were true which were not true. The continuance of the ancient sentiments seemed to him necessary to the present safe conduct of the government.

It has been near thirty years since Mr. Bagehot wrote, and Democracy has surely developed as rapidly as he feared that it would. Many of the methods which he feared would be adopted by the political parties in their efforts to win the votes of the labouring classes have been in common use. Yet, so far as appears, the Cabinet sys-

tem is as firmly established as ever. The new voters appear as conservative as the old. Surely the party which is called by that name has no reason to complain of its treatment at the hands of the newly enfranchised.

There is much reason in Mr. Bagehot's contention that it takes a long time to adequately test the effect of a new policy. Yet surely to the superficial observer of current English politics there seems no reason for alarm in view of the Democratic experiment. Moreover, Mr. Bagehot's elaboration of the necessity for preserving the dignified parts of the English Constitution in order to deceive the English voter, seems at the present day grotesque and absurd.

There are still those whose opinions we are accustomed to treat with respect who give expression to the ancient dread of Democracy. Among the latest of the writings of Sir Henry Maine was a solemn warning against too great reliance upon the Democratic experiment, and during this year, 1896, Mr. Lecky has published an elaborate work, in which he would persuade his fellow-citizens that the English Constitution reached the acme of its perfections during the years previous to the Reform Act of 1868, when Lord Palmerston was the most conspicuous English statesman. These protests against reliance upon Democracy are to be expected. The wonder is that they are not more numerous. It is, as its ardent friends maintain, a new experiment in human government. Only the enemies of Democracy claim that it has been tried in former generations. It is to be expected that a new experiment involving the lives and destiny of the race should be stoutly questioned at every stage of its progress.

Monarchy is also a mere experiment in government. And so are the various forms of aristocracy. But these are ancient experiments, and the conviction grows in the minds of men that personal government in the hands of

a monarch, or in the hands of a privileged few, has been tried long enough. The advent of Democracy and the advent of the age of scientific research are not two things. They are different manifestations of the same thing. We are as likely to get rid of the one as we are of the other.

CHAPTER L

THE UNITY OF THE ENGLISH

PREVIOUS chapters contain frequent references to political strife and contention. This is necessitated by the fact that the Constitution to be described and accounted for is apparently based upon political parties. "Political parties," said Mr. Bagehot, "are of the very essence of the Constitution." If we are to account for the origin of political parties, we can find it only in the contentions of the preceding centuries. It is easier to write a history of the wars and strifes of a nation than it is to write a history of its harmonies and concords; yet a knowledge of the harmonies and concords is vastly more important than is a knowledge of the strife. The natural tendency of faction and civil strife is to produce anarchy and to destroy the State. But in the case of England, we have seen that the State has not been destroyed. There has been seen in the midst of the conflict a prevailing tendency to greater unity. When the English desire to condemn a policy which the government seeks to foist upon them, and have exhausted the ordinary arguments against the measure, they have a way of putting forth as the final, conclusive argument the declaration, "It is un-English." The assumption is that not a man, woman, or child in the kingdom can be found to approve a thing which is un-English.

It is this feeling of unity which is, after all, the impor-

tant element in the English Constitution. But for it the Constitution would collapse. A history which should make clear the process whereby the sentiment of national unity has been developed would be worth more to the race than all the histories of the English people and their government which have yet been produced. The history of political strife does not account for the national harmony. National harmony has grown in spite of the strife, but not because of it; it has persisted in spite of cruelty and oppression, but not because of them. The history of war and oppression and of political contest of every sort is of use chiefly as it sheds light upon the growth of national unity. It is one thing to say that the present English Constitution is based upon party, but it is quite another thing to say that partisan strife tends to promote the stability of the Constitution.

A political meeting held in South London some years ago had been announced by the officers of the Liberal party as a meeting of labouring men to be addressed by a man with a wide reputation as an authority on the industrial history of England. The opening sentence in his address was a startling statement to the effect that the Tory party was a party of rapine and plunder, and the spirit of the entire address was in harmony with that declaration. Now the more intelligent labouring men in the audience knew perfectly that they were not expected to believe such statements, in a partisan speech delivered for partisan purposes. They knew that it is the custom of some party leaders to pretend to believe that the other party is on the point of leading the country to ruin. If the rank and file of the parties accepted as true what is said in partisan debate, the present form of government would be impossible. This war of words has taken the place of the former wars with the sword. It is a more civilized method of warfare suited to the milder

age in which we live. As it is a mistake to suppose that the civil wars of the past are a cause of the national unity, so it is now a mistake to suppose that partisan verbal strife is a cause of the stability of the Constitution. The Constitution exists in spite of partisan debate, and not because of it.

The present Constitution depends for its stability upon the rational and conservative character of the people. By a study of the history of political strife we may gain a satisfactory view of the origin of the Crown and its present place in the Constitution; of the Cabinet and its present position; of the House of Commons, the House of Lords, the Church, the courts, and the voting constituency. The present relations of all these and how they came to be what they are may be learned from the history of political strife. But the most important factor of all, the spirit and temper of the people, are all the time assumed. There is little attempt to account for them. History as generally written may properly be defined as a narration of the more easily observed and less important experiences of social and political life; and English history, even English constitutional history, is no exception to this definition.

It is possible to get some suggestions as to the early development and growth of the national spirit among the English people from the character of King Alfred. It matters little whether the life of King Alfred is fact or fiction; he embodies for his countrymen a high ideal of self-sacrifice and service for the good of his fellow-men. It is an important fact that Englishmen of all classes have had such a character held up for their admiration, just as the veneration of Americans for Washington has been to them an untold blessing. Such characters are a constant rebuke to self-seeking; a constant stimulus to self-sacrifice for the common good.

With something of the same affectionate feeling with

which they regarded their good King Alfred, the early English looked upon the good laws of the past. The laws of Edgar and the laws of Edward the Confessor were a hallowed memory. The alien kings won the affections of their English subjects by manifesting a friendly spirit towards the good laws of former times. These were not regarded as harsh and arbitrary enactments such as the Tudors imposed upon the powerful classes. They were believed to embody the good ways of a more favoured age. And when the barons forced Magna Charta from the unwilling John, the people understood that document to contain a summary of all the good customs of the past.

The English may also have learned lessons of brotherly love from the French who came over with the Conqueror, and settled and lived among them. History has, it is true, given emphasis to a very different set of facts. The brutality and the cruelty of the event were much more easily observed than the sympathy and the affection which sprang up between the alien peoples. In his charter to the city of London the Conqueror expressed his will that his English and French subjects should alike enjoy their accustomed privileges. From the beginning, the under-tenantry among the Normans manifested a disposition to unite with the English tenants in like condition to maintain their common rights. This, it may be said, is a mere incident in the strife of the under-tenants against their lords; nevertheless, it is an incident of greater consequence than the fact of the strife. The fusing of French and English into one people having one language and one interest, is the great fact of the period. At the same time it is a fact of such a character that the historian has found in it few incidents. It belongs to that part of history which is too important, too much of the nature of common life, to furnish an extended field for interesting narration.

It undoubtedly has tended to unity and to ultimate good government in England that France has so much of the time fulfilled the mission of supplying an example of conditions to be dreaded and avoided. In the fact that the weakness of the French Crown had led to anarchy and confusion the Conqueror found a strong motive for husbanding every element of strength in the English Crown. In more recent centuries, when the Stuarts were striving to fasten upon the English an absolute government, the absolute rule of the Bourbons appeared as an example to be avoided and resisted. Still later, while democracy has run riot in France, the English have by common consent taken on democracy in a restrained, conservative manner.

But one of the most important sources of unity and harmony among the English has been the Christian religion. The character of King Alfred had power over the people because it was a Christian character. When we read of the oppressions of barons and bishops, and all who were in places of power, we forget that these same people were Christians. There is no more reason to believe that they were hypocrites than there is to believe that the corresponding classes to-day are hypocrites. To the mind of the Christian, it is meritorious to suffer a wrong rather than to commit a wrong. Brutal and cruel as the strife often was, it was at all times tempered and mollified by the facts of Christian experience. The innumerable charities and benevolent institutions of the Middle Ages were gifts from the rich ruling classes. We have no right to assume that when the barons sought to win the support of the people, they were wholly devoid of interest in their well-being. Much less have we a right to suppose that the clergy were void of interest in the welfare of the people. We reprobate the conduct of the clergy because they failed to act in accordance with the highest ideals of Christian requirement. We do not appreciate, as we ought,

how desperate would have been the case of our ancestors if those high ideals had not existed. An act of cruelty committed in the name of the Christian religion always seems the worse, because of our instinctive resentment of the incongruity. We have always had an exaggerated notion of the extent and the horrors of such events as the Massacre of St. Bartholomew and the persecutions of the reign of Mary Tudor. And the reaction and the repentance in view of such events is made more prompt and vital because of their obvious inconsistency with the essential spirit of the religion.

It is true that many of the civil conflicts have been fostered by religious differences, and that religious controversies have had an important part in the development of political parties. But it should be borne in mind that the modern party strife is much less brutal and less divisive in its tendency than were the class factions which it has displaced. We do not, however, get an adequate idea of the uniting power of the Christian religion by an effort to balance advantages and disadvantages which may have resulted from religious controversy. That power is seen in the fact that at all times, in the midst of the fiercest political and religious contests, there have been those who believed and acted upon the belief that religion itself was more than any authoritative human expression of religion; more than Romanism, more than Protestantism, more than Puritanism, more than Episcopalianism, more than Presbyterianism, more than Methodism. There has been much vindictive cruelty in the treatment of religious opponents, yet there have always been those who revolted at the unchristian spirit of such a course, and who have insisted upon the duty of placing religion above sect or religious party. The strife between Romanist and Protestant was long and bitter, but it was partly due to the many cruel and unjust political acts committed in the name of reli-

gion. The time came, however, when both Romanist and Protestant were ashamed of their anti-Christian hatred. There can be no doubt, upon the whole, that in spite of the many religious controversies Christianity has been the strongest influence toward the unity of the nation.

Literature has had no mean share in the promotion of national unity. In politics, it is often difficult rightly to distinguish cause and effect. A literary product may be a result of the national spirit, while it may likewise be a promoter of the national spirit. Chaucer and Wiclif stand at once for a revival in learning, for a religious awakening, and for unusual social and political activity. The great literary baptism came to England after the strong Tudor hand had kept order for the greater part of a century. The Tudors patronized learning, and they also respected the dominant elements among the people. The literary revival of the Elizabethan Age coincided with the birth of conscious political importance on the part of large numbers of the middle-class folk in town and country. It is not unlikely that one of the causes of the growth of freedom of debate and freedom of criticism upon the acts of the government was the development in the House of Commons of a style of oratory fascinating both to speakers and to hearers. The higher forms of literature are non-contentious and belong to the uniting forces of the nation. Oratory plays an important part in the contentions of politics. The men who maintained the cause of Parliament before the Rebellion against Charles I. were for the most part good speakers. The later Stuarts were also resisted by men who knew how to speak. Walpole relied upon oratory as well as upon bribery to carry his measures through the Houses of Parliament. Later, in the time of George III., when corruption had destroyed the effect of oratory in Parliament, it was for a time still made effective before popular audi-

ences. Still later, when tyrannical rule had suppressed public meetings, the advocate in the courts of law found a place where the voice of liberty could still be lifted.

It hence appears that both literature and religion have been made to play a part in the strife of class against class, and have thus become factors in that balancing of the high powers of State which we call the Constitution. Yet the important fact to be observed is that by far the most important contribution of literature and religion to the stability of the government has been the influence which they have exerted against factional and party strife and in favour of the feeling of national unity.

It is to be hoped that as Democracy attains an assured success, political contention and strife will hold a less prominent place in the constitution of the State. It is not unlikely that the fundamental ideas of all constitutions will undergo yet greater changes. Thus far, democracy has made progress in the various Christian nations, not so much because of an intelligent, clearly defined belief in its principles, as because of the necessity of a choice between evils.

Political wisdom has been gained chiefly through actual suffering. At every stage the people have felt themselves to be victims of a system which they did not create. They have been induced to change or modify the system only when it has seemed intolerable. So long as the people think themselves to be victims of their political institutions, they will want their constitutions to appear to abound in safeguards against hasty action. But the rational democrat looks forward to a time when the people will understand each other better; when they will cease to distrust one another; when the consciousness of the forces which unite them will displace the consciousness of forces which threaten their ruin; when they will feel themselves to be not the victims of their system, but

the masters of it. If such a condition should be reached, there would be no longer any need of a constitution of checks and balances, and the preventing of encroachments would cease to be the chief business of political agents. After such an attainment, the thing of chief interest in the history of the constitution of a nation would be not political strife and contention, but those qualities of character which have enabled the people to hold together in spite of continual conflict.

APPENDIX

MAGNA CARTA[1]

JOHN, BY THE GRACE OF GOD, KING OF ENGLAND, LORD OF IRELAND, DUKE OF NORMANDY AND AQUITAINE, AND EARL OF ANJOU: To the Archbishops, Bishops, Abbots, Earls, Barons, Justiciaries, Foresters, Sheriffs, Reves, Ministers, and all Bailiffs and others, his faithful subjects, Greeting. Know ye that We, in the presence of God, and for the health of Our soul, and the souls of Our ancestors and heirs, to the honour of God, and the exaltation of Holy Church, and amendment of Our kingdom, by the advice of Our reverend Fathers, Stephen, Archbishop of Canterbury, Primate of all England, and Cardinal of the Holy Roman Church; Henry, Archbishop of Dublin; William of London; Peter of Winchester, Jocelin of Bath and Glastonbury, Hugh of Lincoln, Walter of Worcester, William of Coventry, Benedict of Rochester, Bishops; and Master Pandulph, the Pope's subdeacon and familiar; Brother Aymeric, Master of the Knights of the Temple in England; and the noble persons, William Marshal, Earl of Pembroke; William, Earl of Salisbury; William, Earl of Warren; William, Earl of Arundel; Alan de Galloway, Constable of Scotland; Warin Fitz-Gerald, Hubert de Burgh, Seneschal of Poictou, Peter Fitz-Herbert, Hugo de Neville, Matthew Fitz-Herbert, Thomas Basset, Alan Basset, Philip Daubeney, Robert de Roppelay, John Marshal, John Fitz-Hugh, and others, our liegemen, have, in the first place, granted to God, and by this Our present Charter confirmed for Us and Our heirs forever —

1. That the English Church shall be free and enjoy all her rights in their integrity and her liberties untouched. And that We will

[1] Translated by William Basevi Sanders, Assistant Keeper of Her Majesty's Records.

this so to be observed appears from the fact that We of Our mere and free will, before the outbreak of the dissensions between Us and Our Barons, granted, confirmed, and procured to be confirmed by Pope Innocent III., the freedom of elections which is considered most important and necessary to the English Church, which Charter We will both keep Ourself and will it to be so kept by Our heirs for ever.

2. We have also granted to all the free men of Our Kingdom, for Us and Our heirs for ever, all the liberties underwritten, to have and to hold to them and their heirs of Us and Our heirs. If any of Our Earls, Barons, or others who hold of Us in chief by Knight's service, shall die, and at the time of his death his heir shall be of full age and owe a relief, he shall have his inheritance by ancient relief; to wit, the heir or heirs of an Earl of an entire Earl's Barony, £100; the heir or heirs of a Baron of an entire Barony, £100; the heir or heirs of a Knight of an entire Knight's fee, 100s. at the most; and he that oweth less shall give less, according to the ancient custom of fees.

3. If, however, the heir of any such shall be under age and in ward, he shall, when he comes of age, have his inheritance without relief or fine.

4. The guardian of the land of any such heir so under age shall take therefrom reasonable issues, customs, and services only, and that without destruction and waste of men or property; and if We shall have committed the custody of any such land to the Sheriff or any other person who ought to be answerable to us for the issues thereof, and he commit destruction or waste upon the ward-lands, We will take an emend from him, and the land shall be committed to two lawful and discreet men of that fee, who shall be answerable for the issues to Us or to whomsoever We shall have assigned them. And if We shall give or sell the wardship of any such land to any one, and he commit destruction or waste upon it, he shall lose the wardship, which shall be committed to two lawful and discreet men of that fee, who shall, in like manner, be answerable unto Us as hath been aforesaid.

5. But the guardian, so long as he shall have the custody of the land, shall keep up and maintain the houses, parks, fish ponds, pools, mills, and other things pertaining thereto, out of the issues of the same, and shall restore the whole to the heir when he comes of age, stocked with ploughs and wainage according as the season may require and the issues of the land can reasonably bear.

6. Heirs shall be married without disparagement, to which end the marriage shall be made known to the heir's nearest of kin before it be contracted.

7. A widow, after the death of her husband, shall immediately and without difficulty have her marriage portion and inheritance, nor shall she give anything for her marriage portion, dower, or inheritance which her husband and herself held on the day of his death; and she may remain in her husband's house for forty days after his death, within which time her dower shall be assigned to her.

8. No widow shall be distrained to marry so long as she has a mind to live without a husband; provided, however, that she give security that she will not marry without Our assent if she holds of Us, or that of the Lord of whom she holds, if she hold of another.

9. Neither We nor Our bailiffs shall seize any land or rent for any debt so long as the debtor's chattels are sufficient to discharge the same; nor shall the debtor's sureties be distrained so long as the chief debtor hath sufficient to pay the debt, and if he fail in the payment thereof, not having wherewithal to discharge it, then the sureties shall answer it, and, if they will, shall hold the debtor's lands and rents until satisfaction of the debt which they have paid for him be made them, unless the chief debtor can show himself to be quit thereof against them.

10. If any one shall have borrowed money from the Jews, more or less, and die before the debt be satisfied, no interest shall be taken upon such debt so long as the heir be under age, of whomsoever he may hold; and if the debt shall fall into Our hands We will only take the chattel mentioned in the Charter.

11. And if any one die indebted to the Jews his wife shall have her dower and pay nothing of that debt; and if the children of the said deceased be left under age they shall have necessaries provided for them according to the condition of the deceased, and the debt shall be paid out of the residue, saving the Lord's service; and so shall it be done with regard to debts owed to other persons than Jews.

12. No scutage or aid shall be imposed in Our kingdom unless by common council thereof, except to ransom Our person, make Our eldest son a knight, and once to marry Our eldest daughter, and for this a reasonable aid only shall be paid. So shall it be with regard to aids from the City of London.

13. And the City of London shall have all her ancient liberties and free customs, both by land and water. Moreover We will and grant that all other cities, boroughs, towns, and ports shall have all their liberties and free customs.

14. And for obtaining the common council of the kingdom concerning the assessment of aids other than in the three

CASES AFORESAID OR OF SCUTAGE, WE WILL CAUSE TO BE SUMMONED, SEVERALLY BY OUR LETTERS, THE ARCHBISHOPS, BISHOPS, ABBOTS, EARLS, AND GREAT BARONS; AND IN ADDITION WE WILL ALSO CAUSE TO BE SUMMONED, GENERALLY, BY OUR SHERIFFS AND BAILIFFS, ALL THOSE WHO HOLD OF US IN CHIEF, TO MEET AT A CERTAIN DAY, TO WIT, AT THE END OF FORTY DAYS, AT LEAST, AND AT A CERTAIN PLACE; AND IN ALL LETTERS OF SUCH SUMMONS WE WILL EXPLAIN THE CAUSE THEREOF, AND THE SUMMONS BEING THUS MADE THE BUSINESS SHALL PROCEED ON THE DAY APPOINTED, ACCORDING TO THE ADVICE OF THOSE WHO SHALL BE PRESENT, NOTWITHSTANDING THAT THE WHOLE NUMBER OF PERSONS SUMMONED SHALL NOT HAVE COME.

15. We will not, for the future, grant permission to any man to levy an aid upon his freemen, except to ransom his person, make his eldest son a knight, and once to marry his eldest daughter, for which a reasonable aid only shall be levied.

16. No man shall be distrained to perform more service for a knight's fee or other free tenement than is due therefrom.

17. Common pleas shall not follow Our Court, but be holden in some certain place.

18. Recognisances of Novel Disseisin, Mort d'Ancestor, and Darrein Presentment shall be taken in their proper counties only, and in this wise: — We Ourself, or, if We be absent from the realm, Our Chief Justiciary, shall send two justiciaries through each county four times a year, who, together with four knights elected out of each shire by the people thereof, shall hold the said assizes in the shire and on the day and in the place appointed.

19. And if the said assizes cannot be held on the day appointed, so many of the knights and freeholders as shall have been present thereat on that day shall remain as will be sufficient for the administration of justice, according as the business to be done be greater or less.

20. A free man shall only be amerced for a small fault according to the measure thereof, and for a great crime according to its magnitude, in proportion to his degree; and in like manner a merchant in proportion to his merchandise, and a villein in proportion to his wainage if he should fall under Our mercy; and none of the said amercements shall be imposed unless by the oath of honest men of the venue.

21. Earls and Barons shall only be amerced by their peers in proportion to the measure of the offence.

22. No clerk shall be amerced for his lay tenement, except after the manner of the other persons aforesaid, and not according to the value of his ecclesiastical benefice.

23. Neither shall any vill or person be distrained to make bridges over rivers, but they who are bound to do so by ancient custom and law.

24. No sheriff, constable, coroners, or other of Our bailiffs shall hold pleas of Our Crown.

25. All counties, hundreds, tithings, and wapentakes shall stand at the old farms, without any increased rent, except Our demesne manors.

26. If any one die holding a lay fee of Us, and the sheriff or Our bailiff show Our letters patent of summons touching the debt due to Us from the deceased, it shall be lawful to such sheriff or bailiff to attach and register the chattels of the deceased found in the lay fee to the value of that debt, by view of lawful men, so that nothing be removed therefrom until Our whole debt be paid; and the residue shall be given up to the executors to carry out the will of the deceased. And if there be nothing due from him to Us, all his chattels shall remain to the deceased, saving to his wife and children their reasonable shares.

27. If any free man shall die intestate his chattels shall be distributed by the hands of his nearest kinsfolk and friends by view of the Church, saving to every one the debts due to him from the deceased.

28. No constable or other Our bailiff shall take corn or other chattels of any man without immediate payment for the same, unless he hath a voluntary respite of payment from the seller.

29. No constable shall distrain any knight to give money for castle-guard, if he will perform it either in his proper person or by some other fit man, if he himself be prevented from so doing by reasonable cause; and, if We lead or send him into the army, he shall be quit of castle-guard for the time he shall remain in the army by Our command.

30. No sheriff or other Our bailiff, or any other man, shall take the horses or carts of any free man for carriage except with his consent.

31. Neither shall We or Our bailiffs take another man's timber for Our castles or other uses, unless with the consent of the owner thereof.

32. We will only retain the lands of persons convicted of felony for a year and a day, after which they shall be restored to the Lords of the fees.

33. From henceforth all weirs shall be entirely removed from the Thames and Medway, and throughout England, except upon the sea coast.

34. The writ called "Præcipe" shall not for the future issue to any one of any tenement whereby a freeman may lose his court.

35. There shall be one measure of wine throughout Our kingdom, and one of ale, and one measure of corn, to wit, the London quarter, and one breadth of dyed cloth, russetts, and haberjects, to wit, two ells within the lists. And as with measures so it shall be also with weights.

36. From henceforth nothing shall be given for a writ of inquisition upon life or limbs, but it shall be granted gratis, and shall not be denied.

37. If any one hold of Us by fee-farm, socage or burgage, and hold land of another by knight's service, We will not have the wardship of his heir, or the land which belongs to another man's fee, by reason of that fee-farm, socage or burgage; nor will We have the wardship of such fee-farm, socage, or burgage, unless such fee-farm owe knight's service. We will not have the wardship of any man's heir, or the land which he holds of another by knight's service, by reason of any petty serjeanty which he holds of Us by service of rendering Us daggers, arrows, or the like.

38. No bailiff shall for the future put any man to trial upon his simple accusation without producing credible witnesses to the truth thereof.

39. No freeman shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him except by lawful judgment of his peers or the law of the land.

40. To no one will We sell, to none will We deny or defer, right or justice.

41. All merchants shall have safe conduct to go and come out of and into England, and to stay in and travel through England by land and water for purchase or sale, without maltolt, by ancient and just customs, except in time of war, or if they belong to a country at war with Us. And if any such be found in Our dominion at the outbreak of war, they shall be attached, without injury to their persons or goods, until it be known to Us or Our Chief Justiciary, after what sort Our merchants are treated who shall be found to be at that time in the country at war with Us, and if they be safe there then these shall be so also with Us.

42. It shall be lawful in future, unless in time of war, for any one to leave and return to Our kingdom safely and securely by land and water, saving his fealty to Us, for any short period, for the common benefit of the realm, except prisoners and outlaws according to the law of the land, people of the country at war with Us, and merchants who shall be dealt with as is aforesaid.

43. If any one die holding of any escheat, as of the honour of Wallingford, Nottingham, Boulogne, Lancaster, or other escheats which are in Our hands and are baronies, his heir shall not give any relief or do any service to Us other than he would owe to the baron if such barony should have been in the hands of a baron, and We will hold it in the same manner in which the baron held it.

44. Persons dwelling without the forest shall not for the future come before Our justiciaries of the forest by common summons, unless they be impleaded or are bail for any person or persons attached for breach of forest laws.

45. We will only appoint such men to be justiciaries, constables, sheriffs, or bailiffs as know the law of the land and will keep it well.

46. All barons, founders of abbies by charters of English Kings or ancient tenure, shall have the custody of the same during vacancy as is due.

47. All forests which have been afforested in Our time shall be forthwith disafforested, and so shall it be done with regard to rivers which have been placed in fence in Our time.

48. All evil customs concerning forests and warrens, foresters, warreners, sheriffs, and their officers, rivers and their conservators, shall be immediately inquired into in each county by twelve sworn knights of such shire, who must be elected by honest men thereof, and within forty days after making the inquisition they shall be altogether and irrevocably abolished, the matter having been previously brought to Our knowledge or that of Our Chief Justiciary if We Ourself shall not be in England.

49. We will immediately give up all hostages and charters delivered to Us by the English for the security of peace and the performance of loyal service.

50. We will entirely remove from their bailiwicks the kinsmen of Gerard de Atyes, so that henceforth they shall hold no bailiwick in England, Engelard de Cygoyney, Andrew, Peter, and Gyon de Cancelles, Gyon de Cygoyney, Ralph de Martiny and his brothers, Philip Marc[el] and his brothers, and Ralph his grandson, and all their followers.

51. Directly after the restoration of peace We will dismiss out of Our kingdom all foreign soldiers, bowmen, serving men, and mercenaries, who come with horses and arms to the nuisance thereof.

52. If any one shall have been disseised or deprived by Us, without the legal judgment of his peers, of lands, castles, liberties, or rights, We will instantly restore the same, and if any dispute shall arise thereupon, the matter shall be decided by judgment of the twenty-

five barons mentioned below for the security of peace. With regard to all those things, however, whereof any person shall have been disseised or deprived, without the legal judgment of his peers, by King Henry Our Father, or Our Brother King Richard, and which remain in Our hands or are held by others under Our warranty, We will have respite thereof till the term commonly allowed to the crusaders, except as to those matters on which a plea shall have arisen, or an inquisition have been taken by Our command prior to Our assumption of the Cross, and immediately after Our return from Our pilgrimage, or if by chance We should remain behind from it We will do full justice therein.

53. We will likewise have the same respite and in like manner shall justice be done with respect to forests to be disafforested or let alone, which Henry Our Father or Richard Our Brother afforested, and to wardships of lands belonging to another's fee, which We have hitherto held by reason of the fee which some person has held of Us by knight's service, and to abbies founded in another's fee than Our own, whereto the lord of that fee asserts his right. And when We return from Our pilgrimage, or if We remain behind therefrom, We will forthwith do full justice to the complainants in these matters.

54. No one shall be taken or imprisoned upon a woman's appeal for the death of any other person than her husband.

55. All fines unjustly and unlawfully made with Us, and all amercements levied unjustly and against the law of the land, shall be entirely condoned or the matter settled by judgment of the twenty-five barons of whom mention is made below, for the security of peace, or the majority of them, together with the aforesaid Stephen, Archbishop of Canterbury, if he himself can be present, and any others whom he may wish to summon for the purpose, and if he cannot be present the business shall nevertheless proceed without him. Provided that if any one or more of the said twenty-five barons be interested in a plaint of this kind, he or they shall be set aside, as to this particular judgment, and another or others elected and sworn by the rest of the said barons for this purpose only, be substituted in his or their stead.

56. If We have disseised or deprived the Welsh of lands, liberties or other things, without legal judgment of their peers, in England or Wales, they shall instantly be restored to them, and if a dispute shall arise thereon the question shall be determined on the Marches by judgment of their peers according to the law of England with regard to English tenements, the law of Wales respecting Welsh tenements, and the law of the Marches as to tenements in the Marches. The same shall the Welsh do to Us and Ours.

57. But with regard to all those things whereof any Welshman shall have been disseised or deprived, without legal judgment of his peers, by King Henry Our Father or Our Brother King Richard, and which We hold in Our hands or others hold under Our warranty, We will have respite thereof till the term commonly allowed to the crusaders, except as to those matters whereon a plea shall have arisen or an inquisition have been taken by Our command prior to Our assumption of the Cross, and immediately after Our return from Our pilgrimage, or if by chance We should remain behind from it We will do full justice therein, according to the laws of the Welsh and the parts aforesaid.

58. We will immediately give up the son of Lewellyn and all the Welsh hostages, and the charters which were delivered to Us for the security of peace.

59. We will do the same with regard to Alexander, King of the Scots, in the matter of giving up his sisters and hostages, and of his liberties and rights, as We would with regard to Our other barons of England, unless it should appear by the charters which We hold of William his father, late King of the Scots, that it ought to be otherwise, and this shall be done by judgment of his peers in Our Court.

60. All which customs and liberties aforesaid, which We have granted to be enjoyed, as far as in Us lies, by Our people throughout Our kingdom, let all Our subjects, clerks and laymen, observe, as far as in them lies, towards their dependants.

61. And whereas We, for the honour of God and the amendment of Our realm, and in order the better to allay the discord arisen between Us and Our barons, have granted all these things aforesaid, We, willing that they be for ever enjoyed wholly and in lasting strength, do give and grant to Our subjects the following security, to wit, that the barons shall elect any twenty-five barons of the kingdom at will, who shall, with their utmost power, keep, hold, and cause to be holden the peace and liberties which We have granted unto them, and by this Our present Charter confirmed, so that, for instance, if We, Our Justiciary, bailiffs, or any of Our ministers, offend in any respect against any man, or shall transgress any of these articles of peace or security, and the offence be brought before four of the said five and twenty barons, those four barons shall come before Us, or Our Chief Justiciary if We are out of the kingdom, declaring the offence, and shall demand speedy amends for the same. And if We or in case of Our being out of the kingdom, Our Chief Justiciary, fail to afford redress within the space of forty days from the time the case

was brought before Us or Our Chief Justiciary, the aforesaid four barons shall refer the matter to the rest of the twenty-five barons, who, together with the commonalty of the whole county, shall distrain and distress Us to the utmost of their power, to wit, by capture of Our castles, lands, possessions, and all other possible means, until compensation be made according to their decision, saving Our person and that of Our Queen and children, and as soon as that be done they shall return to their former allegiance. Any one whatsoever in the kingdom may take oath that, for the accomplishment of all the aforesaid matters, he will obey the orders of the said twenty-five barons, and distress Us to the utmost of his power; and We give public and free leave to every one wishing to take such oath to do so, and to none will We deny the same.

62. Moreover We will compel all such of Our subjects who shall decline to swear to, and together with the said twenty-five barons to distrain and distress Us of their own free will and accord, to do so by Our command as is aforesaid. And if any one of the twenty-five barons shall die or leave the country, or be in any way hindered from executing the said office, the rest of the said twenty-five barons shall choose another in his stead, at their discretion, who shall be sworn in like manner as the others. And in all cases which are referred to the said twenty-five barons to execute, and in which a difference shall arise among them, supposing them all to be present, or that all who have been summoned are unwilling or unable to appear, the verdict of the majority shall be considered as firm and binding as if the whole number should have been of one mind. And the aforesaid twenty-five shall swear to keep faithfully all the aforesaid articles, and, to the best of their power, cause them to be kept by others. And We will not procure, either by Ourself or any other, anything from any man whereby any of the said concessions or liberties may be revoked or abated; and if any such procurement be made let it be null and void; it shall never be made use of either by Us or any other. We have also wholly remitted and condoned all ill-will, wrath, and malice which have arisen between Us and Our subjects, clerks and laymen, during the disputes, to and with all men; and We have moreover fully remitted, and as far as in Us lies, wholly condoned to and with all clerks and laymen all trespasses made in consequence of the said disputes from Easter in the sixteenth year of Our reign till the restoration of peace; and, over and above this, We have caused to be made in their behalf letters patent by testimony of Stephen, Archbishop of Canterbury, Henry, Archbishop of Dublin, the Bishops above-mentioned, and Master Pandulph, upon the security and concession aforesaid.

63. Wherefore We will, and firmly charge, that the English Church be free, and that all men in Our Kingdom have and hold all the aforesaid liberties, rights, and concessions, well and peaceably, freely, quietly, fully, and wholly, to them and their heirs, of Us and Our heirs, in all things and places for ever, as is aforesaid. It is moreover sworn, as well on Our part as on the part of the Barons, that all these matters aforesaid shall be kept in good faith and without malengine. Witness the above-mentioned Prelates and Nobles and many others. Given by Our hand in the meadow which is called Runnymede between Windsor and Staines, on the Fifteenth day of June in the Seventeenth year of Our reign.

The following documents are taken from the Appendix to Stubbs' *Select Charters*.

A.D. 1628. Petition of Right.

3 Car. I. c. 1.

The Petition exhibited to his Majesty by the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, concerning divers Rights and Liberties of the Subjects, with the King's Majesty's royal answer thereunto in full Parliament.

To the King's Most Excellent Majesty,

Humbly show unto our Sovereign Lord the King, the Lords Spiritual and Temporal, and Commons in Parliament assembled, that whereas it is declared and enacted by a statute made in the time of the reign of King Edward I, commonly called *Statutum de Tallagio non Concedendo*, that no tallage or aid shall be laid or levied by the king or his heirs in this realm, without the good will and assent of the archbishops, bishops, earls, barons, knights, burgesses, and other the freemen of the commonalty of this realm; and by authority of parliament holden in the five-and-twentieth year of the reign of King Edward III, it is declared and enacted, that from thenceforth no person should be compelled to make any loans to the king against his will, because such loans were against reason and the franchise of the land; and by other laws of this realm it is provided, that none should be charged by any charge or imposition called a benevolence, nor by such like charge; by which statutes before men-

tioned, and other the good laws and statutes of this realm, your subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tallage, aid, or other like charge not set by common consent, in parliament.

II. Yet nevertheless of late divers commissions directed to sundry commissioners in several counties, with instructions, have issued; by means whereof your people have been in divers places assembled, and required to lend certain sums of money unto your Majesty, and many of them, upon their refusal so to do, have had an oath administered unto them not warrantable by the laws or statutes of this realm, and have been constrained to become bound and make appearance and give utterance before your Privy Council and in other places, and others of them have been therefore imprisoned, confined, and sundry other ways molested and disquieted; and divers other charges have been laid and levied upon your people in several counties by lord lieutenants, deputy lieutenants, commissioners for musters, justices of peace and others, by command or direction from your Majesty, or your Privy Council, against the laws and free customs of the realm.

III. And whereas also by the statute called 'The Great Charter of the liberties of England,' it is declared and enacted, that no freeman may be taken or imprisoned or be disseised of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land.

IV. And in the eight-and-twentieth year of the reign of King Edward III, it was declared and enacted by authority of parliament, that no man, of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death without being brought to answer by due process of law.

V. Nevertheless, against the tenor of the said statutes, and other the good laws and statutes of your realm to that end provided, divers of your subjects have of late been imprisoned without any cause showed; and when for their deliverance they were brought before your justices by your Majesty's writs of *Habeas Corpus*, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law.

VI. And whereas of late great companies of soldiers and mariners

have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourn against the laws and customs of this realm, and to the great grievance and vexation of the people.

VII. And whereas also by authority of parliament, in the five-and-twentieth year of the reign of King Edward III, it is declared and enacted, that no man shall be forejudged of life or limb against the form of the Great Charter and the law of the land; and by the said Great Charter and other the laws and statutes of this your realm, no man ought to be adjudged to death but by the laws established in this your realm, either by the customs of the same realm, or by acts of parliament: and whereas no offender of what kind soever is exempted from the proceedings to be used, and punishments to be inflicted by the laws and statutes of this your realm; nevertheless of late time divers commissions under your Majesty's great seal have issued forth, by which certain persons have been assigned and appointed commissioners with power and authority to proceed within the land, according to the justice of martial law, against such soldiers or mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever, and by such summary course and order as is agreeable to martial law, and as is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the law martial.

VIII. By pretext whereof some of your Majesty's subjects have been by some of the said commissioners put to death, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might, and by no other ought to have been judged and executed.

IX. And also sundry grievous offenders, by colour thereof claiming an exemption, have escaped the punishments due to them by the laws and statutes of this your realm, by reason that divers of your officers and ministers of justice have unjustly refused or forborne to proceed against such offenders according to the same laws and statutes, upon pretence that the said offenders were punishable only by martial law, and by authority of such commissions as aforesaid; which commissions, and all other of like nature, are wholly and directly contrary to the said laws and statutes of this your realm.

X. They do therefore humbly pray your most excellent Majesty, that no man hereafter be compelled to make or yield any gift, loan,

benevolence, tax, or such like charge, without common consent by act of parliament; and that none be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same or for refusal thereof; and that no freeman, in any such manner as is before mentioned, be imprisoned or detained; and that your Majesty would be pleased to remove the said soldiers and mariners, and that your people may not be so burdened in time to come; and that the aforesaid commissions, for proceeding by martial law, may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed or put to death contrary to the laws and franchise of the land.

XI. All which they most humbly pray of your most excellent Majesty as their rights and liberties, according to the laws and statutes of this realm; and that your Majesty would also vouchsafe to declare, that the awards, doings, and proceedings, to the prejudice of your people in any of the premises, shall not be drawn hereafter into consequence or example; and that your Majesty would be also graciously pleased, for the further comfort and safety of your people, to declare your royal will and pleasure, that in the things aforesaid all your officers and ministers shall serve you according to the laws and statutes of this realm, as they tender the honour of your Majesty, and the prosperity of this kingdom.

Qua quidem petitione lecta et plenius intellecta per dictum dominum regem taliter est responsum in pleno parliamento, viz. Soit droit fait come est desiré. — (*Statutes of the Realm*, v. 24, 25.)

A.D. 1679. The Habeas Corpus Act.

31 Car. II. c. 2.

An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonments beyond the Seas.

Whereas great delays have been used by sheriffs, gaolers, and other officers, to whose custody any of the king's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of *Habeas Corpus* to them directed, by standing out an *Alias* and *Pluries Habeas Corpus*, and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty

and the known laws of the land, whereby many of the king's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable, to their great charges and vexation:

II. For the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters; be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority thereof, that whensoever any person or persons shall bring any *Habeas Corpus* directed unto any sheriff or sheriffs, gaoler, minister, or other person whatsoever, for any person in his or their custody, and the said writ shall be served upon the said officer, or left at the gaol or prison with any of the under-officers, under-keepers or deputy of the said officers or keepers, that the said officer or officers, his or their under-officers, under-keepers or deputies, shall within three days after the service thereof as aforesaid (unless the commitment aforesaid were for treason or felony, plainly and specially expressed in the warrant of commitment) upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the judge or court that awarded the same, and endorsed upon the said writ, not exceeding twelve pence per mile, and upon security given by his own bond to pay the charges of carrying back the prisoner, if he shall be remanded by the court or judge to which he shall be brought according to the true intent of this present act, and that he will not make any escape by the way, make return of such writ; and bring or cause to be brought the body of the party so committed or restrained, unto or before the Lord Chancellor, or Lord Keeper of the great seal of England for the time being, or the judges or barons of the said court from whence the said writ shall issue, or unto and before such other person or persons before whom the said writ is made returnable, according to the command thereof; and shall then likewise certify the true causes of his detainer or imprisonment, unless the commitment of the said party be in any place beyond the distance of twenty miles from the place or places where such court or person is or shall be residing; and if beyond the distance of twenty miles, and not above one hundred miles, then within the space of ten days, and if beyond the distance of one hundred miles, then within the space of twenty days, after such delivery aforesaid, and not longer.

III. And to the intent that no sheriff, gaoler or other officer may pretend ignorance of the import of any such writ; be it enacted by the authority aforesaid, that all such writs shall be marked in this manner, *per statutum tricesimo primo Caroli secundi regis*, and shall be

signed by the person that awards the same; and if any person or persons shall be or stand committed or detained as aforesaid, for any crime, unless for felony or treason plainly expressed in the warrant of commitment, in the vacation-time, and out of term, it shall and may be lawful to and for the person or persons so committed or detained (other than persons convict or in execution by legal process) or any one on his or their behalf, to appeal or complain to the Lord Chancellor or Lord Keeper, or any one of his Majesty's justices, either of the one bench or of the other, or the barons of the exchequer of the degree of the coif; and the said Lord Chancellor, Lord Keeper, justices or barons or any of them, upon view of the copy or copies of the warrant or warrants of commitment and detainer, or otherwise upon oath made that such copy or copies were denied to be given by such person or persons in whose custody the prisoner or prisoners is or are detained, are hereby authorized, and required, upon request made in writing by such person or persons or any on his, her or their behalf, attested and subscribed by two witnesses who were present at the delivery of the same, to award and grant an *Habeas Corpus* under the seal of such court whereof he shall then be one of the judges, to be directed to the officer or officers in whose custody the party so committed or detained shall be, returnable immediate before the said Lord Chancellor or Lord Keeper, or such justice, baron or any other justice or baron of the degree of the coif of any of the said courts; and upon service thereof as aforesaid, the officer or officers, his or their under-officer or under-officers, under-keeper or under-keepers, or their deputy, in whose custody the party is so committed or detained, shall within the times respectively before limited, bring such prisoner or prisoners before the said Lord Chancellor or Lord Keeper, or such justices, barons or one of them, before whom the said writ is made returnable, and in case of his absence before any of them, with the return of such writ, and the true causes of the commitment and detainer; and thereupon within two days after the party shall be brought before them, the said Lord Chancellor or Lord Keeper, or such justice or baron before whom the prisoner shall be brought as aforesaid, shall discharge the said prisoner from his imprisonment, taking his or their recognizance, with one or more surety or sureties, in any sum according to their discretions, having regard to the quality of the prisoner and nature of the offence, for his or their appearance in the court of king's bench the term following, or at the next assizes, sessions, or general gaol-delivery of and for such county, city, or place where the commitment was, or where the offence was committed, or in such other court where the said offence is properly cognizable, as

the case shall require, and then shall certify the said writ with the return thereof, and the said recognizance or recognizances into the said court where such appearance is to be made; unless it shall appear unto the said Lord Chancellor or Lord Keeper, or justice or justices, or baron or barons, that the party so committed is detained upon a legal process, order or warrant, out of some court that hath jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal of any of the said justices or barons, or some justice or justices of the peace, for such matters or offences for the which by the law the prisoner is not bailable.

IV. Provided always, and be it enacted, that if any person shall have wilfully neglected by the space of two whole terms after his imprisonment, to pray a *Habeas Corpus* for his enlargement, such person so wilfully neglecting shall not have any *Habeas Corpus* to be granted in vacation-time, in pursuance of this act.

V. And be it further enacted by the authority aforesaid, that if any officer or officers, his or their under-officer or under-officers, under-keeper or under-keepers, or deputy, shall neglect or refuse to make the returns aforesaid, or to bring the body or bodies of the prisoner or prisoners according to the command of the said writ, within the respective times aforesaid, or upon demand made by the prisoner or person in his behalf, shall refuse to deliver, or within the space of six hours after demand shall not deliver, to the person so demanding, a true copy of the warrant or warrants of commitment and detainer of such prisoner, which he and they are hereby required to deliver accordingly; all and every the head gaolers and keepers of such prisons, and such other person in whose custody the prisoner shall be detained, shall for the first offence forfeit to the prisoner or party grieved the sum of one hundred pounds; and for the second offence the sum of two hundred pounds, and shall and is hereby made incapable to hold or execute his said office; the said penalties to be recovered by the prisoner or party grieved, his executors or administrators, against such offender, his executors or administrators, by any action of debt, suit, bill, plaint, or information, in any of the king's courts at Westminster, wherein no essoin, protection, privilege, injunction, wager of law, or stay of prosecution by *non vult ulterius prosequi*, or otherwise, shall be admitted or allowed, or any more than one imparlance; and any recovery or judgment at the suit of any party grieved, shall be a sufficient conviction for the first offence; and any after recovery or judgment at the suit of a party grieved for any offence after the first judgment, shall be a sufficient conviction to bring the officers or person within the said penalty for the second offence.

VI. And for the prevention of unjust vexation by reiterated commitments for the same offence; be it enacted by the authority aforesaid, that no person or persons which shall be delivered or set at large upon any *Habeas Corpus*, shall at any time hereafter be again imprisoned or committed for the same offence by any person or persons whatsoever, other than by the legal order and process of such court wherein he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause; and if any other person or persons shall knowingly contrary to this act recommit or imprison, or knowingly procure or cause to be recommitted or imprisoned, for the same offence or pretended offence, any person or persons delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved the sum of five hundred pounds; any colourable pretence or variation in the warrant or warrants of commitment notwithstanding, to be recovered as aforesaid.

VII. Provided always, and be it further enacted, that if any person or persons shall be committed for high treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court the first week of the term, or first day of the sessions of Oyer and Terminer or general gaol-delivery, to be brought to his trial, shall not be indicted some time in the next term, sessions of Oyer and Terminer or general gaol-delivery, after such commitment; it shall and may be lawful to and for the judges of the court of king's bench and justices of Oyer and Terminer or general gaol-delivery, and they are hereby required, upon motion to them made in open court the last day of the term, sessions or gaol-delivery, either by the prisoner or any one in his behalf, to set at liberty the prisoner upon bail, unless it appear to the judges and justices upon oath made, that the witnesses for the king could not be produced the same term, sessions or general gaol-delivery; and if any person or persons committed as aforesaid, upon his prayer or petition in open court the first week of the term or first day of the sessions of Oyer and Terminer and general gaol-delivery, to be brought to his trial, shall not be indicted and tried the second term, sessions of Oyer and Terminer or general gaol-delivery, after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment.

VIII. Provided always, that nothing in this act shall extend to discharge out of prison any person charged in debt, or other action, or with process in any civil cause, but that after he shall be discharged of his imprisonment for such his criminal offence, he shall be kept in custody according to the law, for such other suit.

IX. Provided always, and be it enacted by the authority aforesaid, that if any person or persons, subjects of this realm, shall be committed to any prison or in custody of any officer or officers whatsoever, for any criminal or supposed criminal matter, that the said person shall not be removed from the said prison and custody into the custody of any other officer or officers; unless it be by *Habeas Corpus* or some other legal writ; or where the prisoner is delivered to the constable or other inferior officer to carry such prisoner to some common gaol: or where any person is sent by order of any judge of assize or justice of the peace to any common workhouse or house of correction; or where the prisoner is removed from one prison or place to another within the same county, in order to his or her trial or discharge in due course of law; or in case of sudden fire or infection, or other necessity; and if any person or persons shall after such commitment aforesaid make out and sign, or countersign any warrant or warrants for such removal aforesaid, contrary to this act; as well he that makes or signs, or countersigns such warrant or warrants as the officer or officers that obey or execute the same, shall suffer and incur the pains and forfeitures in this act before mentioned, both for the first and second offence respectively, to be recovered in manner aforesaid by the party grieved.

X. Provided also, and be it further enacted by the authority aforesaid, that it shall and may be lawful to and for any prisoner and prisoners as aforesaid, to move and obtain his or their *Habeas Corpus* as well out of the high court of chancery or court of exchequer, as out of the courts of king's bench or common pleas, or either of them; and if the said Lord Chancellor or Lord Keeper, or any judge or judges, baron or barons for the time being, of the degree of the coif, of any of the courts aforesaid, in the vacation-time, upon view of the copy or copies of the warrant or warrants of commitment or detainer, or upon oath made that such copy or copies were denied as aforesaid, shall deny any writ of *Habeas Corpus* by this act required to be granted, being moved for as aforesaid, they shall severally forfeit to the prisoner or party grieved the sum of five hundred pounds, to be recovered in manner aforesaid.

XI. And be it declared and enacted by the authority aforesaid, that an *Habeas Corpus* according to the true intent and meaning of this act, may be directed and run into any county palatine, the cinque ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, and the islands of Jersey or Guernsey; any law or usage to the contrary notwithstanding.

XII. And for preventing illegal imprisonments in prisons beyond the seas; be it further enacted by the authority aforesaid, that no subject of this realm that now is, or hereafter shall be an inhabitant or resiant of this kingdom of England, dominion of Wales, or town of Berwick upon Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his Majesty, his heirs or successors; and that every such imprisonment is hereby enacted and adjudged to be illegal; and that if any of the said subjects now is or hereafter shall be so imprisoned, every such person and persons so imprisoned, shall and may for every such imprisonment maintain by virtue of this act an action or actions of false imprisonment, in any of his Majesty's courts of record, against the person or persons by whom he or she shall be so committed, detained, imprisoned, sent prisoner or transported, contrary to the true meaning of this act, and against all or any person or persons that shall frame, contrive, write, seal or countersign any warrant or writing for such commitment, detainer, imprisonment, or transportation, or shall be advising, aiding or assisting in the same, or any of them; and the plaintiff in every such action shall have judgment to recover his treble costs, besides damages, which damages so to be given, shall not be less than five hundred pounds; in which action no delay, stay or stop of proceeding by rule, order or command, nor no injunction, protection or privilege whatsoever, nor any more than one imparlance shall be allowed, excepting such rule of the court wherein the action shall depend, made in open court, as shall be thought in justice necessary, for special cause to be expressed in the said rule; and the person or persons who shall knowingly frame, contrive, write, seal or countersign any warrant for such commitment, detainer, or transportation, or shall so commit, detain, imprison or transport any person or persons contrary to this act, or be any ways advising, aiding or assisting therein, being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within the said realm of England, dominion of Wales, or town of Berwick upon Tweed, or any of the islands, territories or dominions thereunto belonging; and shall incur and sustain the pains, penalties, and forfeitures limited, ordained and provided in and by the statute of Provision and *Præmunire* made in the sixteenth year of King Richard the second; and be incapable of any pardon from the king, his heirs or successors, of the said forfeitures, losses, or disabilities, or any of them.

XIII. Provided always, that nothing in this act shall extend to

give benefit to any person who shall by contract in writing agree with any merchant or owner of any plantation, or other person whatsoever, to be transported to any parts beyond the seas, and receive earnest upon such agreement, although that afterwards such person shall renounce such contract.

XIV. Provided always, and be it enacted, that if any person or persons lawfully convicted of any felony, shall in open court pray to be transported beyond the seas, and the court shall think fit to leave him or them in prison for that purpose, such person or persons may be transported into any parts beyond the seas; this act, or anything therein contained to the contrary notwithstanding.

XV. Provided also, and be it enacted, that nothing herein contained shall be deemed, construed or taken, to extend to the imprisonment of any person before the first day of June one thousand six hundred seventy and nine, or to anything advised, procured, or otherwise done, relating to such imprisonment; anything herein contained to the contrary notwithstanding.

XVI. Provided also, that if any person or persons at any time resiant in this realm, shall have committed any capital offence in Scotland or Ireland, or any of the islands, or foreign plantations of the king, his heirs or successors, where he or she ought to be tried for such offence, such person or persons may be sent to such place, there to receive such trial, in such manner as the same might have been used before the making of this act; anything herein contained to the contrary notwithstanding.

XVII. Provided also, and be it enacted, that no person or persons shall be sued, impleaded, molested or troubled for any offence against this act, unless the party offending be sued or impleaded for the same within two years at the most after such time wherein the offence shall be committed, in case the party grieved shall not be then in prison; and if he shall be in prison, then within the space of two years after the decease of the person imprisoned, or his or her delivery out of prison, which shall first happen.

XVIII. And to the intent no person may avoid his trial at the assizes or general gaol-delivery, by procuring his removal before the assizes, at such time as he cannot be brought back to receive his trial there; be it enacted, that after the assizes proclaimed for that county where the prisoner is detained, no person shall be removed from the common gaol upon any *Habeas Corpus* granted in pursuance of this act, but upon any such *Habeas Corpus* shall be brought before the judge of assize in open court, who is thereupon to do what to justice shall appertain.

XIX. Provided nevertheless, that after the assizes are ended, any person or persons detained, may have his or her *Habeas Corpus* according to the direction and intention of this act.

XX. And be it also enacted by the authority aforesaid, that if any information, suit or action shall be brought or exhibited against any person or persons for any offence committed or to be committed against the form of this law, it shall be lawful for such defendants to plead the general issue, that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter being pleaded had been good and sufficient matter in law to have discharged the said defendant or defendants against the said information, suit or action, and the said matter shall be then as available to him or them, to all intents and purposes, as if he or they had sufficiently pleaded, set forth or alleged the same matter in bar or discharge of such information, suit or action.

XXI. And because many times persons charged with petty treason or felony, or as accessories thereunto, are committed upon suspicion only, whereupon they are bailable, or not, according as the circumstances making out that suspicion are more or less weighty, which are best known to the justices of peace that committed the persons, and have the examinations before them, or to other justices of the peace in the county; be it therefore enacted, that where any person shall appear to be committed by any judge or justice of the peace, and charged as accessory before the fact, to any petty treason or felony, or upon suspicion thereof, or with suspicion of petty treason or felony, which petty treason or felony shall be plainly and specially expressed in the warrant of commitment, that such person shall not be removed or bailed by virtue of this act, or in any other manner than they might have been before the making of this act. — (*Statutes of the Realm*, v. 935–938.)

A.D. 1689. Bill of Rights.

1 Will. & Mar. Sess. 2. c. 2.

Whereas the Lords Spiritual and Temporal, and Commons, assembled at Westminster, lawfully, fully, and freely representing all the estates of the people of this realm, did, upon the thirteenth day of February, in the year of our Lord one thousand six hundred eighty-eight, present unto their Majesties, then called and known by the names and style of William and Mary, Prince and Princess of Orange,

being present in their proper persons, a certain declaration in writing, made by the said Lords and Commons, in the words following viz.: —

Whereas the late King James II, by the assistance of diverse evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion, and the laws and liberties of this kingdom: —

1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of Parliament.

2. By committing and prosecuting divers worthy prelates, for humbly petitioning to be excused from concurring to the same assumed power.

3. By issuing and causing to be executed a commission under the Great Seal for erecting a court, called the Court of Commissioners for Ecclesiastical Causes.

4. By levying money for and to the use of the Crown, by pretence of prerogative, for other time, and in other manner than the same was granted by Parliament.

5. By raising and keeping a standing army within this kingdom in time of peace, without consent of Parliament, and quartering soldiers contrary to law.

6. By causing several good subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and employed contrary to law.

7. By violating the freedom of election of members to serve in Parliament.

8. By prosecutions in the Court of King's Bench, for matters and causes cognizable only in Parliament; and by diverse other arbitrary and illegal courses.

9. And whereas of late years, partial, corrupt, and unqualified persons have been returned and served on juries in trials, and particularly diverse jurors in trials for high treason, which were not freeholders.

10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.

11. And excessive fines have been imposed; and illegal and cruel punishments inflicted.

12. And several grants and promises made of fines and forfeitures, before any conviction or judgment against the persons upon whom the same were to be levied.

All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.

And whereas the said late King James II having abdicated the government, and the throne being thereby vacant, his Highness the Prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from popery and arbitrary power) did (by the advice of the Lords Spiritual and Temporal, and diverse principal persons of the Commons) cause letters to be written to the Lords Spiritual and Temporal, being Protestants, and other letters to the several counties, cities, universities, boroughs, and cinque ports, for the choosing of such persons as represent them, as were of right to be sent to Parliament, to meet and sit at Westminster upon the two-and-twentieth day of January, in this year one thousand six hundred eighty and eight, in order to such an establishment, as that their religion, laws and liberties might not again be in danger of being subverted; upon which letters, elections have been accordingly made.

And thereupon the said Lords Spiritual and Temporal, and Commons, pursuant to their respective letters and elections, being now assembled in a full and free representation of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like case have usually done), for the vindicating and asserting their ancient rights and liberties, declare:—

1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

2. That the pretended power of dispensing with laws, or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.

3. That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious.

4. That levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament, for longer time or in other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

7. That the subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law.

8. That election of members of parliament ought to be free.

9. That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void.

13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliament ought to be held frequently.

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example.

To which demand of their rights they are particularly encouraged by the declaration of his Highness the Prince of Orange, as being the only means for obtaining a full redress and remedy therein.

Having therefore an entire confidence that his said Highness the Prince of Orange will perfect the deliverance so far advanced by him, and will still preserve them from the violation of their rights, which they have here asserted, and from all other attempts upon their religion, rights, and liberties:

II. The said Lords Spiritual and Temporal, and Commons, assembled at Westminster, do resolve, that William and Mary, Prince and Princess of Orange, be, and be declared, King and Queen of England, France, and Ireland, and the dominions thereunto belonging, to hold the Crown and royal dignity of the said kingdoms and dominions to them the said Prince and Princess during their lives, and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by, the said Prince of Orange, in the names of the said Prince and Princess, during their joint lives; and after their deceases, the said Crown and royal dignity of the said kingdoms and dominions to be to the heirs of the body of the said Princess; and for default of such issue to the Princess Anne of Denmark, and the heirs of her body; and for default of such issue to the heirs of the body of the said Prince of Orange. And the

Lords Spiritual and Temporal, and Commons, do pray the said Prince and Princess to accept the same accordingly.

III. And that the oaths hereafter mentioned be taken by all persons of whom the oaths of allegiance and supremacy might be required by law, instead of them; and that the said oaths of allegiance and supremacy be abrogated.

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: So help me God.

I, A. B., do swear, That I do from my heart, abhor, 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, prelate, state, or potentate hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authority ecclesiastical or spiritual, within this realm: So help me God.

IV. Upon which their said Majesties did accept the Crown and royal dignity of the kingdoms of England, France, and Ireland, and the dominions thereunto belonging, according to the resolution and desire of the said Lords and Commons contained in the said declaration.

V. And thereupon their Majesties were pleased, that the said Lords Spiritual and Temporal, and Commons, being the two Houses of Parliament, should continue to sit, and with their Majesties' royal concurrence make effectual provision for the settlement of the religion, laws, and liberties of this kingdom, so that the same for the future might not be in danger again of being subverted; to which the said Lords Spiritual and Temporal, and Commons, did agree and proceed to act accordingly.

VI. Now in pursuance of the premises, the said Lords Spiritual and Temporal, and Commons, in parliament assembled, for the ratifying, confirming, and establishing the said declaration, and the articles, clauses, matters, and things therein contained, by the force of a law made in due form by authority of parliament, do pray that it may be declared and enacted, That all and singular the rights and liberties asserted and claimed in the said declaration, are the true, ancient, and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed, allowed, adjudged, deemed, and

taken to be, and that all and every the particulars aforesaid shall be firmly and strictly holden and observed, as they are expressed in the said declaration; and all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all times to come.

VII. And the said Lords Spiritual and Temporal, and Commons, seriously considering how it hath pleased Almighty God, in his marvellous providence, and merciful goodness to this nation, to provide and preserve their said Majesties' royal persons most happily to reign over us upon the throne of their ancestors, for which they render unto Him from the bottom of their hearts their humblest thanks and praises, do truly, firmly, assuredly, and in the sincerity of their hearts, think, and do hereby recognize, acknowledge, and declare, that King James II having abdicated the government, and their Majesties having accepted the Crown and royal dignity aforesaid, their said Majesties did become, were, are, and of right ought to be, by the laws of this realm, our sovereign liege Lord and Lady, King and Queen of England, France, and Ireland, and the dominions thereunto belonging, in and to whose princely persons the royal State, Crown, and dignity of the same realms, with all honours, styles, titles, regalities, prerogatives, powers, jurisdictions and authorities to the same belonging and appertaining, are most fully, rightfully, and entirely invested and incorporated, united, and annexed.

VIII. And for preventing all questions and divisions in this realm, by reason of any pretended titles to the Crown, and for preserving a certainty in the succession thereof, in and upon which the unity, peace, tranquillity, and safety of this nation doth, under God, wholly consist and depend, the said Lords Spiritual and Temporal, and Commons, do beseech their Majesties that it may be enacted, established, and declared, that the Crown and regal government of the said kingdoms and dominions, with all and singular the premises thereunto belonging and appertaining, shall be and continue to their said Majesties, and the survivor of them, during their lives, and the life of the survivor of them. And that the entire, perfect, and full exercise of the regal power and government be only in, and executed by, his Majesty, in the names of both their Majesties during their joint lives; and after their deceases the said Crown and premises shall be and remain to the heirs of the body of her Majesty: and for default of such issue, to her Royal Highness the Princess Anne of Denmark, and the heirs of her body; and for default of such issue, to the heirs of the body of his said Majesty: and thereunto the said Lords Spiritual and Temporal, and Commons, do, in the name of all the people

aforesaid, most humbly and faithfully submit themselves, their heirs and posterities, for ever: and do faithfully promise, That they will stand to, maintain, and defend their said Majesties, and also the limitation and succession of the Crown herein specified and contained, to the utmost of their powers, with their lives and estates, against all persons whatsoever that shall attempt anything to the contrary.

IX. And whereas it hath been found by experience, that it is inconsistent with the safety and welfare of this Protestant kingdom, to be governed by a Popish prince, or by any king or queen marrying a Papist, the said Lords Spiritual and Temporal, and Commons, do further pray that it may be enacted, That all and every person and persons that is, are, or shall be reconciled to, or shall hold communion with, the See or Church of Rome, or shall profess the Popish religion, or shall marry a Papist, shall be excluded, and be for ever incapable to inherit, possess, or enjoy the Crown and government of this realm, and Ireland, and the dominions thereunto belonging, or any part of the same, or to have, use, or exercise any regal power, authority, or jurisdiction within the same; and in all and every such case or cases the people of these realms shall be and are hereby absolved of their allegiance; and the said Crown and government shall from time to time descend to, and be enjoyed by, such person or persons, being Protestants, as should have inherited and enjoyed the same, in case the said person or persons so reconciled, holding communion, or professing, or marrying as aforesaid, were naturally dead.

X. And that every king and queen of this realm, who at any time hereafter shall come to and succeed in the Imperial Crown of this kingdom, shall, on the first day of the meeting of the first parliament, next after his or her coming to the Crown, sitting in his or her throne in the House of Peers, in the presence of the Lords and Commons therein assembled, or at his or her coronation, before such person or persons who shall administer the coronation oath to him or her, at the time of his or her taking the said oath (which shall first happen), make, subscribe, and audibly repeat the declaration mentioned in the statute made in the thirteenth year of the reign of King Charles II, intituled 'An Act for the more effectual preserving the King's person and government, by disabling Papists from sitting in either House of Parliament.' But if it shall happen, that such king or queen, upon his or her succession to the Crown of this realm, shall be under the age of twelve years, then every such king or queen shall make, subscribe, and audibly repeat the said declaration at his or her coronation, or the first day of meeting of the first parliament as aforesaid, which shall first happen after such king or queen shall have attained the said age of twelve years.

XI. All which their Majesties are contented and pleased shall be declared, enacted, and established by authority of this present parliament, and shall stand, remain, and be the law of this realm for ever; and the same are by their said Majesties, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in parliament assembled, and by the authority of the same, declared, enacted, or established accordingly.

XII. And be it further declared and enacted by the authority aforesaid That from and after this present session of parliament, no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of parliament.

XIII. Provided that no charter, or grant, or pardon granted before the three-and-twentieth day of October, in the year of our Lord One thousand six hundred eighty-nine, shall be any ways impeached or invalidated by this act, but that the same shall be and remain of the same force and effect in law, and no other, than as if this act had never been made. — (*Statutes of the Realm*, vi. 142–145.)

A.D. 1700. The Act of Settlement.

12 & 13 Will. III.

An Act for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject.

Whereas in the first year of the reign of your Majesty, and of our late most Gracious Sovereign Lady Queen Mary (of blessed memory) an Act of Parliament was made, intituled, 'An Act for declaring the Rights and Liberties of the Subject, and for settling the Succession of the Crown,' wherein it was (amongst other things) enacted, established and declared, That the Crown and Regal Government of the kingdoms of England, France and Ireland, and the dominions thereunto belonging, should be and continue to your Majesty and the said late Queen, during the joint-lives of your Majesty and the said Queen, and to the survivor: And that after the decease of your Majesty and of the said Queen, the said Crown and Regal Government should be and remain to the heirs of the body of the said late Queen: And for default of such issue, to her Royal Highness the Princess Anne of

Denmark, and the heirs of her body: And for default of such issue to the heirs of the body of your Majesty. And it was thereby further enacted, That all and every person and persons that then were, or afterwards should be reconciled to, or should hold communion with the See or Church of Rome, or should profess the Popish religion, or marry a Papist, should be excluded, and are by that act made for ever uncapable to inherit, possess, or enjoy the Crown and Government of this realm and Ireland, and the dominions thereunto belonging, or any part of the same, or to have, use, or exercise any regal power, authority, or jurisdiction within the same: And in all and every such case and cases the people of these realms shall be and are thereby absolved of their allegiance: And that the said Crown and Government shall from time to time descend to and be enjoyed by such person or persons, being Protestants, as should have inherited and enjoyed the same, in case the said person or persons, so reconciled, holding communion, professing, or marrying as aforesaid, were naturally dead. After the making of which statute, and the settlement therein contained, your Majesty's good subjects, who were restored to the full and free possession and enjoyment of their religion, rights, and liberties, by the providence of God giving success to your Majesty's just undertakings and unwearied endeavours for that purpose, had no greater temporal felicity to hope or wish for, than to see a royal progeny descending from your Majesty, to whom (under God) they owe their tranquillity, and whose ancestors have for many years been principal assertors of the reformed religion and the liberties of Europe, and from our said most gracious Sovereign Lady, whose memory will always be precious to the subjects of these realms: And it having since pleased Almighty God to take away our said Sovereign Lady, and also the most hopeful Prince William Duke of Gloucester (the only surviving issue of her Royal Highness the Princess Anne of Denmark) to the unspeakable grief and sorrow of your Majesty and your said good subjects, who under such losses being sensibly put in mind, that it standeth wholly in the pleasure of Almighty God to prolong the lives of your Majesty and of her Royal Highness, and to grant to your Majesty, or to her Royal Highness, such issue as may be inheritable to the Crown and regal Government aforesaid, by the respective limitations in the said recited Act contained, do constantly implore the Divine Mercy for those blessings: and your Majesty's said subjects having daily experience of your royal care and concern for the present and future welfare of these kingdoms, and particularly recommending from your Throne a further provision to be made for the succession of the Crown in the

Protestant line, for the happiness of the nation, and the security of our religion; and it being absolutely necessary for the safety, peace and quiet of this realm, to obviate all doubts and contentions in the same, by reason of any pretended title to the Crown, and to maintain a certainty in the succession thereof, to which your subjects may safely have recourse for their protection, in case the limitations in the said recited Act should determine: Therefore for a further provision of the succession of the Crown in the Protestant line, we your Majesty's most dutiful and loyal subjects, the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, do beseech your Majesty that it may be enacted and declared, and be it enacted and declared by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That the most Excellent Princess Sophia, Electress and Duchess Dowager of Hanover, daughter of the most Excellent Princess Elizabeth, late Queen of Bohemia, daughter of our late Sovereign Lord King James I, of happy memory, be and is hereby declared to be the next in succession, in the Protestant line, to the Imperial Crown and dignity of the said realms of England, France and Ireland, with the dominions and territories thereunto belonging, after his Majesty, and the Princess Anne of Denmark, and in default of issue of the said Princess Anne, and of his Majesty respectively: And that from and after the deceases of his said Majesty, our now Sovereign Lord, and of her Royal Highness the Princess Anne of Denmark, and for default of issue of the said Princess Anne, and of his Majesty respectively, the Crown and regal Government of the said kingdoms of England, France and Ireland, and of the dominions thereunto belonging, with the royal state and dignity of the said realms, and all honours, stiles, titles, regalities, prerogatives, powers, jurisdictions and authorities, to the same belonging and appertaining, shall be, remain, and continue to the said most Excellent Princess Sophia, and the heirs of her body, being Protestants: And thereunto the said Lords Spiritual and Temporal, and Commons, shall and will, in the name of all the people of this realm, most humbly and faithfully submit themselves, their heirs and posterities; and do faithfully promise that after the deceases of his Majesty, and her Royal Highness, and the failure of the heirs of their respective bodies, to stand to, maintain, and defend the said Princess Sophia, and the heirs of her body, being Protestants, according to the limitation and succession of the Crown in this Act specified and contained, to the utmost of their powers, with their lives and estates,

against all persons whatsoever that shall attempt anything to the contrary.

II. Provided always, and it is hereby enacted, That all and every person and persons, who shall or may take or inherit the said Crown, by virtue of the limitation of this present Act, and is, are or shall be reconciled to, or shall hold communion with, the See or Church of Rome, or shall profess the Popish religion, or shall marry a Papist, shall be subject to such incapacities, as in such case or cases are by the said recited Act provided, enacted, and established; and that every King and Queen of this realm, who shall come to and succeed in the Imperial Crown of this kingdom, by virtue of this Act, shall have the Coronation Oath administered to him, her or them, at their respective Coronations, according to the Act of Parliament made in the first year of the reign of his Majesty, and the said late Queen Mary, intituled, 'An Act for establishing the Coronation Oath,' and shall make, subscribe, and repeat the Declaration in the Act first above recited, mentioned or referred to, in the manner and form thereby prescribed.

III. And whereas it is requisite and necessary that some further provision be made for securing our religion, laws and liberties, from and after the death of his Majesty and the Princess Anne of Denmark, and in default of issue of the body of the said Princess, and of his Majesty respectively: Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in Parliament assembled, and by the authority of the same,

That whosoever shall hereafter come to the possession of this Crown, shall join in communion with the Church of England, as by law established.

That in case the Crown and imperial dignity of this realm shall hereafter come to any person, not being a native of this kingdom of England, this nation be not obliged to engage in any war for the defence of any dominions or territories which do not belong to the Crown of England, without the consent of Parliament.

That no person who shall hereafter come to the possession of this Crown, shall go out of the dominions of England, Scotland, or Ireland, without consent of Parliament.

That from and after the time that the further limitation by this Act shall take effect, all matters and things relating to the well governing of this kingdom, 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.

That after the said limitation shall take effect as aforesaid, no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (although he be naturalised or made a denizen, except such as are born of English parents), shall be capable to be of the Privy Council, or a Member of either House of Parliament, or to enjoy any office or place of trust, either civil or military, or to have any grant of lands, tenements or hereditaments from the Crown, to himself or to any other or others in trust for him.

That no person who has an office or place of profit under the King, or receives a pension from the Crown, shall be capable of serving as a Member of the House of Commons.

That after the said limitation shall take effect as aforesaid, Judges' Commissions be made *Quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them.

That no pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament.

IV. And whereas the Laws of England are the birthright of the people thereof, and all the Kings and Queens, who shall ascend the Throne of this realm, ought to administer the Government of the same according to the said laws, and all their officers and ministers ought to serve them respectively according to the same: The said Lords Spiritual and Temporal, and Commons, do therefore further humbly pray, That all the Laws and Statutes of this realm for securing the established religion, and the rights and liberties of the people thereof, and all other Laws and Statutes of the same now in force, may be ratified and confirmed, and the same are by his Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, and by the authority of the same, ratified and confirmed accordingly. — (*Statutes of the Realm*, vii. 636–638.)

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