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R. L. Schuyler.

AN OUTLINE SKETCH OF ENGLISH CONSTITUTIONAL HISTORY

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PREFACE

It is very likely that the task which I have undertaken in this little book is an impossible one. Even to sketch so long a history in so few words seems hopeless, and I am sure that I have left out many things which other students of the English constitution will think should be found here. I have tried to keep in mind in writing chiefly the desire to show how modern liberty came to be what it is and what foundations our institutions have in the past history of the race.

I am indebted to the Editors for permission to use portions of an article which appeared in the American Historical Review for July, 1915.

G. B. A.

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Where freedom slowly broadens down
From precedent to precedent.

—Tennyson

INTRODUCTION

In the course of history there have been two peoples whose public law and institutions have formed the basis of many constitutions besides their own and who have exerted a wide influence upon government almost throughout the world. In ancient times the Romans built up by force a great empire which included the whole civilized world, as they knew it from actual contact, and large regions which they considered barbarian. Even before their empire was completed the Romans began to look upon it as divinely founded, preordained to be the one rule under which all mankind were to be permanently united. Later Christian teachers adopted the same philosophy of history, and the idea of the Roman Empire, eternal and holy, became for centuries a strong bond of union in Christendom at a time when most other tendencies were towards disruption. Partly from this influence and partly from their own intrinsic worth, Roman law and institutions came to prevail in almost all Christian nations and in extensive regions which were never Christian, and even today they influence more or less strongly the government and law of nearly half the human race.

It was in modern times, long after the fall of any real Roman Empire, that the British Empire began. In the course of three centuries, partly by conquest and partly by expansion it occupied the whole of two continents, North America and Australia, and considerable portions of two others, Africa and Asia. Into these regions in natural course English public law and institutions were carried. One portion of the original empire, the United States, set up for itself as an independent state at a time when the constitution had not reached its present stage. It was an inevitable result that it began a development of its own, distinct from that of the mother country, a development of the constitution as it existed at the point of separation. In consequence the United States does not possess some of the features of later growth which we now consider to be most striking in the British system of government. This fact cannot obscure, however, the origin of our constitution in the past history of England, and to the student the dependence historically of our public law upon that of England is as close as that of our private law.

A fact even more remarkable than the practical uniformity of institutions throughout an empire so widely scattered is the spread of the constitution outside the boundaries of the empire. In this case by intrinsic merit and not by physical conquest, almost the whole world has been brought into the sphere of influence of

the British constitution. Curiously enough it is the republics of the world which owe the least in form to this constitutional model, but even among them the indebtedness is not slight. Among monarchies the way of borrowing has been made easy by the treatment of the sovereign in the British constitution, as will be later more fully explained, and there is scarcely one to be found which has not drawn upon it for more or less essential details.

This borrowing is true even of those monarchies which approach most nearly the absolutist type and assert most loudly their independence. In the constitution of the German Empire, for example, while the essential features of the English constitution are not expressly affirmed in the written document, they are nevertheless tacitly implied and in practical operation even more directly allowed though without true ministerial responsibility. The entire English constitution with all its details of public law and practice could be carried into effect under the present German constitution with only one amendment of importance, the constitution of the upper house and its relation to the lower, and a really democratic government could be secured by a new regulation of the right of suffrage. A progress somewhat similar in the interpretation of the constitution in practice actually has taken place in the case of Japan, whose constitution was based originally on that

of Germany, but which in practical operation has become during the past generation more and more of the English type. The change has gone so far that an American scholar who has closely observed Japanese politics for more than twenty years can say that Japan now has a fully responsible ministry.

It hardly remains to point out the interest which the history of such a constitution, the mother of such a progeny, has for every student, or the special appeal which it makes to the American. The history of the formation of the British constitution is a part of our own history. If it be asked where the history of our institutions is to be found previous to the middle of the seventeenth century, there is only one answer to the question which the historian can give. It is to be found in England. The history of the long struggle by which the way was prepared for the clear formulation in the seventeenth century of those ideas which lie at the foundation of all the later development is as much our history as it is of any Englishman. There is to be found historically the origin of many of those ideas, institutions and practices which we regard as primarily our own because they were first worked out into practical form among us. And it is as justifiable to claim for our present constitution an origin in the English constitution of 1399 as it is to claim it for the British constitution as it now exists. The creation and establishment of our

judicial institutions and common law, of the supremacy of law over the government, of our representative system, of the popular control of taxation, of the responsibility of ministers of government to the legislature, and finally of the principle, fundamental to all else, of the sovereignty of the people, were the work of our English ancestors.

It may be that we shall not remain an Anglo-Saxon nation in blood, though the fact should not be overlooked that down to a generation ago the various race elements which were mingling here were the same as those of which the Anglo-Saxon race was originally composed: Celtic—Irish, Gaelic, and French; and Teutonic—German, Scandinavian, and Dutch. In recent years many have come to us from nations far removed in relationship from either of these groups and they may contribute largely to the making of the future American. But it must not be forgotten that, in the active carrying on of history, race does not mean unmixed blood; nor identity of race, identity of blood. The great history-making races have been of mixed blood, and if we would find the pure races, if indeed there are any, we must seek them on the outskirts of civilization whither they have been pushed by the stronger races of mixed descent. The tests which determine race in history are the characteristics of a civilization: common ideas and institutions, law and

literature and language, religion and art, a common past of some significance and common aspirations for the future. In all these things we are still Anglo-Saxon and are likely to remain so, the absorptive force is now so great among us. The constituent elements of our blood may change, but race will not. Our descendants centuries hence are as likely to find their earliest history in England as we are.

In this sense and upon the constitutional side our history on English soil begins in the Norman Conquest of England by William the Conqueror in 1066. He set up a monarchy the most absolute in Western Europe at that time and introduced, as the ruling class under himself, a feudal baronage bound by contract to assist in the government. His immediate successors in their effort to carry farther the centralization of the state in their hands, and to give it constitutional form, developed institutions and practices, which had existed for a long time in more primitive form, into our judicial organization, with its characteristic peculiarities of circuit courts and jury trials, in which began to form at once our common law and our equity system. The success of this royal centralization was so great that it invited tyranny and under John, near the beginning of the thirteenth century, a successful baronial insurrection compelled the king to make concessions. Acting upon the fundamental idea that the feudal contract limited

the rights of the king, the barons insisted that he should promise in a series of particulars, embodied in the Great Charter, that he would keep the law and that, if he did not, he should recognize their right to force him to do so in arms. Within a generation or two, while the special provisions of the Charter lost their importance, the fundamental principle that the king must keep the law and may be rightfully compelled to do so became the ruling principle of constitutional development.

In the meantime from another source, more purely institutional, the representative system in germ had been introduced. It began at once a rapid growth, largely because of its practical usefulness in government, into the English Parliament. At the end of the thirteenth century Parliament established its exclusive right to grant taxes though the right was not maintained in the future without struggle. In the fourteenth century from this beginning, Parliament grew in power by leaps and bounds. It perfected its control of taxation, secured its right to a voice in all making of laws, and began its supervision of government policy by enforcing the responsibility of ministers of the crown to itself. A brief reaction at the close of the century towards irresponsible monarchy was checked by revolution, and there followed a period of more than fifty years of constitutional government almost of the modern type.

The sixteenth century was the scene of another reaction towards despotism, in spirit but not in form, for the sovereigns found it easier to accomplish their will through the constitution than against it. And one great constitutional advance was made in bringing the church under Parliamentary control. With the accession of James I, in 1603, two ideals of government, each of which had dominated some portion of the past, were brought into conflict with one another for final possession of the future, the ideals of the supremacy of the king and of the supremacy of law. This conflict soon led to the formulation of the doctrine of the sovereignty of the people, first as the necessary foundation of right on which to rest the supremacy of law which should bind the king, and soon after to its practical recognition as the basis of the constitution.

At this point the constitutional histories of our two states separate. In England the experiments in the way of republican institutions which the revolution at the middle of the century had imposed upon the nation, outgrowths of past English history developed by Puritan religious ideas, were abandoned when the historical monarchy was reestablished. In the simpler conditions of the small American colonies, democratic institutions were easier to operate and republican government became the universal rule. In these republics the constitutional experiments of the Puritans, which England

had abandoned, were continued and developed under the same influences but with the added influence of new experiences. By these influences, old and new, our national government was formed a century later, revealing on every side its English origin, but at the same time making important contributions of its own to the final government of the world, as for one example in the formation of a nation by the federal union of separate states.

The English government after 1660 necessarily shows at any point of time important differences to that which was developing in America, for England dropped the Puritan experiments out of its constitutional history. Its progress after 1660 linked itself on rather with the constitution as it existed in 1603, plus however the secure establishment of the sovereignty of the people and the supremacy of law. The great problem of the future, as England then faced it, was to work out practical institutions for carrying on a government in which real sovereignty should be vested in the representatives of the nation while in form, for form was unchanged, it should be vested in the king. This problem America did not have to face in its little republics, and its solution in England in the British cabinet system has given us one of the most striking differences between the two states. America has the older English cabinet not under direct legislative control, removable by the legislature

only through the medieval process of impeachment, while England solved her problem by dropping impeachment and devising the responsible ministry—the cabinet virtually appointed by the legislature and removable by it, though in legal formalities all is done by the will and act of the king.

England is really a democratic republic. If the theory upon which its cabinet system is based, that changes in the House of Commons are going to reflect immediately changes of national opinion in the country, operates in actual practice, its government is even more directly under popular control than ours. There would be no gain for political democracy in a change from a monarchy in form of the British type to a republic in form. On the other hand, the retention of the monarchy in England as in theory still supreme, as, so far as actually formulated law is concerned, almost absolute, has been of the greatest value in the spread of democratic institutions throughout the world. It has made it easy for many states to establish true republics without the necessity of extreme revolution. The sovereign has found it easier to yield because in form he retains so much. In the march of the world towards democracy, the responsible ministry and the resulting position of the sovereign is probably a contribution of greater practical value than all else England has done, save perhaps the idea of the limited monarchy itself and the

impressive lessons and examples that are so numerous throughout her history.

These paragraphs sketch in the barest outline the history which we are to follow in more detail. It is impossible in any outline sketch to present all of even the important details of the history of English constitutional growth. I can hope in this essay, however, to give some definite idea of its beginning and of the great epochs which shaped its growth and to indicate in the most essential particulars how it came to be what it is, and to suggest incidentally the bearing of the different stages of its development upon modern constitutions.

CHAPTER I

TO THE GREAT CHARTER

The word "constitution" when applied to a state has in ordinary usage two distinct meanings. In one we include in our idea all the institutions of the state general and local, all the organs of government. The constitution of a state in this sense is the entire bodily organization through which it performs its functions as a state. In the other meaning we refer to the central, or national government only, and in actual usage, for about a hundred years, we have meant by the term a national government of a liberal, usually of an English type. It is in this sense that we may say of a people that they demanded a constitution, or that a constitution was granted them or adopted by them, or that they have or do not have constitutional government. It is in this sense that I shall use the word in this book, in the sense of the central or national government only.

If we use the term in its broader sense, including every phase of public or community action, then the English constitution like the English nation and the English language is a composite product. The two chief

elements which united to form the language are also the two chief elements which united to form the constitution, Saxon and Norman French. The invading tribes of Saxons and Angles who crossed over from the coasts of Northern Germany in the fifth century to occupy the abandoned province of Britain found there a population, mostly Celtic in blood, which had been to a considerable extent Romanized during three centuries of Roman occupation. Opinion inclines rather strongly at present to the belief that a large amount of Celtic blood was absorbed into the future race, even in those parts of England which remained in appearance the most Teutonic. However this may be, no amalgamation took place either in language or in political institutions. In the end the language became half Latin and borrowed many Celtic roots, and strong Roman influences modified and enlarged law and institutions in ways that are still apparent, but in neither case did this take place during the age of German conquest and settlement.

We have in this book to do with the character and constitution of government, and with regard to it the body of original material, law codes, formal legal documents, and chronicle writings, from which opinion must be formed, is happily so large that the facts in regard to non-Teutonic influence are not open to question. In some minor matters the influence of the church brought over from Roman usage things which the Saxons lacked,

the charter as judicial record or land conveyance and wills, but these did not affect methods of government nor the content of the law. The written will was borrowed from the Romans, but not the law of inheritance. The law which grew up and the constitutions which were formed during the more than five centuries of the Saxon period were purely Teutonic, modified only by natural development during so long a time.

The German conquerors of Britain were not at the time of their invasion in an advanced stage of political development. At home they were divided into little "county" states, without common organization, having no kings and no national or tribal government. The shock of the conquest, the necessity of constant defence and even of constant conquest from the Celts or from their German neighbors, if they were to survive, forced upon the colonies established in Britain the creation of the office of king and the formation of more compact governments. From this beginning a period of slow but steady growth and of improvement in the institutions both of general and local government extends to the Norman Conquest in 1066, characterized by an increase of royal power and to some extent of centralization. The development of the general constitution of the Saxon state, however, had not kept pace with the similar change which had taken place in the contemporary Frankish state upon the continent. It is this comparative back-

wardness of the Saxon constitution which accounts for the natural and unnoticed substitution of the Frankish for it when the Norman Conquest occurred. That the substitution was unnoticed implies that the lines of development in the two states had been closely parallel, and that the Saxon was only a somewhat earlier phase of the Frankish.

The fragmentary character of the evidence from which we must learn the constitutional history of the Saxon state makes it impossible with any certainty to date the beginning or describe the early forms and early changes of even the most important institutions. For the purposes of an outline sketch, it is not desirable to express opinions upon questions in regard to which the most authoritative scholars are in doubt, and the field of permanent Saxon influence, local law and local institutions, lying outside our survey, falls almost necessarily out of sight.

If then we leave the local government out of our account and restrict the word constitution to the narrower meaning of the national government, then we must say that, so far as the elements are concerned which grew to form any part of the final structure, the origin is Norman and not Saxon. But this must be understood to mean the very remote beginning merely. The essential and distinctive features of the English constitution, those which have given it its place in the

world of today and which constitute its great contribution to civil liberty, do not appear in its beginning but were all the products of later English history, of the development which took place on English soil. They are due not to Saxon nor to Norman, but to English endeavor only.

In historical fact, the beginning was of quite a different type from the later constitution, for the government which was set up in England by the Norman duke, William the Conqueror, as a result of his conquest of the country in 1066, was for that day a highly centralized absolute government. The king was all powerful even as compared with the powerful Norman baronage which settled in England with him. The king and these barons together constituted all government above the merely local, and we must not imagine the existence in the eleventh century of anything that we should now understand by the term "the people," nor indeed of the existence of a nation in our sense of the word. As factors in the public life of the state, people and nation were still in the distant future. The community was one of classes, though not of strict caste, and only the upper classes, barons and clergy who themselves were virtually barons, had any influence upon the general government.

These two features of the public life of England after the Conquest constitute from our present point of view

the chief changes which resulted from that event, the introduction of absolute monarchy and of the feudal baronage. The Saxon state which was overthrown by the Normans had been making for some centuries slow progress towards both these results. The king had been growing stronger, the country more united, and the machinery for the government of all parts of it from the center had been steadily improving. Kings like Cnut and, potentially at least, Edward the Confessor were powerful rulers. But with all the progress it had made the Saxon was still some generations behind the stage which had been reached by the Norman development. It was the necessary result of this comparative backwardness that in the change which took place the monarchy which the Norman dukes had established at home, not a monarchy in name but in all except name, was transferred to England bodily and put in place of the Saxon monarchy which disappeared. It might be perhaps more accurate to say that there was put in place of the Saxon monarchy another of the same type but in a more advanced stage of development. But in either case we are compelled to say that it was the Norman conception of the office and practical operation of the kingship, not the Saxon, which became fundamental in the English constitution.

So also in case of the feudal baronage. During the Saxon centuries great progress had been made towards

those elements of the later feudal system which were economic in character. The economic conditions which had favored and even induced the growth of these institutions through a great part of the Roman Empire existed in England also and had there produced similar results. Protection of weaker men and of smaller landholdings by the more powerful landlords, some features of dependent tenure and of private jurisdiction, even the passage of local public courts into private possession, were to be seen before the Norman Conquest. But those political elements of the feudal system which had resulted from the transformation of the duties which the subject owed the state, military service, judicial obligation, allegiance even, into private duties to an overlord, those elements which constitute the essential character of the feudal baronage in the great political rôle which it played in the medieval history of Western Europe, had no existence in England before 1066. Nor did that which resulted from the growth of political feudalism, the feudal organization of all public life, the feudal air and atmosphere which embraced everything, the feudalization of the state machinery and the position of the baron, because he was a baron, as the operative unit in that machinery.

This kind of feudalism was introduced into England by the Normans, and the government which they set up was marked by these two somewhat opposed character-

istics, an absolute and centralized general government on one side and on the other a powerful baronage. These two elements of the feudal state were closely bound together as well as opposed, for it was the baronage through whom the general government must be administered, out of whom even the organs of centralization had to be formed; but also the barons' personal interests were all bound up with the local instead of the general, and he might at any moment yield to the constant temptation of feudalism to emphasize and enlarge his local independence at the expense of the state. For two centuries after the Conquest there was a constantly recurring rivalry and conflict between these opposing tendencies, the centralizing tendency of the monarchy and the dividing and limiting tendency of the baronage.

As yet the powerful Norman monarchy was practical rather than constitutional. It was not absolute because law and institutions made it so, for they did not, but because in military and financial resources it was stronger than the baronage and because tradition and prestige and a kind of general support sustained its power. The problem of immediate constitutional growth in the following age was the question whether this practical absolutism could be transformed into the constitution of the state and securely embodied in law and institutions or whether the limiting and, one must say

from the point of view of government in the twelfth century, the crippling tendency of feudalism should be the one to obtain permanent expression in the English constitution.

As yet neither king nor baronage had any wide outlook on the future nor any clear conception of constitutional progress or specific rights. The king had more regard for the present exercise of power than for laying the foundations of its future permanence. The individual baron was not prone to regard his share in public affairs as privilege or opportunity for the exercise of influence on the conduct of government, but rather as a burden. He had entered into certain obligations of public service, in the army, in the central council which was at the same time legislature and court, and of money payments on certain infrequent occasions, all in return for the land which had been granted to him. These obligations seemed to be personal between himself and the king. He received his lands from the king. He promised the king to render these services in return when he should be called upon to do so. If he was not called upon in any particular case, he might congratulate himself on escaping a part of his burden. The relationship between king and man was merely a contract which, though not often stated in definite legal terms, was nevertheless definitely understood and regulated by custom. Under such a contract, a business quite as

much as a political arrangement, being really a process of getting government carried on by renting land, these services of the barons taken together furnished the state with its military, legislative and judicial machinery, and with a small part of its revenue. The working classes, agricultural and commercial, might be occasionally called upon to pay, but there was no place for them as classes in the national government.

In such a community ideals of public service were not high, and the individual would naturally escape gladly with as little share in public affairs as possible. Nearly everything was left to the determination of the king. The state machinery, the state itself, was his private property. If order and security were maintained throughout the land, the government was good, the king was a good king. No one demanded anything more and the king, fulfilling this duty, might look upon the kingdom as his own, as the baron did upon his manor.

Such was the exceedingly simple constitution of the feudal state. For carrying on the ordinary operations of government, for conducting the public business of the country and looking after all the relations between the individual and the state, there were in reality but two regular and permanent institutions. One of these emphasized decidedly the local side of things and was the organ through which the central government exercised its functions and secured its rights in the terri-

torial subdivisions of the state, the sheriff. The other was especially concerned with the central government, indeed we may almost say that it was in itself alone the central government, for it was through this institution that chiefly, though not in absolutely every case, the king's prerogatives were exercised. This was the central or national assembly, occasionally meeting and called often the great Council, together with its smaller and more permanent form called simply Council. To either form the name curia, or curia regis, was occasionally applied.

We do not know just how, nor at what point in Anglo-Saxon history, the office of sheriff originated. It may very possibly have begun as an economic office only, a kind of stewardship of the royal domains in the local divisions of the state, as the name "shire-reeve," steward of the shire, implies. Afterwards by degrees, with the increasing power of the king, it may have been made to represent him for local purposes in more and more of the functions of government. That is what the sheriff was at any rate at the date of the Norman Conquest: the representative of the king in executive and administrative, judicial and military matters, and in all his financial interests, in the shires into which the state was divided. Such an office hardly seems to us to constitute a sufficent bond of centralization, but it was effective in the state of those days, and the Normans had nothing

better of their own to put in its place. They had an office of their own in fact almost identical in character which had been developed in the Frankish kingdom and which they called "vice-comes," vice count or viscount, because the chief executive which this office represented locally in their country was the count. The duke of Normandy, as he came to be called in the next generation, was count under the king of the Franks, the count of Normandy, an office in the Frankish kingdom not very unlike that of sheriff, and the viscount was his deputy in the local subdivisions of Normandy. It was therefore easy for the Normans to continue the English sheriff in his office and functions as they found him at the Conquest. In fact the stronger kingship which they established increased the importance and power of the sheriff, and the century which followed 1066 was the great age in the history of that office, which began to decline when more effective means of centralization were brought into use. In language the Saxon term "sheriff" survived in popular use, while the Norman word "county" took its place beside the Saxon "shire."

The Anglo-Norman central Council was an institution of quite a different type, and yet it shows even more clearly perhaps the undifferentiated character of the government. In form and appearance, and in the main in the functions it performed, it seemed, as clearly as in the case of the sheriff, identical with the Saxon

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

feudal character of every institution of the kind in Europe and the Latin Orient.

Before trying to get an idea of the part which this institution played in government, it is necessary to understand as clearly as possible the difficult fact that, to the men who were acting in it, its two forms, the great and the small Councils, were identical in everything except size. The small Council was the active body in the intervals between the meetings of the great Council, but it was not a committee which the larger body had clothed with certain of its functions to be performed under responsibility to itself. It is very natural for us to think of it as a committee, but no one at the time had such an idea of it. It was the larger body shrunk to the smaller dimensions determined by those who were immediately connected with the government or attendant, perhaps accidentally even, on the king. But size had nothing to do with function, and in the business of the state the small Council could do all that the great Council could do. In fact the steady and permanent institution by which day by day the business of the Anglo-Norman state was operated and supervised was the small Council. The unity of this institution in its two forms is somewhat difficult for our more analytical minds to grasp clearly, and yet the fact is exceptionally important because this undifferentiated institution, in which most functions of that primitive government were

centered, became in time through each of its forms the mother of a numerous progeny of institutions existing in the modern state. The fact that all functions and powers of the central body belonged alike to each of the forms in which it acted reveals itself also in the later history in a tangle of crisscross institutions and operations which is most puzzling and misleading unless the original identity is clearly held in mind.

As the chief machinery of actual government and a part of the constitution, the essential fact regarding the Council is that it exercised or supervised the exercise of all the functions of the state without making any institutional distinction between them. It was the supreme legislature on those infrequent occasions when the slight business of the community demanded new legislation or the modification of existing law. It was the highest court of law in which the most important cases, or the cases of the most important persons, were tried and decided, it might be in the same session and by the same assembly which perhaps immediately before had changed the law of the land. It was in supreme control of the executive and administrative activities of the state. To it all executive and administrative officers, high or low, were responsible and, when we attempt to collect instances of the legislative action of the Council in this early period, we find that a large proportion of

them were in reality in the form of administrative orders or changes made in administrative practices.

It was upon this side of the Council's activity that the first step was taken towards differentiation in this early period or, as we may say, the first step towards the machinery of the modern constitution. The financial business of the state began, at some unknown time, to be set apart from the other business of the Council and to be carried on in sessions specially devoted to the purpose. It was the business of the Council, since it was the central organ of the government, not merely to get in the revenue of the state in cash and to open continuing accounts by which to check the financial activities of the sheriffs in their respective counties, but also to supervise indirectly all the activities of the sheriff in administrative and executive work. Undoubtedly where the particular matter was one affecting the whole country, like a general feudal levy or like the complaints against the sheriff coming up from all England about 1170, the great Council instead of the small would act in the case, but always so far as we know and probably from the beginning, it was the small Council which supervised the collection of the revenue.

This financial business being quite specific in character could easily and first of all lines of business be set off by itself and considered in sessions specially devoted to the purpose. The Council meeting in such sessions was known

as the Exchequer and, in what was probably a second stage of its history, it came to be considered that a special responsibility for attendance and action rested upon the official members of the Council whose offices had to do with finances. This stage was reached at least as early as the reign of Henry I, soon after the beginning of the twelfth century. By slow degrees the Exchequer came to be more and more highly specialized and limited to its one field of work, but traces long remain visible to us of the fact that it had once been the small Council and capable of acting in an Exchequer session upon any of the business which the small Council had to do.

The development of the Exchequer was the most important purely institutional change in the first century after the Conquest, but in the meantime two changes had been taking place so gradually as not to have been clearly perceived at the time, but leading to constitutional results which were permanent. One was the increase in the practical power of the king, the other was the growth of the church in practical independence within the state. In both the cases I use the word "practical" to mean that these changes were not yet, or only in small part, embodied in law and constitutional form.

Monarchy and baronage stood over against one another after the Conquest as the two most powerful forces of the time, and the king was the stronger of the

two. It was not, as has been said, the constitution which made him strong. He was the strongest power in the state because he possessed more of the practical elements of strength, the greatest military power, the largest financial resources, and the highest prestige, and because the law and custom of the time allowed him certain decided advantages over anyone else. And yet there was something more that went to make his position than these things. Even on the continent where feudal disintegration had reached its extreme limit, that age had kept a conception of the office of king which we can hardly call a theory or ideal of kingship, it was held with so little general consciousness, but which was so far as it went definite enough. The king was among men a representative of the divine government. The supreme objects of his rule should be those which the divine government seeks. His great duty was to make peace and justice prevail, to secure for his subjects the undisturbed enjoyment of their rights. The idea was derived largely from the Old Testament, with some traditions of the Roman monarchy through Charlemagne, and some little speculative influence from the scanty literature inherited from the ancient world. It was no full-blown theory of government and probably it was little in the minds of baron or burgher except on special occasions. Men did in those days very little abstract thinking about their government and made no effort to

shape it according to any definite plan. But the idea of the king's duties in the state was accepted generally enough to make the king in practice something more than a mere lord of vassals, and to give him strong foundations on which to build a centralized and anti-feudal power. That there was any building with plan and intention towards such an end during the first century after the Conquest, we cannot confidently say, but there was some growth in that practical power which has been described above.

William the Conqueror's son, William Rufus, the second king of the Norman family, exercised his power with such harshness, or took such extreme advantage of his opportunities to increase it, as to excite the hostility, at least of those who wrote the books, and twice there were baronial rebellions against him without success. He was too strong to be opposed. His reign lasted but little more than ten years, but in that time, just how we do not know, he was believed by his own generation to have pushed the feudal rights of the king to illegal extreme at the expense of his vassals. His sudden death gave the barons an opportunity of which they took instant advantage. His brother Henry needed their support to secure the throne and as their price they demanded formal promises of him that in the legal relations between king and baronage there should be a return to the days of William I. In making this demand

and putting the king's answer into written form in Henry's so-called coronation charter, the barons fell back in principle upon the fundamental fact of feudalism already mentioned, the contract which created the relation between lord and vassal. The charter, which consisted of definite promises on the part of the king as to the character of his government, implied an equally definite engagement on the part of the barons to support him as king, and was a specific contract within the more general and unexpressed contract which created the feudal relationship.

In the feudal system both as a practical way of getting certain things done and as a body of law, the controlling idea was that of contract. It was by a contract that the relationship between lord and vassal was created, and it was within the limits of that contract and as determined by it that the feudal system, as a system of government, was operated. The sovereign of the feudal state in getting his army, or legislature, or court, or in collecting such money payments as the feudal relation provided for, had no legal right to exact more service or larger sums than the contract between him and his vassals allowed as fixed and interpreted by custom. On the other side also the king assumed in this contract certain obligations towards his vassal, in some directions definitely understood, with reference, for example, to the right of the vassal to be tried by his peers, and in

other directions more or less vague, but comprised in the ideas of justice towards the vassal and protection of him in his rights. It was upon this conception of the obligations by which the king was bound that the barons acted in securing the charter from Henry as a check on the increasing royal power.

Here again it is not likely that lord or vassal had this idea of a ruling contract constantly in mind, but it was held clearly enough to act as a decided check on the development of an absolute monarchy, when the apprehension of the powerful Anglo-Norman baronage was excited, and to become ultimately the first stepping stone towards the constitutional or limited monarchy. In the coronation charter of Henry I there is no explicit reference to contract, as there is none in the ordinary codes of feudal law, or in the more extended and specific charter of King John which we call Magna Carta. But the coronation charter sets forth in its first clause as the reason of its existence the oppression of the kingdom by unjust exactions and unjust customs—exactions and customs, that is, which had no right to be. Clearly it was possible to distinguish between the things to which the king had a right and those to which he had no right, and the king as clearly admitted that unjust exactions and customs ought to be abandoned.

But the coronation charter of Henry I was only a momentary check in the growth of a stronger royal

power. In the end it did no more than make a record for future use of the fact that in the method of the charter and in the principle of contract on which it rested there was a way provided to curb the king and set limitations to his absolutism. Henry I proved to be an even stronger king than his brother William had been and before long he reverted to the practices which in the charter he had promised to abandon. Those particular exactions to which, we judge from the charter, the barons objected most bitterly, like the extreme exercise of the rights of wardship and marriage, became permanent rights of the crown, and in the days of his grandson were a recognized part of English feudal law.

In the days of that grandson, King Henry II, the absolute monarchy which was forming made an advance more rapid and more decisive than any before that time, because it took a long step towards embodying the royal absolutism in fixed constitutional form. The problem before King Henry when he came to the throne in 1154 was the perpetual problem of the middle ages, of maintaining order and security everywhere throughout the country and of making the king's justice, his power to enforce right law, feared in every local subdivision of the state. It was the problem not merely of holding the people of the country to the law, but even the local officers of the government whom the opportunities of distance and difficult intercommunication were con-

stantly tempting to use their offices for their personal advantage, or even to turn them into personal possessions annexed to their local territorial lordships. The king could not be everywhere at once, and yet some form of direct contact between the central and the local, some immediate fear of the king's hand everywhere, was a vital necessity.

This problem was solved by making regular and permanent a practice which had been occasionally used since the Conquest and which had been inherited by the Normans from the Frankish monarchy. From the central Council, the small Council, which was, as we have seen, the institution supervising the executive and administrative work of the government and at the same time a court of law trying cases, a commission of its members was sent to groups of counties throughout the kingdom to hold in each county of the circuit before the local county court a session, not of the county court, but of the central curia regis. William the Conqueror had made use of this practice to collect in each county the material for his great record of the taxing possibilities of England, the Domesday book, and even in his reign it was frequently used for the local trial of law suits by the curia regis. Now Henry II determined that the central supervising body of the kingdom should be carried by this expedient into every county, with all its powers and prerogatives, to hold a session by the help

of the local machinery on the spot where local evidence was more easily got and protection more effectively offered against the local fear of the powerful offender. It was a most efficacious plan for that day of undifferentiated institutions.

At the same time great improvements were made in the procedure to be operated by these new courts both in criminal and civil cases, improvements which begin an age of rapid growth in the history of our judicial institutions. It was indeed upon these institutions, upon the organization of our courts, upon the development of the jury and of our judicial processes, and upon the formation of the common law and the system of equity, that this innovation was to have its most permanent effect. But to men in that age another effect was more noticeable and this is in the constitutional history of the country more noteworthy. This new institution added to the constitution of the Anglo-Norman state, to the practical machinery of government, a new engine of centralization, far more immediate and effective than any which existed before. The controlling central power was brought by it into direct contact with every freeholder in the land through its use of the county court, and thus bound together all parts of the country distant and near under a common supervision. The king's hand was laid upon every man. It was the first step and a

long step towards embodying the practical Norman absolutism in constitutional forms.

From such a beginning it would not be difficult to go on to add to a royal control of administration vested in fixed forms, an equally fixed royal legislative right and an unchecked control over the new processes of taxation which were soon to be put into use. It was a first step towards a rounded constitution embodying in fully developed machinery a royal control of all the functions of the state. This is what actually occurred in France. The singular contrast which the institutional history of these two countries presents was long ago pointed out. In details of constitutional life, France and England of these early centuries were practically identical. France was also a feudal state. The means of carrying on the government, the machinery of the state, were furnished by the feudal services of the baron; the operative agent of the government was the baron. Feudal law was the same, the feudal practice and spirit controlled life equally in the two states. In both states the same vague ideas as to the royal duty of justice prevailed, derived from the same past and expressed in a coronation oath practically identical. And yet out of an institutional situation hardly to be distinguished, France emerged at the close of the middle ages an absolute and England a limited monarchy. A hundred and fifty years ago one of the first foreign writers who undertook to describe

the English constitution for the benefit of other peoples declared that the explanation of this peculiar fact is to be found in that other fact that England began its history with an absolute and France with an almost powerless monarchy. This declaration of the clever French philosopher is much more than a striking paradox. It may have been in his case a brilliant intuition, but it might have been a sober generalization. As in the course of English history other elements in the state arose to power beside the king and slowly won their way to influence upon the government, what they gained was taken from the king and his uncontrolled action by degrees hemmed in and limited. In France step by step the barons, who had been the strongest element in the feudal state, were subjected to control and what they lost was added to the king, by whom from the beginning it had been in theory possessed.

If this explanation of the constitutional history of these two states may perhaps be thought too simple for the tangled maze of facts which they present, there still does remain this constitutional situation clearly contrasted in one direction at the beginning and in the opposite direction at the end of their medieval history. For the Anglo-Norman kingship, if not an ideal, certainly was a practical absolutism. The king was not merely the strongest element in the state but the constitution furnished no means by which a will in

opposition to him could express itself except by disobedience and rebellion, the feudal last resort. But even with this recognized possibility nothing but a combination of barons against the king could hope to be successful, and no combination even was successful for a century and a half. In the days when feudalism was at its height the right of the baronage to resist the wrongdoing of the king was apt to be looked upon as an individual right, the right of an individual only, and some beginning of corporate consciousness, some recognition of the fact that the rights of the class together were threatened by royal innovations, was necessary before combined action of constitutional significance was possible. But that came slowly everywhere, and nowhere in the Europe of that date outside England is there to be found so strong and so centralized a state in the first years of the thirteenth century.

But it was apparently not from the centralizing aspect of Henry's changes that the impulse came which put a check upon this development. It came from the conduct of a king who ruled, or who was believed by his time to rule, as William Rufus had done; it was because he stretched or seemed to stretch the royal rights to illegal limits in his demands of money and of services. These at least are the reasons which Magna Carta seems to give us why the barons objected to the changes of Henry II, and not so much the increased centrali-

zation resulting. The interference of his judicial processes with the jurisdiction of their baronial courts especially excited their opposition and seemed to them an illegal usurpation, rather it would seem because it deprived them of one of their important property rights than because it made the king more powerful.

But before taking up the Great Charter, which resulted from the barons' opposition to the king, it is necessary to notice the other practical development referred to above which was destined in the end to have important constitutional consequences. When Henry II began his reform, he found that the most serious immediate obstacle in his way was the fact that his clerical subjects, persons in holy orders, were not within the jurisdiction of his courts. This had not always been the case. In Saxon days cleric and layman had been judged in the same tribunals. But the growing ecclesiastical monarchy of Christendom, a real state with all the organization and machinery of a state, could not be satisfied with that arrangement, and William I, who sympathized with the purposes of the great reformation which placed Gregory VII on the papal throne, gave to the church of England after the Conquest its independent courts. No serious consequences from this step were felt at once. It is perhaps true at a time when both law and judicial organization were somewhat crude and undeveloped that the separation of the two kinds of

courts was an improvement. At any rate it would seem to the men of that time that in the change made by William I the state surrendered nothing of its own normal jurisdiction. It turned over to the church courts jurisdiction over ecclesiastical questions and cases only.

The church, however, which confronted Henry II was relatively much stronger than it had been under William as a result of two changes which had taken place in the intervening century. In the first place the conflict over investitures, over lay appointments to ecclesiastical office, though settled by a compromise under William's son, Henry I, had brought about a great increase of the practical power of the church as compared with the state, not in England merely but throughout Europe. The church did secure more control over the filling of its offices which gave it a more complete and more stable organization. In the second place the church in England had taken advantage of the doubtful title and weak control of Stephen, Henry I's successor, to draw into its courts all cases affecting clerics, even those naturally belonging to the state courts like criminal cases and questions concerning the ownership of land. It had gone far beyond the position in independent jurisdiction allowed it by William I.

As a result of this stronger position of the church and of the vigorous leadership and then the unfortunate murder of Thomas Becket, the archbishop of Canterbury,

Henry II was not able to accomplish his entire programme of reform but was obliged to surrender to the church courts a part of the criminal jurisdiction which it had usurped though naturally belonging to the state. The church did not succeed in retaining all that it had attempted under Stephen, but it gained much in prestige and in power, and it passed into the thirteenth century as an independent government, almost or quite as strong as the state, with the support behind it of a great international monarchy whose authority extended over the whole of Europe.

CHAPTER II

FROM MAGNA CARTA TO PARLIAMENT

The Anglo-Norman absolute government of the state reached its climax in the reign of King John, youngest son of Henry II and brother of Richard the Lion Heart, which covers the first sixteen years of the thirteenth century. In English literature and history John has lived to the present day as the wickedest of tyrants, with scarcely one redeeming trait of character. It is probable that the traditional picture is a bit too dark. Something may be said for John, at least in the way of intellectual ability and statesmanship, and much for the strength of his position. He defied the thunders of the imperial church under the most powerful of medieval popes, Innocent III, and maintained his defiance unshaken for years, and it was further years before circumstances made it possible for the barons to curb his power. But the indictment of character and the accusation of tyranny are too well supported by contemporary evidence to be waived aside. His disregard of all rights that stood in his way, the cruelty of his punishments, and his acts of personal oppression led, when an opportunity offered

towards the close of his reign, to a combination of the barons against him which was too strong to be resisted.

These were unquestionably the immediately effective causes which led to the successful insurrection. It is very likely that without them the opposition to the institutional changes which had been made by John's father could not have produced united action, though certainly John by his own arbitrary conduct had added acts of doubtful legality, not known to his father's reign nor to his brother Richard's, but involved surely enough in any logical development of the innovations of Henry II. But by this time the baronage as a whole had been taught to recognize the legal foundation of their cause as against the king which existed in the law. They saw also how difficult it was to bind a king of John's character by any ordinary promises. Consequently the concessions which they demanded of the king they threw into the written form of a legally binding grant—the Great Charter, and they seem to have been careful, except in a few cases, to demand nothing which they could not justify in the law as it existed. By this demand and by the documentary form which they gave to it, specific and permanent in character, this baronial opposition to the highest expression yet given to the Anglo-Norman absolute monarchy took the first step towards the limited monarchy.

The barons themselves had no such idea. They did

not intend, or even suspect what they really did. They had and could have no such idea as that conveyed to us by the words constitutional, or limited monarchy, a conception still in the distant future and quite beyond the horizon of the thirteenth century. They based their action on the fundamental principle of feudalism which has already been stated. The king had broken the feudal contract. He had no right to do many of the things which he had done. In their distrust of any mere promises which he might make, they determined to bind him for the future in the strongest way possible to them, and they had before them, recalled to their minds by the archbishop Stephen Langton, the precedent of Henry I's coronation charter, which that king had been obliged to grant to meet a similar demand, and the text of that legal document. They accordingly drew up a deed of gift, based on the form for the most unreserved conveyance of land then in use, in which the king bound himself and his heirs to respect for the future for them and their heirs their legal rights and to grant them in perpetuity the liberties which they insisted belonged to them. In it he also agreed, as another derivation already spoken of from the same feudal right that, in case he should violate their rights in spite even of his promises made in this form, they might make war upon him and force him to regard the law.

This deed of gift was Magna Carta, the Great Charter

of English liberties, whose seventh centennial we have only recently passed. If we regard it as belonging to the year 1215 and disregard what it has come to mean to later times, Magna Carta was in substance a feudal document. It states but little more than feudal law, and it pledges the king to recognize the rights of the barons merely and their vassals. Modern scholars have failed to find in it any of the great principles or institutions of English liberty on which we especially pride ourselves: Parliament, consent to taxation, the jury trial, Habeas Corpus; and they have therefore said that the influence of Magna Carta in the growth of the English constitution and of English liberty has been greatly overstated. The conclusion does not follow from the premises. None of the principles named is in the charter, and yet it was by a very true instinct that the English nation recognized for centuries that the Great Charter was the palladium of their liberties, and in a very right sense it was actually the beginning of the English constitution considered as limited monarchy.

For what the Great Charter did was to lay down two fundamental principles which lie at the present day, as clearly as in 1215, at the foundation of the English constitution and of all constitutions derived from it. First that there exist in the state certain laws so necessarily at the basis of the political organization of the time that the king, or as we should say today the

government, must obey them; and second that, if the government refuses to obey these laws, the nation has the right to force it to do so, even to the point of overthrowing the government and putting another in its place. That this second principle has never been distinctly affirmed in legal form since the thirteenth century is not evidence against its continued existence. Even the thirteenth century expressed it only as a right of insurrection to force conformity to the law, not of the deposition of the king, but in the great crises of the past when the constitution was seriously endangered, the nation never hesitated to act upon the extreme right logically involved in the supremacy of the law. We have only to remember the Declaration of Independence with its reiterated statements, that what the king of England had been doing was an infringement of the legal rights of the colonists as Englishmen, until the point had been reached when he was "no longer fitted to be the ruler of a free people." The principle upon which the Declaration of Independence rests is exactly the same as that upon which Magna Carta rests, stated in modern terms by colonists, i.e., by a portion of the nation which could not undertake to revolutionize the whole. In every age of English history in which the question has risen, in every crisis in the development of English liberty, this double principle is that upon which our ancestors stood and upon which, as a foundation,

they built up little by little the fabric of free government under which we live. The specific and individual legal provisions which Magna Carta stated may soon have disappeared in the changing social conditions of the following generations, but the sound judgment of the nation insisted that successive kings, one after the other, should pledge themselves to be faithful to the Charter, some of the kings many times over, and should confirm to them the liberties which it granted. In these demands they did not intend to pledge their king to laws which had become obsolete, but to that fundamental conception which underlay all special provisions, a conception of the relation of the government to the governed which has become almost proverbial in the Anglo-Saxon world—a conception not expressed in the definite terms of today, which would have been impossible to the thirteenth century, but clearly enough implied. These renewed pledges and confirmations continued almost to the end of the middle ages, until the supremacy of Parliament had come to be rather clearly recognized and the chief lines of the modern constitution quite distinctly laid down. Then in the fifteenth century, when we may say the idea of a constitutional monarchy had become for the time at least a habit of the English mind, they ceased.

If then we consider 1215 as the date when constitutional monarchy began and Magna Carta as the first step

towards it, in the next succeeding centuries two other steps were taken. First, the organization of a continuous and consistent opposition, to use the term which has become technical in modern constitutional history, whose practical purpose was, however unconsciously entertained or even misunderstood, to protect the fundamental principles of the Charter from the encroachments of the king; and second, the carrying on of a series of experiments in order to devise some form of institutions in which this fundamental principle of the national control of the king's government might be permanently expressed or, to state the object in more modern terms, in which a limited monarchy might be constitutionally embodied. For an idea, or an ideal, has little influence upon the actual everyday life of the world until it has been expressed in workable institutional form, and in truth the work of the great institution making races of history has been less to cherish or to promote ideals than to invent and improve workable forms.

In the history as it actually occurred, this attempt which I have put second, to find constitutional forms for a limited monarchy, in reality began first, for the first experiment made in that direction was in the Great Charter itself. In the famous sixty-first clause of that document, a standing committee or board of twenty-five barons was constituted whose business was to be to bring to the attention of the king any violation of the Charter

and to try to induce him to remedy the matter. If he would not, it was then their right to make war upon him with the support of all the nation until he should be brought to consent. Then he was to be obeyed as king as before. In other words the committee of barons was first to decide that the Great Charter had been violated, plainly a judicial act, and then as a last resort they were virtually to suspend the king from office, for in making war upon him in the name of the Charter they assumed that they were acting for the community more truly than he.

This was a crude and clumsy expedient, but it is to be remembered that it was the first attempt ever made in history to put into constitutional form the principle that the government must obey the fundamental laws of the state. There was no earlier experiment from which the men of 1215 could learn. There was no theoretical discussion of the institutional forms of a limited monarchy in the literature open to them. Nor should its clumsiness conceal from us the fact that in this first attempt is clearly struck the keynote of English constitutional history and foreshadowed, faintly perhaps but truly, what is its final triumph and greatest glory, for this was in truth an attempt to find a way of enforcing the fundamental law upon the king without the necessity of civil war and revolution, with civil war and revolution as the last resort only. That is in very briefest

form of statement what the Anglo-Saxon constitution is; it is a perfected method of holding the government responsible to the will of the nation without the constant danger of civil war.

Magna Carta considered in itself accomplished nothing. Apart from a few clauses, mostly of temporary and special interest, it stated only principles of feudal law, and the feudal system was at the moment upon the edge of its rapid decline. What Magna Carta was to be in the future of English history would depend upon the interpretation given to it in the next age and especially upon the impression, permanent or otherwise, made by its fundamental principle that the king may be legally held to obey the law.

In the fifty years which followed the Great Charter, there was begun that perennial struggle which characterizes English history for four hundred years between the endeavor of the king to free himself of all restrictions, and the endeavor of the nation to protect and secure its own interests. In the thirteenth century this struggle resulted in the second attempt to put the responsibility of the king into constitutional form, by removing temporarily in 1258 from all power a king, Henry III, who could not be trusted and vesting the government in officers and commissions appointed by and responsible directly to the Great Council or, to use the name by which it was then beginning to be called,

to Parliament. The Provisions of Oxford, as this constitution was called, marked a great advance in half a century from the crude beginning of clause sixty-one of Magna Carta, but it was still far below the standard of the modern constitution, and it was a short-lived experiment only. It did, however, establish a precedent for future experimenting in the same direction, and it has a special interest for us in the fact that it reveals a blind reaching forward towards what was to be one of the highest achievements of the modern constitution—ministerial responsibility to Parliament. The modern principle, however, growing out of wholly different conditions and making its way slowly and "without observation," has no historical connection with the Provisions of Oxford nor with any other medieval experiment.

The Provisions of Oxford were short lived and their permanent value was merely as a precedent of institution making and a renewed assertion of the fundamental principles of Magna Carta. But the same reign, that of Henry III, son and successor of John, saw the beginning of two new historical factors which were to be of permanent and powerful influence in the making of the English constitution. As one of these, we may date from this reign the entry of the nation into public affairs as a determining force, the consciousness of a corporate and organic whole, the community. For the

second, we may date from this reign also the beginning of Parliament.

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

The feudal system, as a form of organization given to the state, was in every feature of its political operation falling to pieces in the thirteenth century. Its great service in holding the state together in an age of political disintegration was no longer needed. Its legislative, judicial, military, and financial services to

the state were finished and better methods of getting all these services performed were coming in. Along with these things there disappeared also, in the change which marked the rise of a national consciousness, the general conception of the state which feudalism had formed. The king ceased to be looked upon as primarily the lord of vassals; the kingdom was no longer to be his barony, his lordship, which he might exploit as he pleased. The idea was growing up instead that his was an office; that his chief function was to seek and serve the interests of the community even if, as it now begins to be seen may be possible, these interests are in conflict with personal interests of his own. The community, as contemporaries said, and we hardly dare yet to say the nation, beginning slowly to be looked upon as a kind of personal whole, a corporate unity, might have its own important interest which might be injured or sacrificed by the things the king would like to do. In that case his interests must yield and the community might insist by force that its views should prevail. The narrower conception of Magna Carta, that the barons had the right to protect from infringement by the king those rights of theirs which were the natural outgrowth of the fundamental principles by which the feudal organization of the state was constituted, was broadening out into the more modern conception of the national state and of

the relation of the government to the community of the ruled.

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

the community, they made a new application of the principle of Magna Carta.

In 1258 as in 1215, the king refused to accept the barons' interpretation of his duty until he was compelled to do so. In 1258 in framing securities for future good government, the barons found themselves obliged to go farther than the barons of 1215 had done in clause sixty-one of the Great Charter, but in the same direction. To protect the concessions made in the Charter, the barons had demanded the exercise of one royal prerogative, the judicial. The Provisions of Oxford of 1258 virtually suspended the king from all power and vested the whole government for the time being in commissions responsible to the great Council. In form this was going a good deal farther than clause sixty-one, but logically it was only a more complete expression of the same principle, that a king who would not rule according to law, or as we may now begin to say, as the nation wished him to, might be removed from the government.

Constitutionally the Provisions of Oxford were an attempt to put the limitation of the king into institutions which would work practically. As such the Provisions had a profound influence on the future. The idea of the responsibility of the king's ministers to the great Council, which they vaguely expressed in their commissions, gets its most perfect medieval

expression in the process of impeachment something more than a hundred years later, and becomes the formative plan of all attempts to put the limited monarchy into institutional form down to the seventeenth century. In fundamental meaning the Provisions of Oxford are even more important for they were a long step towards government for the people and by the people. Said the poet of the barons' cause who wrote in 1264: "Since the government of the realm is the safety or ruin of all, it matters much in whom is its guardianship. . . . . It is the glory of a king to save many, by his own pains to relieve many. Let him not urge therefore his own interests, but regard his subjects who trust in him; if he has saved the kingdom, he has done the duty of a king." But this conception of government, clearly held, was still far off in the future. It is only the faint beginning of a drift in the current of history that we can detect here, but it was a drift that never ceased. However vaguely seen or felt, this conception underlies the whole constitutional progress of the future and is in reality the solid foundation of every new advance. The seventeenth century when it formulated clearly the doctrine of the sovereignty of the people only completed what the thirteenth century began.

CHAPTER III

THE BEGINNING AND GROWTH IN POWER OF PARLIAMENT

Before the close of the reign of Henry III another beginning was made of great constitutional importance for the future, the beginning of Parliament. Though in origin and history for more than a hundred years outside the line of growth by which the limited monarchy was being formed, Parliament was destined before very long to take the chief part in that development, and to become the vehicle for the continuous and consistent opposition to the crown to which the guardianship of the constitution was committed.

The germ from which Parliament grew was the existing national assembly of the state, the great Council. This was a feudal assembly. It was composed of the king's vassals, and the idea of the service which they were rendering in making up the assembly was a feudal idea. The service was a part of that which they had engaged to render the king for the fiefs they held. Notwithstanding the fact that occasionally some person was called to the assembly by the king who had no

connection with him by a feudal tie, it would have seemed impossible to the twelfth century, at least in so highly feudal a country as England, that men should be admitted in numbers to the assembly as delegates of a great class in the community which stood in no vassal relationship to the king. It is no slight sign of the decline of feudal ideas in their hold upon the community that it did seem possible in the last half of the thirteenth century. In these sentences has really been described in simplest terms the origin of Parliament. It was the introduction into the feudal great Council of the representatives of classes in the community which in feudal days had had no standing there, the representatives of the commercial classes and of the small landowners. But the extent of the change should not be exaggerated. It should be remembered that there is no evidence to show that these new elements in Parliament were allowed during that century any share in its determining and deciding functions over any class or interests except their own.

Into the feudal great Council then were brought new elements, not on a feudal basis and representing classes in the community which were essentially not feudal. The result was a structural change, very similar in character to that by which the earlier Teutonic national assembly was made over into the feudal great Council. It was like that the introduction of a new principle of

composition, the principle of representation. Scholars have not yet come to an agreement among themselves as to the source from which the idea or the practice of representation was derived, nor can we say that they were looked upon at the close of the thirteenth century with anything like our modern clearness of understanding. They were understood, however, clearly enough to be consciously applied in the step that was taken, and from that beginning they have grown through uninterrupted experience into our present-day conception of representative government. And also we must not overlook the fact that the new principle was less completely applied to the old institution than in the earlier change to a feudalized assembly. The old great Council remained unchanged. For a long time it still acted now and then alone as Parliament, and for a longer time yet traces of its independent powers and functions survived. The new elements were grouped around it, not organically absorbed into it changing its nature. It still exists in fact, almost unchanged, in the present House of Lords.

Before very long these new elements drew off by themselves into a separate "House," the House of Commons, leaving the old great Council by itself as the other house of the new Parliament. The surviving great Council, however, changed in one respect. It was no longer in the strict sense a feudal body. Its members

were descendants of the feudal barons; the hereditary feature remained; their service was based in form upon the old service, but no one any longer thought of it as a return for land and all ideas about it that were really feudal died out, were dying out in England in general at that time, except in deductions that were merely legal or ceremonial.

The new elements were first introduced into the old Council not in conformity to any theory that was then held, nor with any intention of permanent policy. The step was first taken to serve an immediate practical end and implied no pledge nor even desire on anyone's part that the experiment should be repeated. Deputies from the English counties were summoned to a meeting of the Council, in this case the small Council, in 1254, to report the feeling of the counties about a tax which the government desired to lay. In the process by which this introduction was made, a precedent was exactly followed which had long been in use when the Council acting as a court desired a report from a county court upon their action in some case which had been before them. Deputies from the boroughs and cities were first introduced into the Council by the revolutionary leader, Simon de Montfort, in 1265, apparently from a desire to strengthen his party, which had for some time been declining. Of the action of this Parliament, the first containing all the elements of the future Parliament, we

know little, but it seems highly improbable that the new elements exercised any other function than that of giving information and advice, the conciliar function proper.

For fifty years and more after these dates, form and function of the new institution were not fixed by any certain rules. In membership, in manner of internal organization, and in method of operation, what seems to us like aimless experimenting was going on in the interval. In 1295 what is known as the Model Parliament was called together by Edward I. It was a model Parliament in the sense that it contained all the elements that go to form later Parliaments, but it contained also one element, the representatives of the lower clergy, which soon dropped out of Parliamentary history. Nor was this Parliament in organization any more nearly an exact model than in composition, for the representatives of the counties, the knights of the shires, met with the greater barons, and burgesses and clergy each met by themselves. It was a Parliament of three houses, like later French Estates General, the first estate the clergy, the second the nobles, and the third the burgesses, a form of organization corresponding more closely to the organization of feudal society than that into which the English Parliament finally settled. Parliament passed into the fourteenth century with composition and organization still unsettled.

If Parliament, as an institution for practical use, was vague and formless in the thirteenth century, it was equally true that it was for purely practical reasons that the change which created Parliament was made, not as carrying out any theory of government. Apparently what was chiefly desired in drawing the new elements into the great Council was information, in a way authorized, of the local feeling about pending questions from delegates whose report was the only share they took in the final decision, unless the question seemed to concern exclusively their own class. If the printing press and the telegraph had existed in the last half of the thirteenth century to render possible the easy collection of information from all parts of the country, we may question whether representative institutions would ever have been invented, for their purpose could have been more easily served in another way. For a long time Parliament, bringing its members together in a single assembly from all parts of the country, was the only means by which the public opinion of the nation could be ascertained and brought to bear upon the government. Political organization, party campaigns, public discussion, and newspapers were still a long way in the future.

If Parliament entered the fourteenth century with composition, organization and methods of working still undetermined, all these questions were rapidly settled.

The two new elements, representatives of the counties and representatives of the towns, became permanent features of the new institution. The ecclesiastical element, the representatives of the general clergy, withdrew to perform their parliamentary duties in assemblies of their own, called Convocation. Parliament settled into an organization of two houses, not upon any definite theory that two were better than one or three, nor with any clear plan or purpose, but largely by accident, because the church which should, according to continental analogy, have formed a third house, chose to remain outside. But it was by no accident, though no doubt a thing not planned, that the representatives of the counties, who were drawn from an aristocratic landowning class, a minor aristocracy, joined in the house of "Commons" with the representatives of the towns who came from the commercial, burgher class. This union occurred in no other country of Europe, and it points to peculiar social conditions in England.

To describe what lay behind these conditions in the way of cause would carry us too far afield in this outline sketch, but the result may be briefly stated. The merchant burgher, the political equal of the minor baron in the county court, was in fourteenth-century England regarded as his social equal also, married his sons and daughters into knightly families without

exciting opposition, and found no obstacle to the purchase of land or even, if he wished, to the foundation of a knightly family of his own. While barriers of custom and interest were being raised between the great and minor barons, they were being broken down between the latter and the burghers. On the continent the minor barons formed a part of the barons' house as they had in England in some parts of the thirteenth century, but in the fourteenth century the English knights finally found themselves more at home with the burgesses, and the House of Commons was formed by the combination of these two classes. This is probably all that we need to say by way of explanation, the knights found themselves more at home with the burgesses.

This unintended event probably determined the rapid advance of Parliament in power during the fourteenth century, for that advance in reality was not that of both houses of Parliament equally but of the House of Commons. The House of Lords considered by itself was relatively of less importance at the close than at the beginning of the century. The House of Commons evidently had in that age admirable leadership, a high degree of self-confidence, and a feeling of equality with lords and royal ministers which were not generally characteristics of the third estate in the Europe of that day nor for long afterwards.

In entering upon the fourteenth century with its

function in the state only vaguely defined and its power as a factor in the government not even foreseen, Parliament had before it a great task, if the foundations of its dominance in the modern constitution were then to be laid. Towards this result three things, by no means small things, were accomplished, or at least begun, in that century: the establishment of the control of Parliament over all forms of public revenue; the establishment of the right of the House of Commons to a voice in every act of legislation; and the establishment of the right of Parliament to supervise and direct the general policy of the government. The way, however, for the taking of these three steps in advance had been prepared by certain events of the thirteenth and early fourteenth centuries which lie outside the history of the new Parliament.

In 1215 in two famous clauses of Magna Carta, the principle was asserted that no feudal aids except those provided for by the feudal contract, nor the feudal payment called "scutage," should be called for by the king unless with the consent of the great Council. If we leave unsettled the question of the arbitrary action of King John and a certain difficulty of statement regarding scutage, this principle corresponds to the practice of the past, so far as we know it, and is well founded in feudal law, but it was omitted from all the reissues of the Charter by the next king, Henry III.

Why it was omitted is something of a puzzle, unless it was from the difficulty of exact statement referred to in regard to scutage, because the practice of the reign and of the following reign of Edward I, until near the close of the century, conformed to the original Charter. Edward I, however, found himself in serious financial difficulties when he became involved in war with France and Scotland at once. Even the new Parliament, acting for all classes of the nation together, did not provide him with all the money that he thought necessary. The church was beginning to object to the increasing taxation of the clergy by the state and even to try to forbid it entirely.

In these circumstances Edward believed that the necessities of the state were so great that he was justified in collecting money from the community without previous consent. At the moment, however, a majority of the great barons, representing the traditions of baronial opposition to his father, Henry III, which had culminated in the Provisions of Oxford, were from a variety of reasons, some of them merely personal, ready to take advantage of any mistake which the king might make. They seized this opportunity. They may not have been particularly interested in establishing consent to taxation as a fundamental principle of the constitution, nor indeed have had any constitutional ideas at all, but the demand was clearly in line with the baronial

opposition of the thirteenth century which they represented and the practice of the century gave them a decided advantage.

The king found himself obliged to yield the point and the principle was formulated in the so-called Confirmation of the Charters in 1297. The statement of the principle then made was no doubt intended by those who drew it up to cover all forms of revenue except those allowed by the feudal law and to cut off all possibility of arbitrary taxation. "Moreover we have granted for us and our heirs," the king was made to say, ". . . . to all the commonalty of the land that for no business from henceforth will we take such manner of aids, tasks, nor prises, but by the common consent of the realm and for the common profit thereof saving the ancient aids and prises due and accustomed."

So stated and accepted by the king, the Confirmation of the Charters may be said to have restored to the tradition of Magna Carta the principle of consent to taxation, not limited now as in the original clauses to feudal revenues but broadened out, as taxation itself had broadened during the century, to cover all new forms of revenue. From this date on this principle, as the fundamental rule of action, was never called in question by any English king. Successive kings might try to avoid its effect by inventing new forms of revenue to which they could say it did not apply or by unwar-

ranted extensions of old revenues, but from this date it was definitely established as a fundamental law of the constitution that the king was dependent for his revenue upon a previous grant.

Hardly had this principle been established when the next step forward was taken. The guardianship of the constitution which was beginning to form was still in the hands of the baronial opposition rather than of Parliament, but the new step was the first move in the slow crossing over of constitutional development from the line of baronial to that of Parliamentary supervision and protection. Edward II was successful before he had been many months in possession of the throne in exciting against himself a vigorous and determined opposition. In the Parliament of 1309, a Parliament of the new type not a mere great Council, a grant of taxes was made to the king "upon this condition" that he give attention to a certain list of grievances attached to the grant, of which the Commons complained, and find a remedy for them. The list in itself is not important and marks no constitutional advance. It was also a generation or more before the attaching of conditions to grants of money became a recognized feature of Parliamentary procedure and we are hardly justified in beginning with 1309, or with any of the less complete instances which preceded it, the continuous history of Parliament's use of the financial necessities of reluctant

kings to force them to grant reforms. It is interesting, however, to notice how quickly after it became possible, the new Parliament began to make experiment with this weapon.

We are accustomed to think of the English constitution as one in which Parliament, or more specifically the House of Commons as representing the nation, is in supreme control of all of the functions and operations of government. But at the beginning of the fourteenth century we stand at the beginning of Parliament as the organ of representative government not merely in England but in all history. What it was to be, the share which it was to take in actual government, was still to be determined. As yet nothing was fixed; the rights and functions of the new institution were vague and undefined; nothing was known even of its possibilities. As the successor of the feudal great Council and heir of the principles into which feudal consent to taxation had been transformed during the thirteenth century, that each class in the community should give consent to its own taxation, Parliament had a starting point of the greatest strategic value from which to begin its advance to power. How conscious Parliament was of the meaning of this advantage we hardly dare to say and at most it was a starting point only. The struggle to win full control of national revenue and expenditure was to be long and severe. In legislation hardly even

a starting point for the new institution had yet been found, and in the determination of the general policy of the government, Parliament foresaw its own future so little that it sometimes vigorously repudiated such an ambition and laid the foundations of its later power in entire unconsciousness of what it was doing.

Yet to secure these three things was necessary before modern Parliamentary government could come into existence: complete control by Parliament of all national revenue and expenditure; the exclusive exercise of the legislative right by Parliament, including the House of Commons as an equal partner in every act; and the power to determine the general policy which at any moment of time should give character and purpose to the government. At the end of the fourteenth century no one of these had been so far secured as to be beyond future danger, but great progress had been made towards them all and in regard to the first at least but little comparatively speaking yet remained to be done.

It was in the control of taxation that the greatest progress was made in this age, and from the starting point which Parliament thus secured in its sole power to provide revenue, it even reached forward to begin the practice of examining and criticizing the way in which the revenue was used. The men of 1297 when they pledged the king in the Confirmation of the Charters to take no taxes without previous consent may have thought

that they had cut off all important sources of revenue, but within a few years they discovered their mistake. The largest and most lucrative product for export of the England of the fourteenth century was wool, and English wool was the chief supply of the rich manufacturing cities which had grown up in the Low Countries across the Channel. The foreign merchants who traveled through England to buy up the wool from the monasteries and manorial lords were not interested in the English constitution nor in the problem of controlling the king through taxation. On the other hand, they were greatly interested in the protection and privileges which the king could give them in the port towns, in the markets, and on the highways of the country, and they stood ready to pay him for what he had to give. It was a simple matter to arrange between the merchants and the king an export duty on the sack of wool which was easy to collect and richly productive not merely from the size of the crop but also from the high money value of the pound of wool. This was a difficult matter for Parliament to deal with because Edward III argued with much plausibility that the foreigners paid the tax and, though Parliament detected the fallacy and insisted that the tax was deducted from the purchase price, it was only towards the end of the reign that the king was finally brought to renounce the practice for good and all.

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

Edward knew the honesty of his own intentions and what interested him most was that by such a simple expedient Parliament could clearly be convinced that the king had spent the money as he had engaged to spend it. Neither the king nor Parliament understood what was involved in this innocent-seeming beginning. It

was in truth the starting point of Parliamentary appropriations, of appropriating the national revenue to government expenses in detail, which modern Anglo-Saxon Parliaments practically regard more highly than the more fundamental right of granting the revenue, because it secures in a high degree though indirectly a control of government policy. If Parliament refuses an appropriation for a specific purpose, government must abandon that purpose. No one in the fourteenth century, however, saw this possibility and, though the practice of setting aside certain revenues to particular objects was carried somewhat farther in the next fifty years, modern appropriations to minute details of government expenditure had to await the full establishment of Parliamentary powers at the end of the seventeenth century.

The establishment of the modern methods of legislation was not, as in the case of taxation, the expansion of an old process to meet new conditions. It was rather the establishment of a new method at the expense of the old which was finally driven out of the field. The feudal method of legislation had been by the king and the Council, either the great or the small Council, since, it will be remembered, there was no difference in function between these two bodies. In this function so exercised, the new elements brought into the great Council to form the modern Parliament had had no previously regular

and recognized share, as they had had in taxation, neither through their representatives nor as the classes which were represented. The only process open to them, if they wished to initiate legislation, was to petition the king that such and such a law be made. Apparently even the Council, which had from the beginning a recognized share by advice and consent in acts of legislation, if it wished to initiate legislation of its own, in place of acting on matters laid before it by the king, took the first step in the process by a petition to the king. In fact in making use of this procedure by petition as the beginning of modern legislation, the new Parliamentary elements were employing a practice which was then exceedingly common. The right of petitioning the king for some exercise of his royal prerogative was during these generations not merely originating modern legislation but was also rapidly developing that great division of our jurisprudence which is known as equity.

The chief practical difficulty to be overcome, however, in establishing modern legislative methods was not to get the right of the House of Commons to initiate legislation by petitions recognized. That was an easy matter. The difficulty was to establish an exclusive right for the new legislation, to drive the older method of Council legislation completely out of the field and limit all law making to Parliamentary petitions. This was the purpose which the House of Commons set before

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

In the third particular, in securing control of the policy which should be followed by the government, Parliament made even less progress during the fourteenth century than it did in the other two lines of

advance. We have already noticed briefly how by taking advantage of the king's financial dependence the foundation was laid of the modern practice of appropriations, and by a development of the practice such a control might have been reached, but no more than a beginning was made in this way. Not long after the middle of the century, however, another process was devised, better suited to medieval conditions and, when put into use, very effective in checking the carrying out of an anti-Parliamentary policy. It may indeed be looked at as wider in its range than the mere control of a particular governmental policy and be regarded as the best of the medieval attempts to find institutional expression for the limited monarchy, of the attempts to devise institutional forms through which the king could be controlled without the danger of revolution and civil war. Considered in this way, it was the highest and most successful institutional expression of the limited monarchy until the most recent times, so successful indeed that in theory it still forms a part of the Anglo-Saxon constitution—the process of impeachment.

As a process it is not necessary to describe impeachment since such a description forms a familiar part of the constitution of the United States into which impeachment passed from the English constitution. In principle the process rests on the doctrine of ministerial responsibility as the middle ages understood it, a doc-

trine which came to be expressed in the maxim "the king can do no wrong." This political maxim is not, as it seems to be at first sight, the corner-stone of an absolute monarchy. It is rather one of the foundation stones on which the limited monarchy was built. For it does not assert that no wrong will be done by the government, nor that anything that may be done by the government is right. What it says is that when wrong is done by the government, it was not the king who did it but his minister. As was said by Sir Dudley Digges in opening for the House of Commons the impeachment of the duke of Buckingham in 1626, one of the first steps of Parliament against the royal ideas of Charles I: "The laws of England have taught us that kings cannot command ill or unlawful things. And whatsoever ill events succeed, the executioners of such things must answer for them."

In this interpretation of the impeachment process may be seen both the part which it played in the development of the constitution and the way in which it fell into line with earlier attempts to give constitutional expression to the limited monarchy. If the king were personally held to a direct responsibility for his acts, there would always be great danger of civil war. For it is not often in history that a king is found so thoroughly bad that no party is left that will rally to his defence. But a minister can be held to a strict respon-

sibility with far less danger. And yet when the ministers of the king have been taught that, if they insist upon carrying out his policy in opposition to the will of Parliament, they will be held to a strict accountability for their acts, a very serious obstacle has been placed in the way of an irresponsible and arbitrary monarch.

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

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

CHAPTER IV

CONSTITUTIONAL GOVERNMENT AND ROYAL REACTION

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

In establishing its power in various particulars—the financial dependence of the king, the legislative dependence of the king, the dependence of the king at least partially in matters of government policy, Parliament had really been doing one greater thing. It had been enlarging the body of law which the king was bound to observe as that had been stated in Magna Carta. It may be said rather that it had been transforming it. Political feudalism no longer existed. The services to

the state, for whose performance it had once been necessary, were now better got in other ways. Many of the rights on which the barons had once insisted in Magna Carta were obsolete and forgotten. The baron himself was disappearing. He was becoming the modern noble to whom a title and a good income and a place at the king's court were more important than his older feudal independence. But the fundamental principle of Magna Carta was neither obsolete nor forgotten. At no moment in all the progress and transformations of the past had it been lost to sight. The king was bound to keep the laws which seemed to the nation at any stage of its advance necessary to its interest and fundamental statements of its rights.

In more specific statement, in making a place for itself in the state during the fourteenth century and laying the foundations of its future power, Parliament had bound the king almost completely in taxation, a little less firmly in legislation, and slightly in the control of government policy. These were the new fundamental laws of the state which took the place of, were transformation of, the principles of feudalism which Magna Carta had formulated. They were the new foundations of the constitution by which the king was limited, in addition to some surviving principles of the Great Charter which occupied, however, a less conspicuous place in public law. Inevitably it followed that Parlia-

ment by establishing these limitations became the guardian of the constitution which rested upon them, in place of the baronial opposition which through the whole thirteenth and early part of the fourteenth centuries had performed that function. This change was of immense importance in the formation of the limited monarchy. In place of the unorganized, short-sighted and self-centered opposition of the barons, so often personal in character and to which a continuity of purpose was scarcely possible, nor even the intelligent accumulation of precedent, the directing of the advance passed over to an institution whose activity was never suspended, which allowed nothing that had been gained to be forgotten and which was capable of continuous growth and adaptation. The process of impeachment as resting upon the principle that the agents of the king's policy were responsible directly to Parliament, and that therefore the king was under Parliamentary control, is the institutional expression of the fact that the guardianship of the constitution was in the hands of Parliament. From this time on the formation of the limited monarchy went on, not without reaction, but consistently and without permanent loss.

In describing this change, I have not intended to imply that Parliament was conscious that it had taken this place or that it understood the larger significance of its own position. The events of the next generation,

however, were of a sort almost to give us the right to say that the king for his part was conscious of the situation, what it implied for the future of the royal power, and the results of what he attempted to do in consequence certainly advanced Parliamentary understanding. The reign of Richard II began with a minority during which the practical supremacy of Parliament was evident and the precedents of Edward III's reign were confirmed. Even the Council, the special organ of the king's activity, was almost a creature of the Parliament.

A king who knew anything at all of the meaning of monarchy could hardly fail to appreciate the position in which Richard found himself placed when he reached his majority. In another direction certain facts of these and the following years showed clearly enough what dangers to the government might lie in factious combinations of nobles supported by princes of the royal blood. It is impossible for us to say from any direct evidence which we have that Richard learned the lesson which this twofold situation might teach a king, and that he determined to reestablish the personal and unlimited government of the crown which his ancestors had possessed. This much, however, we have a right to say, that what he did in the last years of his reign is what he would have done if he had understood this position and with great skill formed such a plan. His

acts seem consciously and definitely shaped to carry out such a purpose.

Possibly there still lingers in our general knowledge some remembrance of the tragedy which closed the reign of Richard, because it is the theme of the first of the series of plays in which Shakespeare wrote his continuous history of England from the fall of Richard II to the death of Richard III. But to Shakespeare the tragedy at the end was naturally everything. He shows neither interest nor knowledge concerning the issues earlier drawn between king and Parliament which brought the tragedy about. The historian must note that Richard attacked at the same time Parliament and the powers of Parliament. It is significant of his perception of the supremacy of Parliament that he felt compelled to use it to accomplish at least the first items of his programme. To make sure of the action he desired, he seated in the House of Commons men he could rely upon, using the help of the sheriffs who were the returning officers, and in addition he overawed Parliament by troops of Welsh archers in his pay. From such a Parliament he secured the grant of a revenue for life and a limited right of legislation: only a beginning but one that could have been developed with time into complete legislative independence. He established also the principle that members of Parliament could be held to a direct responsibility to himself

for their words and acts in Parliament and severely punished under an accusation of treason. He went even farther than this and assumed the right to nullify actual acts of Parliament by falsifying the records or by the suspension of a statute by prerogative action.

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

It was also complete. The house of Lancaster came to the throne dependent upon the support of the nation

for the possession of a crown won by revolution, logically pledged to recognize the rights which Parliament had secured during the fourteenth century and to allow the full exercise of the powers which Richard had attacked. They were pledged also to the same policy by the force of circumstances, for Henry IV, the product of the revolution, himself in constant danger of counter revolutions, was too dependent upon such support as he could win to adopt a policy of aggression in any direction, or to antagonize so strong an institution as Parliament had become. His reign seems a very mediocre one, despite Henry's undoubted abilities, because he found himself obliged in everything to take a moderate and middle course. His son and successor, Henry V, the Prince Hal of Shakespeare, felt himself strong enough to renew the war with France and made himself a great name by the victories he won, but his long campaigns kept him away from England and left the government there necessarily in other hands. His premature death brought his son, Henry VI, to the throne while a babe in arms and a long minority and, after he came of age, the king's mental and physical weakness, tended still to maintain Parliament's general control.

For this long period of sixty years Parliament's authority was unquestioned, nor did the Lancastrian kings show at any time a disposition to question it.

Their natural inclination seemed to be, so far as we can judge it, to rule in harmony with Parliament. It was a period of unbroken constitutional government. Startlingly and prematurely modern, I have called it in another place, and though the machinery of constitutional government had as yet been worked out in few details, it was in spirit modern. Parliament seemed aware of the security of its position and busied itself on one hand with perfecting details and on the other with strengthening its control. It used the king's Council as its own instrument, and, most remarkable of all, we seem to be able to detect the faint beginnings, amid somewhat similar conditions, of that change in the relations between Council and Parliament out of which, in more modern times, the English cabinet system grew. But even Parliamentary control of the Council, through which the daily government of the country was carried on, could not prevent the rise of those factious rivalries among the great men of the day which led in another generation directly into the civil Wars of the Roses.

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

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

What conclusion the best thought of the time had reached about the place of the king in the government may be indicated in the words of a contemporary student of the English constitution, which are "so explicit and weighty that no writer on the English constitution can be excused from inserting" them, as Hallam says, in the third part of his chapter on the English constitution in his *Europe during the Middle Ages.* Sir John Fortescue, who had been chief justice of England, had had his training and almost all his active life in the Lancastrian age. In his book *In Praise of the Laws of England,* written early in the reign of Edward IV, he said of the king: "He can neither make any alteration or change in the laws of the realm without the consent of his subjects, nor burden them against their wills with strange impositions." And again: "As the head of the body natural cannot change its

nerves and sinews, cannot deny to the several parts their proper energy, their due proportion and aliment of blood, neither can a king who is the head of the body politic, change the laws thereof, nor take away from the people what is theirs by right, against their consent. Thus you have the formal institution of every political kingdom, from whence you may guess at the power which a king may exercise with respect to the laws and the subject. For he is appointed to protect his subjects in their lives, properties and laws; for this very end and purpose he has the delegation of power from the people and he has no just claim to any other power but this.'' These may be the words of a philosophical student of government, but there can be no doubt that in essence Fortescue was right. At that date the principle had been in reality established that the royal power was a delegation from the people, although it was to be two hundred years longer before that principle could be carried out in the practical government of the country.

One new Parliamentary right which the revolution of 1399 went a long way towards establishing should not be passed over—the right of determining the succession to the crown. By this is not meant the larger and more important right of deposing a king who could not otherwise be controlled. The right of deposition had been made in a sense constitutional by Magna Carta, as the foundation upon which rested the smaller

and included right of temporary suspension asserted in clause sixty-one. That right of temporary suspension for bad conduct had been exercised by the great Council in 1258 and again in 1310, and the more complete right of deposition had been exercised against Edward II in 1328. But more than this was done in 1399. Parliament assumed the right to pass over the line marked out for succession by the principle of primogeniture, lately established in English law, the principle of strict hereditary succession by blood, and to place upon the throne the younger line, the house of Lancaster. Logically this right was involved in the older right of deposition, but its exercise in this form was destined in the immediately following centuries to attract to itself more general interest and to be more useful to Parliament than the greater right from which it was derived. Indeed as early as 1460 it led to a most significant declaration of the power of Parliament. When the duke of York after a decisive victory over the Lancastrians in the field unexpectedly called upon a Yorkish Parliament to recognize his better right to the crown, as standing for the elder line, the House of Lords gave as one of its reasons for refusing his demand the fact that the entailing of the crown upon the house of Lancaster by act of Parliament created a better title to the throne than any other could be.

The fifteenth century stands in sharp contrast to the

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

underlying all the superficial reaction of the next century.

And so Parliament from 1399 to 1460, carrying on the government as a matter of course, concerned itself in strengthening its position not in large things but in small ones. It was busy about the establishment of the so-called privileges of Parliament: freedom of debate, which perhaps can hardly be called a small thing; the freedom of members from arrest; the right of the House of Commons as distinguished from the upper house to originate taxation, to determine the qualifications of members, and to discipline and punish members and disrespectful outsiders; the regulation of the right of suffrage in the counties; the extension of the practice of appropriations; and the improvement of the process of legislation. Comparatively these were small things, but in that stage of progress important. As with the greater advances of the fourteenth century, not all of these privileges were completely established at once. Some of them, like freedom of debate, were called in question for a long time. But a substantial beginning was made in them all during the Lancastrian period. In comparison with these, the special facts in which the Parliamentary control of the Council expressed itself, which seem on the surface the most striking facts of the period, are of minor interest because they did not become precedents of constitutional importance. The

responsibility of the Council, that is of the executive and administrative departments, to the legislature, had to be reestablished at a later time, after the results of the Tudor reaction had been overcome, and it was then done from a different beginning and in a different way.

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

ents; they kept Parliament from meeting during long intervals of time in sharp contrast with the fourteenth century; and they provided themselves with an independent revenue at least partially sufficient for their needs by means of forced loans and forced gifts, "benevolences" they called them. But perhaps it was the mere accession of the house of York to the throne, emphasizing the right of strict hereditary succession in the teeth of a statute, which was the most severe blow to Parliamentary supremacy struck at the time.

As part of a résumé of results already attained, Hallam calls attention near the beginning of his *Constitutional History of England* to certain principles of civil liberty which at the end of the fifteenth century protected the individual from the arbitrary action of the government. They had been established in England in the common law, that is, in private rather than in public law, but in America we have made them parts of the constitution. He says: "No man could be committed to prison but by a legal warrant specifying his offence; and by a usage nearly tantamount to constitutional right, he must be speedily brought to trial by means of regular sessions of gaol-delivery. The fact of guilt or innocence on a criminal charge was determined in a public court, and in the county where the offence was alleged to have occurred, by a jury of twelve men, from whose unanimous verdict no appeal could

be made. Civil rights, so far as they depended on questions of fact, were subject to the same decision. The officers and servants of the crown, violating the personal liberty or other right of the subject, might be sued in an action for damages to be assessed by a jury, or, in some cases, were liable to criminal process; nor could they plead any warrant or command in their justification, not even the direct order of the king."

CHAPTER V

THE TUDOR STRONG MONARCHY

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

Nor was the general situation an aid to constitutional

government. It was a new and stormy age on which Europe as a whole was then entering, the transition in political history from medieval to modern times. The modern nations had assumed something like their final form. France had acquired, not quite its final eastern boundary, but its general geographical outlines; the great feudal baronies, earlier independent, had been overcome or absorbed; the government of the state had been centralized in the sovereign, not with the perfection of detail to be obtained in the seventeenth century, but to the exclusion of any rival powers. In the Spanish peninsula the chief kingdoms which had been so long pushing back the Moors were now brought under one rule by the marriage of Ferdinand and Isabella, and by a sharper and quicker process than in France, largely of force, an absolutism practically as effective as the French had been established. The house of Austria, which had added to its southeastern dominions the most of the great Rhenish combination, the patchwork which had been formed by the ambitions of the dukes of Burgundy, was just entering upon the great period of its history.

New ambitions were rising before these new states soon to be the first "great powers" of modern diplomacy, which was then itself also new. Medieval conditions had passed away. In the immediately preceding centuries the pressing problem before every government

was national or internal consolidation and centralization. If a ruler of the later middle ages sought to build up an interstate alliance, in the great majority of cases his purpose was not dominion outside the boundaries he was striving to establish, but he hoped by foreign help more easily to overcome some difficulty within those boundaries. Those difficulties were now so far overcome in these great states that the ruler could give his chief interest to other things. Then opened out a new vision of empire, not now of a Holy Roman Empire co-extensive with Christendom and founded in the divine plan for human history. This conception was not a part of fifteenth-century plans, and the word empire took on then a new meaning. It began to mean the dominion and power of a state outside its national boundary lines; in a few cases perhaps, it included the annexation of other states or parts of states, but more truly it meant the conception and inauguration of the struggle for the domination of Europe by a single state. This has been the conception, broadened later into an idea of world domination, which has brought on all the great wars of European history since that date, and we can only hope that in the great world war of 1914 we are seeing its last stage.

In this first phase of modern international rivalry, the great contestants were France and Spain. Between them England was a little state hardly sufficient to

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

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

practical absolutism with the general support of the nation.

We should have, however, a wrong impression of the sixteenth century if we regarded it merely as an age in which the growth of the constitution was suspended and an absolutist reaction had full sway. It was in two particulars at least something quite different from that. In the first place in important respects the constitution continued in operation. The Tudor sovereign found it easier to get what he wanted done with the help of Parliament and by the forms of the constitution than to do away with Parliament and build up instead an institutional absolutism. During some part of the time it was really true that what the king wanted the nation also wanted; sometimes Parliament was controlled and induced to do what perhaps the majority of the nation did not sanction; at other times, especially towards the beginning of the period, Parliament was thrown somewhat into the background and long intervals were allowed to pass between its sessions, long at least as compared with the greater part of the period since the accession of Edward III; and in the opposite direction occasionally Parliament asserted a will of its own and refused to be led by the king, though not usually in large matters. But under all these varying conditions Parliament was used. It was the legislating, authorizing, creative instrument. The use which was made

of the constitution was no doubt the use of forms from which the spirit had departed. The forms were used to carry out the sovereign's will, not to limit it or to carry out a will in opposition to his. But, it must be emphasized, the forms were used. The constitution in the matter of Parliamentary powers and functions at least was kept in operation. Nothing was lost or forgotten which had been gained. Everything was ready to be filled again with the spirit of a truly constitutional monarchy when conditions should so change that the struggle with the king, which would be necessary, could be entered upon without national danger.

The second particular in which the Tudor age may be seen to be not one of mere reaction was given its peculiar character, and indeed was rendered possible, by this use of constitutional forms to carry out the king's will. Briefly and in general form the fact may be so stated: It was the positive work of the sixteenth century to bring the national church under the same degree of Parliamentary control which had been at that date established over the monarchy. The medieval church withdrew from the government of the state and kept within its own sphere a larger share of the public life of the community than we should think likely from the position of any modern church. Large fields of law, wills and inheritance, marriage and divorce, were its exclusive province. Some administrative functions

of the modern state, like the care of the poor, were in its hands. The Papacy was a great international state with all the organization and machinery of a political government. To its capital went up from all the countries of Europe a constant stream of reports, appeals, and taxes, and an equal stream came down of orders, commissions, and judicial decisions. In some respects the Papacy was more than an international state for it assumed to represent the divine government more directly and to speak with a higher authority than any merely political state. England was in a few matters in a somewhat more independent position than most states of the time, but still in a large part of its public life it was dependent not upon its own government but upon a foreign government.

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

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

This ecclesiastical revolution was a great forward move in bringing the entire round of public affairs under national control, and when we take it into account, it is no longer possible to say that the sixteenth century

was an age when the growth of the constitution was suspended. In comparison with this advance, some improvement in executive and administrative machinery, some increase in the activity of the Council, not now under Parliamentary control but directly representing the sovereign, are of minor importance. The great thing is that the powers which Parliament had gathered into its hands in nearly two centuries of earlier growth had not been dropped, but had rather been confirmed and enlarged in its possession, as marking out its definite and secure function in the state. It was to Parliament that the king turned as if to the source of final authority and sanction in his revolutionary reorganization of the state. New precedents of far-reaching importance had been established and all was ready, when conditions should become more favorable, for the reconstruction of a constitutional limited monarchy upon a broader and more solid foundation than ever.

Nor is what has been so far said a complete statement of the constitutional meaning of the sixteenth century in English history. The economic and social historian points out also a condition of things which the historian of constitutional development is bound to regard. The constitutional monarchy of the fifteenth century was premature in one way because as yet there was no nation in the modern sense prepared by political discipline and social advancement to work in its own interests the

constitutional machinery which had been so rapidly built up since the meeting of the Parliament of 1295. The baronage was the controlling power in English political life during the long reign of Henry VI, and the baronage of the fifteenth century was far more interested in its own factious ambitions than in Parliament or nation. From 1455 to 1485 the great fact in English history seems on the surface to be the Wars of the Roses; but that was a war of the baronage, not of the people, and in spite of continuous civil war the economic and social development of the country at large was going rapidly forward. It needed the strong absolutism of the Tudors to bring the nobles and their private armies into subjection to the law and reestablish an orderly public life.

The relentless vigor with which Henry VII accomplished this work established his throne, and for a hundred years after Bosworth Field the nation was so wrapt up in the economic revolution, the commercial progress, and the consequent social changes that were going on, that it stood ready to pay any price which their sovereigns demanded for the peace they maintained. As a result before the end of Elizabeth's reign a community life had come into being which had no existence in 1450. The nation, conscious of its organic life and power, able to say "the people" in something like the modern sense, was ready not merely to work

in its own interests the constitutional machinery of the fifteenth century but to demand in addition all which was logically implied in it but never before understood. In the Tudor age also the constant employment of Parliament by the policy of the crown in legislation on matters of grave importance gave it an acquired knowledge of practical government greater than it had ever before possessed. The nation also had been politically disciplined and developed especially by the keenness of its interest in religious questions and trained to consider with care the rights and duties of government. The sixteenth century was an age of apprenticeship in the use of the constitution and in the practical operation of government, which shows its result clearly in the acquired knowledge and skill of the seventeenth.

The conditions which had given character to the Tudor age began to change before the death of Elizabeth. The execution of Mary Stuart and the successful defence against the threats of Spain gave something of security against both domestic and foreign danger, though the nation was not fully conscious of how great a change in these respects had really taken place. But Parliament began towards the end of the century to be somewhat restless; to show an inclination to greater independence, and a disposition to be more critical of royal methods. There was, however, no real interference with Elizabeth's action which can be said to

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

CHAPTER VI

PARLIAMENT VERSUS THE KING

James VI of Scotland began to reign when a babe in arms and could never remember a time when he had not been a king. He was something of a student and he read, not without a natural inclination to believe, current philosophical arguments in favor of the divine right of kings, and even restated them in a book of his own writing. He was the king of a poor country, but he knew himself heir to the English crown and could look forward with pleasant anticipation to its wealthier resources and to the headship of a liberal and aristocratic church in place of the hard and narrow republicanism of the Scotch Presbyterians. He knew the history of the Tudor monarchy and Elizabeth's methods of rule and her overbearing ways of dealing with individual opposition. He knew also that his right to the throne was shadowed by the provision for the succession which Henry VIII had made under the authority of Parliament, by which his own elder line had been postponed in the inheritance to the younger line of the descendants of Henry VII. But he knew too, when he

came to the throne with the sanction of the nation in the teeth of this arrangement, that the principle of succession by direct descent, the principle of divine right, had made no small gain over the principle of Parliamentary authority. It is not at all strange that James became king of England with the determination to go on with the practical absolutism which the Tudors had exercised and indeed with clearer theoretical ideas than they had had of monarchy as the natural government intended for mankind and of his own right as the particular monarch divinely selected.

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

The practical situation created was, however, the same as if it had been designed. A square issue was joined between a king determined to go on with a virtual absolutism and a Parliament determined that the king should be limited by the law.

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

The great practical question to be solved was: Would it be possible to make these two conceptions of government work peaceably together? Would it be possible

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

in specific words, was in the end really answered by the facts, by the actual situation left as the result of the struggle.

The joining and the settlement of this issue make the seventeenth century like the fourteenth century a great creative age in English constitutional history, creative not of institutions nor of constitutional procedure, but of meaning and interpretation fixed beyond future question. If we say that by 1399 the English constitution had been brought into existence so far as its fundamental principles are concerned, we have by no means said that the work of making the constitution was completed. There was much of a creative sort still to be done. Most important work still remained in seeing that these principles were consistently carried out in all the details of government. The importance of this work may be seen in saying that it was especially to be done in the control of national finance, in making the judiciary independent of executive interference, and in the directing of foreign policy—this last an item in which the work is perhaps not yet complete. Much had still to be done in devising machinery for the operation of practical government according to these principles, and this in its chief instance has given us the English system of government by a cabinet of responsible ministers. And perhaps most broadly fundamental of all, much had still to be done in ascertaining what these

principles logically implied as to the nature of government, the source of its powers, and the seat of sovereignty in the state. This last was the work of the seventeenth century and it was truly creative although a work of interpretation.

The work of the seventeenth century was creative also not merely in the general result to which it was to lead but also in many details by the way. Seventeenth-century England was deeply interested in its past history, and the leaders on both sides of the conflict made an appeal to precedent hardly equaled in any other age. But it must be admitted that precedents in favor of the claims of Parliament were many times interpreted and urged in the light of what they logically implied rather than of what they originally meant. The king also more than once asserted that he possessed a general right of action on the basis of precedents which related only to a much more limited range of cases, as in the instance of the so-called impositions, a supertax added by proclamation to the customs duties fixed by law. Impositions indeed had been added in this way to the legal duties by earlier kings but always for special administrative purposes, not for raising revenue, and in justifying his use of the right by the earlier precedents the king was certainly carrying them beyond their legitimate application. The case is typical

of the kind of legal justification asserted for many other things done by the Stuarts during the century.

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

What Parliament was really doing through all the faulty history it employed, was to apply logically in new ways, to new details, in further extensions, the

fundamental principles which the past had established. The struggle between Parliament and the Stuart kings was the process through which the nation was learning to understand what these principles really implied for the whole constitution of the state. Indeed the keenness with which the opposition of the seventeenth century pressed to their logical limit past precedents against the king, often to a meaning which the makers of the precedent would not have recognized as their own, leads us to suspect that during the long interval of the absolutist reaction, there had already formed, unconsciously and beneath the surface no doubt, a clearer conception than ever before of what the constitution was and what it might logically involve; that the sixteenth century had in this way really laid down a solid foundation for later advance on which the seventeenth century was building.

Against extensions of this sort, if they be really logical, history can urge no objection. The historical argument is never of any validity against the results to which the living process of a nation's growth has brought it. However far they may go beyond the beginnings the past has made, if they are the genuine results of national life, they have a rightfulness of their own which history cannot question. This is what we must say of the main things which Parliament was striving to obtain in the seventeenth century. They were new claims in form, but they were logical applications of

established principles, and the time had now come when it was necessary that they should be made if the English constitution was not to cease to grow.

Almost immediately after his accession James I found himself face to face with law by which he was bound, with rights and privileges of a political sort which he could not change. In summoning his first Parliament he undertook to rule that certain classes of persons of doubtful character should not be elected to the House of Commons and to assign to Chancery the function of deciding whether his prescription had been complied with in individual cases or not. This would be to deprive the House of Commons of the right to decide upon the qualifications of its own members and upon disputed election cases. A conflict immediately arose between the House and the king over the matter, in the course of which the king asserted that the House "derived all matters of privilege from him and by his grant," and the House in a formal defence of its position declared that "our privileges and liberties are our right and due inheritance, no less than our very lands and goods." This was a square issue squarely drawn but it was not at this time further developed. In the end the king had to abandon the attempt which he had made, though the lesson that a body of law existed in the state superior to his will was very imperfectly learned.

This was the opening battle of a long struggle and

typical of it all. The position of the king was that rights and liberties which limited his own action were grants from the crown and might therefore legitimately be revoked. On the contrary Parliament asserted, as it put it later in the reign, that they were "the ancient and undoubted birthright and inheritance of the subjects of England," that is, possessed by the same title as private property and as little subject to withdrawal by the king. In other words this was saying that they were rights and privileges by which the king himself was bound and limited in his action. This was one form of the fundamental issue, and it was to find a working compromise between the two assertions that it must be pressed to a settlement.

Beyond this point the conflict hardly developed in the reign of James I. The actual issues between king and Parliament were largely of finances, in which the king believed himself driven to raise money without Parliamentary grant and finally to free himself from Parliamentary opposition by refusing to call Parliament together during periods of unusual length. Three times during the reign the royal theory of a monarchy free from restrictions was stated with great clearness. This was done first by the barons of the Exchequer in their decision that the "impositions" were legal; and again by an Oxford scholar, Cowell by name, in his law dictionary called "The Interpreter," in which he went so

far that the first edition was suppressed because of the criticism aroused in Parliament; and third by the king himself in a rebuke administered by him in person to the judges of the Exchequer Chamber in 1616. In this last case the king declared that his prerogative was twofold, one "ordinary" which might be subject to law and the other relating to his supreme power and sovereignty, by which he meant his superiority to the law. This declaration was meant to be the royal interpretation of the fact that the king is at once under the law and above the law. On its side, Parliament made two formal statements of what it claimed, one in the Apology of 1604 and the other in the Protestation of 1621, both of which have been quoted above, but Parliament stated its position as a matter of fact. It made no attempt to go back of what the law was and find a theoretical or scientific foundation upon which to rest its justification. All that had yet to be worked out by future experience.

In such assertions as these the king almost necessarily had a certain considerable advantage. In the past it had been natural for thinkers to say that sovereignty resided in a person. Historically there had been little experience in practice of a sovereign people, or of a sovereign legislature, and the sovereignty of the people had not yet been worked out in any theory capable of practical application. It had been sometimes stated in

philosophical speculation, but not with any reference to working forms. It had been sometimes stated in legal treatises but only in the most abstract way as a principle on which might be based a very different actual form of government from any democracy, the imperial government of Rome for instance. The Roman law declared that the emperor possessed the supreme law-making power because the people had vested their authority in him—*cum populus ei et in eum omne imperium suum et potestatem concedit.* But it was not a sovereign people of that kind towards which the seventeenth century was working.

As a practical matter also is to be reckoned the revival of impeachment by Parliament during the last years of James's reign. During the long period of the strong monarchy, since 1450 in fact, this weapon against the king had not been used. While Parliament was under royal control, either because it was too weak to resist, or because it really wished to support the king's policy, there had been no occasion for its use. But now conflict had begun again, and the study of history on the Parliamentary side speedily restored this weapon to its hand. In a series of cases towards the end of the reign of James, some of them experimental, uncertain as to details of method, one of them at least, the impeachment of the Lord Chancellor Francis Bacon, probably not aimed directly at the king, Parliament

recovered a knowledge of how to use this method of attack. Early in the reign of Charles I it put it into full operation in the impeachment of his chief minister, the duke of Buckingham. In this case, as has already been stated, the speakers for the House of Commons came very near to stating as clearly as it could be done today, the doctrine that the king can do no wrong, that the minister is responsible for the acts of the government and cannot shelter himself behind the king's orders; and the king, insisting on his own responsibility, found no method of escape except to end the impeachment by a dissolution of Parliament.

The reign of Charles I, at least to 1640, is a natural continuation of his father's. Charles was more obstinate and more short sighted than James, and Parliament had now a clearer understanding of what was at stake. For these reasons things drifted more rapidly to extremes than in the earlier period. By 1628 issues had been so sharply drawn upon a number of questions of detail that Parliament was ready to put into formal shape its position regarding them and to demand that the king accept the resulting statement of their views as law binding upon himself.

The formal document in which this statement was made, which the king did finally agree to, is the Petition of Right, one of the series of great documents of our constitutional history which begins with Magna Carta.

The Petition of Right in spirit, purpose, and method is exactly in line with the Great Charter. It asserts that the things to which it demands the king's agreement were already the law of the land, and it is based upon the supposition that the king has shown himself so unwilling to regard these principles that it must obtain his formal pledge, binding upon his successors as in 1215, to respect them in the future. As a matter of fact, what the document really does, as was done in a few at least of the clauses of Magna Carta, is to demand that Parliament's view of what was lawful should be accepted by the king instead of any view that may have been acted upon by earlier kings. The assertion as to Habeas Corpus may be taken as a typical instance. Habeas Corpus was a writ designed to prevent the arrest and holding in prison of a man without just cause. The writ brought the officer holding the prisoner before a court of law, most often before the court of King's Bench, and required him to show upon what charges he was held. If these were insufficient or illegal, the court discharged the prisoner. Now Parliament asserted that specific reasons must be given in every case, that the answer that the prisoner was held by the order of the king or the Council was not satisfactory. Undoubtedly such a view of the real meaning of the writ was logical enough, but there is also no

doubt but that orders of king or Council had been in the past regarded as a satisfactory answer to the writ.

Under the imperative necessity of obtaining a grant of money from Parliament because of his unfortunate war with France, the king was obliged to yield and to enact the Parliamentary interpretation into law. It cannot be affirmed that the Petition of Right is of equal importance in English constitutional history with either Magna Carta or the later Bill of Rights. It deals with only four points and the two most important of these, taxation and Habeas Corpus, needed further and supplementary legislation later in the century. It uses many words after a fashion of the time and is the least concise and clean-cut of all our constitutional documents. Its historical value is to be found less in the enactment of constitutional principles than in the precedent which it established in the struggle of that century of the Parliamentary coercion of the king in constitutional interpretation, and in the assertion which it made in a most striking manner of the supremacy of the law.

Not long after agreeing to the Petition of Right, Charles's patience with Parliament became exhausted, and there followed the longest period of government without calling a Parliament together since the House of Commons began to be. The king's decision to rule alone was of as vital significance in the history of New England as of Old. The Puritan party, which had

arisen in the later years of Elizabeth's reign, the radical party in questions of religious reformation and of opposition to the king, was grown now to be numerous in England, and seeing his success, began to despair of the future at home. No more in the church than in the state did there seem any hope. Laud, in full sympathy with the king and appointed by him archbishop of Canterbury, seemed in this interval of arbitrary government as certain to carry out his plan as the king. The age of "comprehension," of liberal blindness to lax observance of established forms in public worship, was at an end, and the Puritan who would not make use of the legal ritual was being driven out of the national church. Religious liberty and political liberty, as they were understood by the Puritans, seemed perishing together in England. In this despair thousands of Puritan families determined to begin another England in America and in so doing they rescued the northern colonies from the gradual encroachments of Dutch and French.

But more important than the geographical expansion which the Puritans secured were the constitutional ideas which they brought to America. There was indeed to be for these ideas an immediate future in England which the Puritan emigrants did not foresee, a future in which they were to be forced to a premature development in the hothouse process of revolution. But it was to be

a development short lived and without permanent influence in the mother country. It was in that other England which they helped to found across the sea that the peculiar constitutional ideas of the Puritans in a slower and more normal development were to bear fruit for all the world. Nor must the fact be overlooked that it was not in New England alone that Puritan colonists settled, nor through New England influence alone that Puritan ideas affected the future in America.

At home, between 1630 and 1640, everything seemed to be going as the king and Laud desired. The modern newspaper was not yet in existence. None of the machinery of democratic expression, public meetings, political speaking, party organization, had yet been devised. Parliament still remained the only organ in the state by which the general opinion of the nation could be made conscious of itself, could be created, gathered, and expressed. By the policy of the king the opposition was for a period of eleven years deprived of the opportunity of Parliamentary expression, and it was in consequence helpless and dumb. The financial dependence of the king on Parliament, which was at that date the only thing making a meeting of Parliament necessary, seemed for the moment at least to be successfully overcome. The search for precedents out of the past came here strongly to the assistance of arbitrary government, and various expedients for raising money

were discovered, long disused but not forbidden by law, like ship-money and distraint of knighthood; or ingenuity invented means of avoiding the strict letter of statutes as in the revival of monopolies. By means like these, and a liberal allowance of debts, the government managed to meet its current needs during years of no special financial strain.

CHAPTER VII

THE VICTORY OF PARLIAMENT

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

In April, 1640, the so-called Short Parliament came together. It speedily disappointed the hopes of the king and his advisers. The ablest of the king's supporters, probably the ablest man of the time, was the earl of Strafford, who as Sir Thomas Wentworth had been in the early part of the reign a leader of the opposition but had not been able to follow that party into its extreme position and had gone over to the king. He with others urged the calling together of Parliament. It was hoped that the national antipathy to the Scots would induce the House of Commons to vote the king at once such money as he needed to carry on the war, and then the complaints of the opposition could be dealt with from a position of advantage. But the leaders of Parliament were as alive to this possibility as the advisers of the king, and they insisted on examining and criticizing the policy which had been followed since the last Parliament before making a grant of money. When the king became convinced that Parliament was determined to keep to this plan, he dissolved it in anger after a session of three weeks in which nothing had been accomplished.

But something had been gained. The nation had been made aware of its own opinion and of the strength which it possessed as against the king. The members of the dismissed Parliament returned to their homes with new courage and new determination, and their

spirit was reflected in the elections which were held later in the summer. The king tried the expedient of calling a meeting of the old great Council, but obtained from it no permanent relief. It was not long indeed until he was convinced that he could not go on without Parliament, whatever Parliament might do, and a new one was summoned to meet at the beginning of November of the same year. This is the famous Long Parliament, which by one stretch of ingenuity or another is reckoned to have continued in existence for twenty years.

The Long Parliament met in a most determined spirit. The House of Commons was almost unanimous. The number of members who were ready to defend the acts of the king against the attacks of the majority was very small. The majority on its side was conscious of the character of the crisis in which they were called to act, of the issue between monarchy and Parliamentary government, as no similar body of men had ever been before in any crisis of English history. In their thinking also, in the argumentative defence of their position, if they had not yet reached any ultimate principles which they could state, they were at least on the eve of great advance in that direction. In this advance of theirs the student of constitutional history, and especially the student of the antecedents of American constitutional ideas, is particularly interested. They could hope also to proceed to extremes against the king

without interruption, for the Scottish army, known to be in sympathy with them, had taken its station in the north of England ready to march on London at a moment's notice.

The first step of the House of Commons was the impeachment of Strafford. There was no doubt some personal bitterness against a man who seemed to the opponents of the king to be an apostate from their cause; they were also no doubt afraid of his abilities; but it is equally true that in him they intended and conducted an attack upon the king which did much to bring the fundamental contradiction of the two positions into light. The accusation was treason. But as yet in English history there had been no definition of treason except as an offence against the king. If sovereignty in reality resided in the king, treason took necessarily the form of an offence against him. Here was a logical difficulty insuperable to ordinary and traditional ways of thinking. Strafford, as the most devoted supporter of the king in his conflict with Parliament, could not have committed treason in any historical meaning of the term. Yet some way must be found of convincing the House of Lords, on which rested the responsibility of judging a man upon a capital charge, that they might righteously find guilty of treason and condemn to death one who had most faithfully served the king as the king

himself believed. If this could not be done, the hope of a successful impeachment must be abandoned.

Forced forward by this dilemma, the leaders of the House of Commons advanced in the formulation of their case to a statement which they might logically have rested on Magna Carta had they known as much of the true historical influence of that document during the formative centuries of the past as they believed themselves to know of its special clauses. As a matter of fact, though there had been much thinking on the Parliamentary side since the king's father began to put the issue as he understood it into words, they were not entirely conscious of what they were doing. It is probable that they were thinking only of the specific case and its difficulty, though reasoning concerning the foundations of government had already begun and was soon to go very far in the democratic wing of the party. In reality what they did in constructing and endeavoring to prove their accusation of treason was to combine together the fundamental principle on which Magna Carta rested with that on which impeachment rested. If there existed a body of law which the king was bound to keep, and if the king who refused obedience could be driven from the throne, made non-existent in the state, then surely the lesser man, the minister who aided and abetted the king in his refusal, might justly be made to suffer the penalties of treason. But they did

not quite see that this was what they were doing. The argument in this form was still beyond them. They still interpreted the past history of the constitution too narrowly, however rapidly they were advancing in the understanding of its meaning.

What Pym said in opening the case of the Commons before the Lords was that Strafford had committed treason in attacking and endeavoring to subvert the fundamental laws of the country and the liberties of the subject; or as it was phrased in the bill of attainder, where the formal accusation was no longer treason against the king, but "high treason," against whom or what not specified, "for endeavoring to subvert the ancient and fundamental laws and government of His Majesty's realms of England and Ireland and to introduce an arbitrary and tyrannical government against law in the said kingdom." The case for impeachment was not clear enough to convince the Lords, and a bill of attainder had to be substituted for it. The Lords were little better satisfied with this form, and it could be carried only in a very small house by the mob pressure of Puritan London, and by the same means the king was made to sign the bill.

There followed several months of active legislation, mostly destructive in character, in which the king was deprived of the institutions of arbitrary government, like the Star Chamber Court, and of the sources of

illegitimate revenue which had been found for him. As the end of the first session drew near, it became evident that the House of Commons was no longer a unit. The number of those who thought that enough had been demanded of the king was increasing, and when the second session opened in October, 1641, the division of parties was nearly even. The Grand Remonstrance, the appeal to the nation of the party resolved to go on with the radical programme, was carried by a majority of eleven only in a vote of more than three hundred. Here was the material of conflict unless a compromise could be found and the Puritan party was not one of compromise.

Actual civil war began over the question of the control of the militia, the only organized military force in England, and the action of the House of Commons in the matter marks another step forward towards the doctrine of the sovereignty of the people. When the king resolutely refused to accept the bill transferring the appointment and responsibility of militia officers from himself to Parliament, the House of Commons resolved to carry out its will by what it pleased to call an "ordinance," remembering perhaps that there had been in early times law-making by non-Parliamentary legislation called by that name, but forgetting that an ordinance in the fourteenth century was not an act of

Parliament without the king but an act of king and Lords without the Commons.

In defence of their action, of their right to make law without the king's formal consent, the House of Commons declared: "What they do herein hath the stamp of the royal authority, although His Majesty, seduced by evil counsel, do in his own person oppose or interrupt the same; for the King's supreme and royal pleasure is exercised and declared in this High Court of law and council, after a more eminent and obligatory manner than it can be by personal act or resolution of his own."

These words do not contain an explicit declaration of the sovereignty of the people or of Parliament but, if they are to be scientifically defended, it can be done only on the ground of the sovereignty of the people expressed through Parliament. What these words really say is that sovereignty is exercised by Parliament, not by the man who holds the name and title of sovereign. It may be added that they are so entirely assumed to be true in the present English government that the king is not supposed to have any will, or opinion even, on any political question, except that of his ministers.

The war went against the king. In a little more than two years he was obliged to surrender himself to Parliament. In a second stage of the war, which followed, those of the Presbyterian Puritans and their Scottish

supporters who were ready to make some agreement with the king in the hope of saving a national church organization, were defeated, and the democratic wing of the Puritan party, the Independents or Congregationalists as they were called from their ecclesiastical teaching, was at the end of 1648 in sole possession of power. They returned from the field very angry with the king and with the Presbyterian Puritans for what they believed to be the unnecessary sacrifices of the second war, and they immediately proceeded against both. First the Presbyterians were all expelled from Parliament, leaving of the Long Parliament the Independents only, a Parliament which came to be known as the Rump. Then in a second step they constituted a court to try the king for treason—treason in the sense of Strafford's treason, against the nation and the fundamental laws, not against the sovereign person. In the formal charge before the court they said: "That the said Charles Stuart, being admitted King of England, and therein trusted with a limited power to govern by, and according to the laws of the land, and not otherwise; . . . . yet, nevertheless, out of a wicked design to erect and uphold in himself an unlimited and tyrannical power to rule according to his will, and to overthrow the rights and liberties of the people, ... which by the fundamental constitutions of this kingdom were reserved on the peoples' behalf in the right and power of frequent

and successive Parliaments; . . . . he, the said Charles Stuart, for the accomplishment of such his designs . . . . hath traitorously and maliciously levied war against the present Parliament, and the people therein represented.''

In trying the king upon a charge of this kind, the Independents necessarily broke with the history of the past, with established form and precedent, even more completely than they had done before. The House of Lords, even the little fraction left in that House, would not go so far. All government was reduced to one House and its appointees, and again a declaration was adopted in defence of this position, having especially in mind the trial of the king. The House of Commons resolved ''that the people are, under God, the original of all just power; that the Commons of England, in Parliament assembled, being chosen by and representing the people, have the supreme power in this nation; that whatsoever is enacted or declared for law by the Commons in Parliament assembled, hath the force of law, and all the people of this nation are concluded thereby, although the consent of the King or House of Peers be not had thereunto.'' But already by this time the sovereignty of the people and the delegated character of government had been expressed clearly and fully by so many mouths and pens that there can be no doubt it had become one of the ruling ideas of the party. It had been stated ten years before by Thomas Hooker

in a sermon which he preached not long after his arrival in Connecticut in this way: "They who have the power to appoint officers and magistrates, it is in their power also to set the bounds and limitations of the power and place unto which they call them. And this, in the first place, because the principle of authority resides in the free consent of the people." Hardly a more striking example can be had of the transfer of Puritan ideas of government to new influence and power in America.

It is hardly possible today to do better than these statements in formulation of the principle of the sovereignty of the people and of the representative character and derived powers of the legislature. We must remember, however, that in England such ideas were revolutionary. The new constitution which was foreshadowed by them was a break with past history and, however logically involved in that past, as an experiment in actual government it had not been prepared for in experience or in institutions by an adequate political development. In the details of this advance the Independents were influenced by their religious, as well as by their political training. After a long, slow process of growth towards democracy, which was not to be begun for more than a hundred years, England was to come in reality to these principles, though not in avowed law and not along a road which led through this age of revolution. It was American, not English, constitu-

tional law which was here making its first beginning, its first essays in imperfect and half conscious formulation, and it was in America that these principles were developed in unbroken growth into the government of a great people.

The execution of the king and the disappearance of the House of Lords, left the House of Commons the sole survivor of the national authorities of the old constitution. But the House of Commons was the Rump merely, the Independent members, and the real power in the state was undoubtedly the army and its leading officers. But the chief influences in army circles had been for a long time democratic, and years before it succeeded to power individuals and councils had been busy considering the foundations of government and the forms it should assume. A flood of proposals, theories, and arguments appeared in those years, as characteristic in tone and substance of an age of religious, as of political revolution. For the Puritan, especially for the Independent, this age was both, and the results he attempted to accomplish in constitution making are a compound of the conclusions to which the tendencies of English history would naturally lead, prematurely conceived, and the ideas which he drew from the Bible and applied in the organization of his churches.

Of these suggestions, the most formal and developed as a proposal to be carried out in government, was that

which was presented to the House of Commons in January, 1649, under the title, "The Agreement of the People." This title conveys to us less clearly than it did to contemporaries what the document was intended to accomplish; but it implies and was intended to imply what the preamble of the American Constitution asserts: "We the people of the United States do ordain and establish this Constitution." It implied that the people of England by an agreement formally entered into were to make a written constitution in order to establish a government and define its powers. As a proposal for actual government, we need not consider the Agreement of the People, for it was never put into operation, but as a landmark in the history of American constitutional law it is of great importance. The foundation upon which it rested, the agreement of the people, is the same as that upon which our constitutions rest, and it was here proposed for the first time in history as the foundation of a national government. The similar compacts which had preceded it in America, though they came from the same ultimate sources and were truly intended to establish "a Civil Body Politick," served for little communities of people in which an actual democracy was entirely feasible, and representative institutions, as an expedient for working a democracy on a great scale, need scarcely be considered for a long time. The Agree-

ment of the People was seriously intended as the constitution of a great nation.

The Agreement of the People was never put into operation. It was the programme, not of the majority of the Independent party, but of the more radical extremists. It has an importance in history, however, beyond the fact that it was the first written constitution proposed for a great state. In 1653 the leaders of the army with the approval of Cromwell drew up another written constitution, called the Instrument of Government, much more concise, specific and practicable than the Agreement but following its suggestions in many particulars. This constitution was actually put into operation and formed, nominally at least, the basis of the government of England for something more than three years, the first written constitution in history which actually created a government of delegated powers, defined and limited, for a nation. Its history does not here concern us, nor the astonishing number of details in which it anticipated later American practice, for it had no influence on the constitutional history of England.

The Puritan revolution of these twenty years from 1640 to 1660 marks the division of the stream of English constitutional development into two branches. For England it was an attempt to arrive at the logical conclusions of that development prematurely, by violence

and revolution, under the stimulus of religious as well as political excitement, before an adequate preparation in ideas and institutions had made the ground ready. In the reaction which naturally followed, the work of the revolution was undone. Constitutional development linked itself back to the results of its more natural processes in the stage which it had reached at the end of the first session of the Long Parliament in 1641. Nearly everything for which the revolution strove is now a part of the English constitution, but not as a result of its endeavor. Rather as a result of the slower and more normal process of growth, out of which in a sense the revolution indeed came but which it for a moment interrupted. In the Puritan and Quaker colonies of America the ideas of this revolution created the natural political atmosphere. There they were not revolutionary, but became the material from which the normal constitutional life of these little states drew its strength. Their natural political development began with these ideas and led, as their population and needs increased, to more and more extensive realization of them in practice, until at the last they had large share, with other influences, in shaping the institutions of the second great Anglo-Saxon nation.

CHAPTER VIII

THE VICTORY CONFIRMED

The extent of the reaction against the radical party was shown by the character of the restoration of Charles II in 1660. The king was restored to the throne with no constitutional guarantees whatever. Nothing was said of the sins of his father, nor of the principles which the great majority of the House of Commons were determined to defend in 1640. The legislation of the first session of that Parliament remained on the statute books, and arbitrary government was to that extent deprived of the means of operation. But the supremacy of Parliament was not declared in any formal statement, nor was the king required to acknowledge that his powers were limited or derived from the people. So far as formal pledges are concerned, or formal statements even, with which the new government began, there was nothing to indicate that anything of a constitutional character had happened since the first of November, 1641.

Much had happened, however, which affected the minds of men and which could not be forgotten.

Charles's statement that he had no wish to go on his travels again is not of chief interest as the sign of a cynical character. It was his expression of a profound political observation which judged correctly the actual state of things. Charles knew that a great constitutional change had taken place, though perhaps he could not have called it that nor defined very clearly its nature. What he did know very assuredly was that he could not resist the will of Parliament beyond a certain point, and by that knowledge he shaped his conduct. It was not that he was any more willing than his father to submit to the authority of Parliament or any the less determined to reestablish an irresponsible royal power. He had a keener political insight and recognized more quickly the limits of the possible and understood the consequences of overstepping them. And so when a Parliament, which was usually ready to do what he wished, objected strenuously when he undertook to relieve the nonconformists of their legal disabilities by proclamation, he yielded and withdrew from his attempts.

Such an act on the part of the king was highly typical of the actual situation as it had been left by the Restoration, not in law or formal statement, but in the facts themselves. In form and law the king was supreme and sovereign. In fact Parliament was supreme. The sovereignty in the state, the power of final decision on every political question, if an issue arose upon it, had

been transferred to it. Never since that date has it been possible for the king, so long as the king remained the real executive, nor for the ministry after the cabinet had absorbed the executive authority, to withstand the convinced will of Parliament. No period of later history, not even the most modern, reveals this result more clearly than that which followed first, in which the attempt of Charles I's sons to reestablish the old royal power met with disastrous failure.

The result in 1660 just described was a compromise; not less truly a compromise because it was expressed in facts rather than in words. The question which had arisen at the beginning of the reign of James I, whether it would be possible to make the strong monarchy of the sixteenth century and the strong Parliamentary control of the fifteenth work together in practice; what boundary line could be found between king and constitution, had been answered by the discovery of a compromise. But it was a compromise of a peculiar type. As developed in the next hundred and fifty years, it meant that form and appearance remained with the king, the reality with Parliament. The words in which the modern constitutional lawyer states the result are as accurate as can be found: "Sovereignty resides in the king in his Parliament." The king is in theory sovereign, but his sovereignty can be declared and exercised only in Parliament. The king gave up the power to

determine by his individual will the policy of the state, but the surrender was disguised by an appearance of power and for a long time by the exercise of very substantial powers and the permanent possession of important rights and influence. It was more than a hundred years before all that the compromise implied was clearly recognized and the balance established at its present level. But it was really made in 1660.

In the history of government in the world no event has ever happened of greater significance or of wider influence than the making of this compromise. Upon it depended the spread of the English constitution throughout the civilized world which is one of the chief characteristics of the nineteenth century, even if it should in the end prove that constitutional monarchy is only a halfway house on the road to ultimate democracy. In this respect it is difficult to overstate the influence of this compromise. Had the course of English history led to a constitution in which in form and law the ministry was directly responsible to Parliament instead of to the king, not merely would it have been immensely more difficult to reconcile the sovereign to a loss of the substance of power, but the adoption of the constitution by other and unwilling monarchies would have been made a practical impossibility. The compromise feature of the present constitution by which in theory and in form the ministry, though supreme, seems

to be the creature of the king and responsible to him, would have had no existence. The choice which in that case a successful revolution might offer to a sovereign between a formal direct responsibility of all the organs of actual government to the legislative assembly on one side, and an out-and-out republic on the other, would have had no particular attractiveness or significance. The world influence of the English constitution depended for its existence upon the fact that Parliament came to control the actual government in fact rather than in form, indirectly, not directly; that an actual republic was concealed under all the ceremonial and theoretical forms of a continued monarchy.

If Charles II knew that Parliament was in reality supreme, he had no intention of allowing that result to develop undisputed into the permanent constitution of the state. With more than average political skill and aided by the course of events, by the plans of Louis XIV on the continent, and by the disorganization of the opposition at home, he was able in the twenty-five years of his reign to accomplish much. But to rule as freely as he wished, he found it necessary at last to rule without a Parliament, and during the last five years of his reign the houses were not called together. The practical power which in these ways he gathered into his hands, evading the check of Parliament upon him, and sometimes evading the knowledge even of his own ministers,

has been said by a student of those times to have been greater than that exercised at any time by the Tudor sovereigns. But it was still a practical power, not a constitutional. The problem before Charles and his brother, who succeeded him, was the same as before the Angevin sovereigns of the twelfth and thirteenth centuries: whether it would be possible to vest in institutions an existing practical absolutism and make it constitutional. Charles's premature death gave him no opportunity to make the trial.

James II began with everything in his favor: the practical power handed on to him by his brother; the sympathy and favorable disposition of the nation; a disorganized and discouraged opposition; a Parliament ready to do anything in reason which he wished, and yet he proceeded so hastily and with so little judgment towards his ultimate goal, which could be reached only by slow and cautious approach, that within three years he had destroyed all his advantages and turned the whole nation against him. It was no doubt a religious motive, the desire to give Catholicism a better position in England, that urged James on, but the means which he employed and the results which unintentionally he accomplished were constitutional. The suspension or virtual annulment of the law, so that Catholics might be appointed to office in the state, in the army, and even in the church, and all their disabilities be removed; the

reestablishment of the arbitrary ecclesiastical Court of High Commission; the violent attack on established rights seen in the case of the university of Oxford; the attempt to use the courts as the instruments of his will; and the collection of a large army in the neighborhood of London with which opposition might be overawed, so clearly revealed the designs of James that all parties united in an invitation in the summer of 1688 to William, Prince of Orange, the husband of James's daughter, to come to their relief. Even the party which believed in the divine right of kings and which had been urging that all resistance to the constituted sovereign authority was sinful, joined the others in this invitation.

The revolution which followed, long known as "the Glorious Revolution," was sudden, bloodless and complete. James's power, which had seemed great, suddenly crumbled to nothing. Scarcely one was found who dared or wished to maintain his cause. The ground was swept clean for the Convention Parliament, and it was free to frame into specific provisions of the law the principles upon which the Revolution had acted, for neither William nor his wife could lay any claim to the throne by divine right or by any right except the will of the nation. The nation's right through its chosen representatives to depose the sovereign who would not keep the law and to determine among all the possible heirs of the crown who should reign in his place, came

here, so many centuries after the principle on which it rested was first laid down, to its most complete expression. Not that it was here, any more than in Magna Carta, expressed in formal law. No government is likely to provide in constitutional enactment for its own overthrow. But it was expressed in facts and is the principle of right on which the Revolution rested and its justification.

With careful observance of every form that could be observed, with just as little extra-legal or revolutionary action as was possible, going even to the extent of maintaining that James had abdicated the throne, the Convention Parliament laid down the terms on which monarchy would be reestablished in the person of James's son-in-law and eldest daughter, William and Mary, and required their consent to them. In that sense the Bill of Rights, in which these terms were finally enacted, becomes more nearly a constituent constitutional document than any other in English history. It is not however a constitution in the American sense, nor in the sense of the Independents of 1653. It does not affirm the sovereignty of the people or of Parliament. It says nothing of the fundamental rights by virtue of which conditions may be made with the king before he is allowed to reign, or limitations placed upon his exercise of power. It does not describe nor define the organs of government nor lay them out in a detailed

plan. It concerns itself only with the immediate practical purpose and deals only with those dangers against which the experience of the past thirty years had shown it was necessary to guard. And yet in the historical explanation which accounts for its existence, in its logical meaning and necessary implications, and in the fundamental principles by which alone it can be justified, it includes all that it omits.

It should be remembered also that the Bill of Rights, considered as a constitutional enactment, affirmed in more specific language than any earlier document the underlying fact of English constitutional development, that the king has no right to violate the fundamental laws of the kingdom. To be sure the Bill does not say this in set terms, but by unavoidable inference. In the preamble, after enumerating the arbitrary acts of James, it continues: "All which are utterly and directly contrary to the knowne lawes and statutes, and the freedome of this realme." And in the body of the Bill the same acts are declared to be illegal. The Bill is also as clearly a contract between the king and the nation as the charters of Henry I and John were between the king and the barons, though there was in the seventeenth century no reminiscence of a feudal contract. It is made evident in the Bill, though again not expressly affirmed, that it is in consequence of their recognition of the illegality of James's acts that William and Mary

are accepted as reigning sovereigns. In these respects the Revolution of 1688 and the Bill of Rights mark the culmination of English constitutional development. The foundations upon which the constitution rests, the supremacy of the law, the sovereignty of the nation, are never again called in question. All the later progress consists in more and more complete application of these principles in actual government, the more complete carrying of them out in practice.

The Revolution of 1688 and the Bill of Rights restored the monarchy with constitutional guarantees. The arbitrary measures which the Stuarts had employed were enumerated in specific form, declared to be illegal, and the recognition of their illegality by the king made the condition of the possession of the throne. The views of the constitution with which James I had begun the century were therefore repudiated and made henceforth impossible. But the democratic extremes of the Puritans were equally refused, and the sanction of the law and of practical success was given to the interpretation of the constitution towards which Parliament was gradually working from 1603 to 1642. The Bill of Rights logically marks the end of this great age of constitutional advance, for that is what it should rightly be called. It was not an age of advance in institutions, though a considerable enlargement of the body of law which the king must obey in the Bill of Rights and the independ-

ence of the judiciary, omitted probably by oversight and enacted a few years later, are institutional in character. But the great development in the understanding and application of the constitution as it existed in 1603, or we may say as it existed in all its larger lines in 1399, makes the seventeenth century a great age of constitutional advance.

CHAPTER IX

THE MAKING OF THE CABINET

The reign of William and Mary opens a new and a different epoch in the constitutional history of England. The Stuart interpretation of the constitution was never again insisted upon by any English king. It is indeed a little more than two hundred years before any question of the fundamental meaning of the constitution becomes a leading one for the nation to decide. It is doubtful if even that question—the real position of the House of Lords—should be considered to concern the fundamental meaning of the constitution, for it also was virtually decided in 1688. The characteristic of the new age was institution making, and the chief institution made is beyond all question one of the most important of history, we may perhaps in the end be justified in saying the most important, for its history is not yet finished. The new institution was the English cabinet, meaning by that not the cabinet as a mere institution, but the cabinet system of government: the cabinet as controlled by the doctrine and practice of ministerial responsibility.

To understand the beginning of the cabinet system

we must go back to the Restoration of 1660. The Restoration was, as we have seen, a compromise by which the form of sovereignty remained with the king while the reality was transferred to Parliament. If fully carried out in practice, this compromise would mean the direct supervision and control of all lines of government policy and executive action by the legislative assembly. Such an arrangement was new to all human experience and naturally there existed no machinery by which it could be carried out in practice, no institutional forms through which a legislature could exercise an executive authority which in theory it did not have. Constitutional machinery for the practical operation of the compromise must be devised, and the origin and growth of this machinery is the origin and growth of the cabinet with the principle of ministerial responsibility to Parliament. Or we may state the fact in another way: the English system of vesting the executive authority in a cabinet virtually chosen by the legislature and held under a close control by it, was the method finally devised to carry out in the practical operation of the government of the country the sovereignty of Parliament which had resulted from the constitutional advance of the seventeenth century.

It would be absurd to suppose that the men of Charles II's reign, or any later reign, were conscious that here was a practical problem for them to solve.

What they were conscious of at first was some little difficulty in harmonizing the king's policy and Parliament's policy upon a common line of action, and such conscious efforts as were made, as in Sir William Temple's plan for a reorganization of the Privy Council, were directed to creating a mediating, harmonizing body between these two great powers. These conscious efforts led to no result. So far as any progress was made under Charles II, it resulted from the efforts of a small body of ministers who were in the confidence of the king and at the same time able to influence the action of Parliament. The earl of Clarendon, who was for a time one of these ministers, has described their methods in words which are especially interesting to us because they might be used almost without change to describe methods employed in Washington during the past thirty years in efforts to bring the influence of the President to bear on legislation. He says: "These ministers [Clarendon and Southampton] had every day conference with some select persons of the house of commons, who had always served the king, and upon that account had great interest in that assembly, and in regard of the experience they had and their good parts were hearkened to with reverence. And with those they consulted in what method to proceed in disposing the house, sometimes to propose, sometimes to consent to what should be most necessary to the public; and by them to

assign parts to other men, whom they found disposed and willing to concur in what was to be desired: and all this without any noise, or bringing many together to design, which ever was and ever will be ingrateful to parliaments, and, however it may succeed for a little time, will in the end be attended with prejudice."

As a matter of fact, the king was still, and for a long time after, the real executive. He chose his own ministers and controlled their policy and did not concern himself with Parliament's approval of them nor consistently with Parliament's approval of his policy. On its side Parliament naturally regarded the new methods with some suspicion, as evidence of intrigue in the king's interest, but it knew no way of exercising its power of final decision except by making a square issue with the king, nor of holding the king's servant responsible except by asserting a direct responsibility enforced by the old practice of impeachment.

The situation in this respect was not changed by the Revolution of 1688. That Revolution was not a decision as to particular forms or machinery. What was at stake once more were the principles which underlay all forms, and the whole nation showed that it was determined to maintain the settlement of 1660 so far as that was a settlement of the fundamental question of the supremacy of Parliament. But we may be sure that if satisfactory constitutional machinery had been devised

during the reign of Charles II for exercising that supremacy in practice, it would have been included in the settlement of 1689. But it had not been, and indeed in 1689 it was only the fundamental principle of Parliamentary supremacy that was in any sense apprehended. Neither the range of its application to the operation of actual government, nor the method of its application, was yet understood, nor was the latter, which is the principle of ministerial responsibility applied to the cabinet, clearly understood for another century.

With the accession of William III this fundamental question at issue between king and Parliament was settled, as has been said, never to be raised again. The characteristic feature of the new age was not a question of that kind, nor of the interpretation of the constitution, but it was progress upon the new task of devising machinery for carrying out in actual government the compromise settlement already reached. In workable machinery for this purpose, the age of William III made no great advance over that of Charles II. The mediating body still consisted of a small and informal group of ministers who enjoyed the confidence of the king and who were influential in Parliament. The king still retained a very decided control over the conduct of government, especially in foreign affairs, and he never dreamed of allowing Parliament any voice, direct or indirect, in the choice of his ministers.

William III made, however, in the course of his reign one very important discovery which was never afterwards forgotten. He began to reign with a desire to be king, not of a faction, but of all England, and as what he thought would be a harmonizing measure, he chose to have a coalition ministry made up from both political parties at once. But he soon found out that the easiest way to accomplish the objects he desired, the line of least resistance in carrying out his policy, was to choose his chief ministers from those political leaders who were best able to secure the support of Parliament, or in other words from that party which had a majority in the House of Commons.

This was a great step forward, but it was not yet a matter of principle. No one supposed it to be more than a mere matter of convenience, and a long time passed before its real meaning began to be understood. It was in truth the beginning of the principle of ministerial responsibility with all its applications in the present constitution. It was from this origin that modern ministerial responsibility arose, gradually and unperceived, and not from the medieval idea or practice. The medieval was for some time supposed to continue alongside the new growth, unconnected with it, rather as opposed to it, for the older method of impeachment was still thought to be the only means which Parliament had of controlling the king's ministers.

Parliament indeed under William was again greatly troubled by the signs of this new development which it could see was going on but could not understand. The government's policy seemed to be determined by a secret clique of ministers upon whom it was difficult to fix responsibility. Not long after the accession of William and Mary, the House of Commons began to debate methods of holding the government responsible and found no satisfactory means. Impeachment seemed to be slipping out of its hands and nothing taking the place. Parliament really was losing impeachment because it was no longer needed or in place. The future struggles of English history were not to be between king and Parliament over the establishment of the constitution, or over its meaning, but they were to be over purpose and policy in the daily operation of the government between the leaders of groups of opinion in the nation whose equal loyalty to the constitution was unconsciously accepted early in this period. In such a situation it was instinctively felt that it was an unworthy use of a party advantage to subject the leaders of the opposition side to a criminal prosecution and, though it was not yet seen what could be used in its place to enforce responsibility, impeachment was tacitly dropped.

How wholly unconscious was the real development which was going on at that time is strikingly recorded in the Act of Settlement of the last year of William's

reign. In clauses four and six of that document Parliament attempted to destroy the beginnings of the cabinet system in order to protect what it believed to be its means of enforcing responsibility and, if those clauses had been put into force, would have succeeded. Clause four required that all conciliar business should be transacted in the Privy Council and not elsewhere, that is, not by the suspected clique alone, and that the members of the Council should furnish the evidence of their responsibility by attaching their signatures to the resolutions to which they consented; and clause six forbad the election to the House of Commons of any officers of the crown, including of course the ministers. That is to say, Parliament had so little conception of how best to realize its own supremacy that it deliberately tried, in the interest of an obsolete method, to end the line of progress which was bringing in the most effective means ever devised, or apparently devisable, for operating a republic under the forms of a monarchy.

It was in this stage of the development of cabinet government that the house of Hanover came to the throne. George I never ceased in any respect to be a German and he cared little about the character of English government and understood the constitution and constitutional tendencies even less. George II had a greater interest in his British kingdom and a clearer idea of what was going on in government, but he did not

know how to interfere with the natural growth of tendencies which were in full course when he came to the throne. As a result the forty-five years of these two reigns is a long period of unbroken development in the history of cabinet government. Nearly half the time is covered by the ministry of Sir Robert Walpole, a time of peace and of unnoticed growth. Walpole was not merely the first prime minister but the first minister who had something like a clear, though no doubt largely unconscious, idea of the character of the machinery for government which was forming and of the principles according to which it should be consistently operated. The fact that George I did not understand English shut him out of the consultations of the cabinet, and George II did not seriously attempt to restore the king's right to attend. Decision of government policy in the absence of the king and without his knowledge made abundantly clear the sole responsibility of the cabinet for the conduct of public affairs, and Walpole saw that this state of things should require the cabinet to be a unit in policy and collectively responsible. He had some difficulty in applying this principle strictly, and other prime ministers after him, and it was not until the beginning of the nineteenth century that it came to be rigorously observed and a commonplace of thinking about government.

Walpole was also the first minister who consciously perceived the relation which should subsist between the

cabinet and the majority in the House of Commons. He was the first to organize that majority in something like an official way and to act upon the logical conclusion that when he lost the majority he must resign. The progress was rapid under Walpole and it continued after his fall. Its character is further indicated by the fact that in 1746 Lord Granville failed in the attempt to form a cabinet because he could not bring together a body of men to act with him who would command the support of Parliament, and also by the fact that in the same year the king was forced under pressure and against his will to admit William Pitt to the ministry. These are full-grown characteristics of the modern cabinet, but cabinet government was not yet complete nor perfectly understood by anyone at the middle of the eighteenth century. The first thirty years of George III's reign revealed how much was still to do.

George III came to the throne in 1760 as a young man of most decided convictions and intentions. He had been trained by his mother to be a king in the highest Tory sense, and he possessed by nature a degree of obstinate short-sightedness sufficient to prove his Stuart descent. It was, however, not the policy of the elder Stuarts which George attempted to carry out. It was the cabinet system of government which he attacked and it was that which he failed to overthrow. If neither he nor his contemporaries understood that system as com-

pletely as we do, he understood at least what its growth had cost the crown, and this is what he set about to recover. What might have been the ultimate result of his attempt if it had been successful, it does not belong to the historian to say, though it is difficult to see how constitutional liberty could have survived if he had been completely successful. But his immediate plans as he developed them went no farther than to reestablish the degree of control over the policy of the government which William III had possessed.

He was at first successful. By forcing devoted adherents of his own into the cabinet which he had inherited from his grandfather, the cabinet of the great war minister William Pitt; by creating a strong influence of "king's friends" in the House of Commons, independent of the cabinet; and finally by finding a prime minister in the person of Lord North whose private conviction regarding the relation of minister and crown agreed with his own, he did succeed in recovering for a time a decided royal influence over the policy of the government. The highest point of this success was the ministry of Lord North from 1770 to 1782. The price which was paid for it was the loss of the American colonies.

Had cabinet government been understood at that time as it was a century later, had ministerial responsibility of the modern type existed then, it is hardly an exaggera-

tion to say that the American Revolution would not have occurred. It is at any rate open to belief that if ministerial and Parliamentary opinion had been free to form in view of the facts alone, some workable compromise could have been found between opposing interests, neither of which desired at first extreme measures.

The failure of the king's policy to compel the return of the colonies to their allegiance was also the failure of his policy to control the cabinet, not at once nor while he lived with absolute completeness, but so completely that after the fall of Lord North there was no longer any possibility of accomplishing the plan with which he had set out. This fact it is which has led Englishmen to say that Washington "by his military conduct of the War of the American Revolution saved English constitutional liberty, as well as won American independence." The final subjection of the executive to the legislature in all respects, never again to be seriously resisted, may be dated from the end of Lord North's ministry in 1782. The few individual exceptions which occurred after that date are cases in which the cabinet and the legislature yielded to the nominal executive, not on principle, but because it did not seem advisable or worth while to make an issue on the particular point.

One incident, coming only a few weeks after the signature of the peace with the United States, might be

cited as evidence of the continued power of the king, but it is really more significant of other things. In December, 1783, George III suddenly dismissed the coalition ministry, to which he had been obliged to submit against his will, on their being defeated in the House of Lords, although they still had a good majority in the House of Commons. The younger William Pitt, then twenty-five years of age and just entering upon his great career, consented to form a ministry in support of the king. With an overwhelming majority against him, the new prime minister began a severe and dramatic struggle with the House of Commons which lasted for more than three months. He stood almost alone. He was the only member of the cabinet in the House of Commons. All the leaders of debate and brilliant orators of the House, in that most brilliant period of House of Commons oratory, were against him. The business of Parliament was at a standstill. The passing of the appropriations and of the annual mutiny bill was postponed, and from that date it has been understood that the Parliamentary weapon compelling the appointment of a minister of its choice is the refusal to do business with any other.

But Pitt maintained his position boldly with the king's support. Twelve successive votes were passed against him by the Commons, any one of which would now be thought sufficient to compel the resignation of the

cabinet. The insistent demand that he should resign and the anger occasioned by his refusal to do so, fixed firmly in the public consciousness the duty of a ministry to give up office on an adverse vote in the House of Commons. Since the time of Pitt no minister has been able to maintain himself in a like situation, and it is hardly probable that Pitt could even then have done so, if public opinion outside Parliament had not been turning in his favor. The change of feeling was steadily reflected in a dwindling majority in the House, and finally on a defeat by a majority of one only, he dissolved Parliament and appealed to the country in a general election. The country returned him a great majority and his ministry of nearly twenty years was securely begun.

Pitt's struggle to maintain himself against a hostile House of Commons had great influence in bringing about an understanding of cabinet government and the principle of ministerial responsibility, but that understanding was still far from complete and was only slowly perfected through another twenty-five years. Two incidents between 1784 and the close of the century show how incomplete the understanding still was. Three years after Pitt's triumph the Constitution of the United States was framed by an assembly of the most experienced public men and students of politics in America, who considered with care the question of

setting up a government to operate in the best way. One great problem before them, set by the situation of the time, was to secure a really effective executive while leaving ultimate authority in the legislature as representing the people, exactly the problem which ministerial responsibility solves. In their constitution, however, not merely did they entirely separate the executive and legislative departments, then becoming closely united in England, but they gave little attention to the cabinet, and they seem to have had no idea whatever of ministerial responsibility.

If we may judge by the powers conferred upon the president in the Constitution and the fact that the cabinet is not mentioned, merely referred to in passing in the phrase "the principal officer in each of the executive departments," their idea of the head of the state and his relation to his cabinet seems to have been that which George III had made familiar to them during the ministry of Lord North; I do not mean that they consciously thought about it, but that this is the idea which they would instinctively have. It is altogether probable that they thought that in this respect they were following the English model, as beyond question they did when they adopted impeachment, and certainly, had there existed in England any such definite idea of ministerial responsibility as fifty years later, there would have been some discussion of it in the Convention.

The other incident is even more indicative of English understanding. In 1791 Parliament under the leadership of Pitt's ministry framed a new government for Canada. The debate on the bill shows conclusively that the desire was to give to Canada the same kind of government which England had, and there can be no question but that this was honestly intended. And yet no responsible ministry was granted, nor even proposed, and the foundation was laid for the later Canadian rebellion which opened a new era in British colonial government.

It is from the opening years of the nineteenth century that we must date a full understanding of the cabinet system and of the way in which ministerial responsibility is enforced through it, though even then the understanding was rather that of practical action than of theoretical description. It was not until about the middle of the century that descriptions of the system were written that seem satisfactory to us, and well past the middle before any treatise was published upon the new constitution as a whole.

CHAPTER X

THE RISE OF DEMOCRACY

While cabinet government was developing during the long reign of George III, from 1760 to 1820, change of another sort was taking place in England which had most important constitutional consequences and may in the end affect the nature of cabinet government itself. If so, the future historian will undoubtedly describe this change as opening a new epoch in England's constitutional history as truly as did the accession of the house of Lancaster or the house of Stuart. The change which took place was the economic revolution which began about the middle of the eighteenth century and its effects upon population and opinion. Within a few years of one another a series of discoveries, inventions, and favoring events combined together to create a new industrial age. The application of steam to machinery; the invention of new machinery to which steam could be applied, especially in the manufacture of cloth; the opening up of great stores of coal to make easy the production of steam and iron; improved methods of smelting iron ore to meet the demand made by the increased

use of machinery; better means of transportation for raw material and manufactured goods; and the expanding markets which followed the peace with France in 1763, all worked together to one end, an unparalleled industrial development.

But the industrial change brought with it changes in population and in attitude towards political questions. Cottage and village industries disappeared. Great factories grew up and concentrated population. New large towns were formed and old ones grew larger. Wealth endowed a new class which arose from among the manufacturers or from families not prominent before to take their place in popular influence beside the old aristocracy. A new political atmosphere began to form in large portions of the country. The new forces which were beginning to make themselves felt were less bound by old ideas, more ready to change, inclined even to be radical, and deeply interested in certain reform demands which affected their position in the state or their local conditions. The political change which resulted from and attended the economic revolution somewhat slowly developed into a great movement towards a democratic control of government and of all public interests which has gone on constantly widening and deepening from that day to this and constantly achieving more and more of its aims in the management of national and local affairs.

Historically we must trace the transformation of England into a democracy back to its beginning in the rise of new centers of population with new and pressing problems to be solved and to the rise of new classes demanding political opportunity for themselves. But it must not be supposed that the changes which this movement has brought about one after another have been revolutionary in character. They are the logical outgrowth, the consummation in practical government, of that slow drift towards the sovereignty of the people which began long centuries ago in English history. The Puritan attempt, in a revolutionary atmosphere and under the stimulus of radical religious thought, to accomplish these ends prematurely led to failure in England, but in America to an earlier and more complete fulfillment of the natural tendencies of the past. Now early in the nineteenth century, England began an approach to these same democratic results, slower than would have satisfied the Independents, but rapid as compared with the intervening generations.

As soon as the close of the struggle with Napoleon's attempt at world empire removed a natural but un-English repression, and the English people had time to fall securely back into the normal current of their life, the advance began. About 1828 there opened a great epoch of reform changes which has continued, with intervals of lessened activity, to the present day, an

epoch not merely of destructive but in the highest sense of constructive legislation. The first steps taken in this process were towards securing religious liberty by law. In 1828 the most serious disabilities of Nonconformists, which had in reality long been obsolete, were removed. In the next year Catholics were given throughout Great Britain practical political equality with Protestants, but it was some years still before Jews were admitted to Parliament or Nonconformists on equal terms to the universities. These acts were speedily followed by the extinction of Negro slavery in the colonies, by the adoption of free trade, and by the beginning of the slow process of reform in the criminal law, in the organization and procedure of the courts of civil law, and in local government. But in a sense these acts of legislation, though results of the growing influence of the mass of the people upon government, are not strictly constitutional measures. The first great step in constitutional reform, to be followed in time by the most far-reaching consequences, was the passage of the first Reform Bill in 1832. The history of this bill and of the steps by which it made its way through Parliament illustrates in so many ways the operation of the English cabinet and Parliamentary system in the nineteenth century that it should be told in some detail.

The demand for reform in the election of members of the House of Commons had really been felt before

the long war with France which began in 1793. No change had been made in the election laws since the fifteenth century, and members were still elected from the counties by the votes of the holders of freehold land of the annual value of forty shillings, and from an arbitrary list of boroughs, long regarded as fixed, in which the right of suffrage was defined in widely-varying ways as each borough had originally determined for itself. Glaring inequalities had always existed in the relation of representation to population, to some extent in the counties and to a great extent in the boroughs. The Puritan reformers had dealt with this matter in the modern sense, but their measures were not continued, and the inequalities, especially in the case of the boroughs, were greatly increased by the changes in population which followed the industrial revolution. Large new towns arose which had no representation. Old boroughs lost population heavily. Worse even than this, the decline of population, combined with limited rights of suffrage, had put many boroughs sending members to the House of Commons completely into the hands of neighboring great landowners who either controlled the election through their ownership, the so-called pocket boroughs, or found it easy to buy the required number of voters, the rotten boroughs. The duke of Norfolk nominated eleven members of the House of Commons, Lord Lonsdale nine, Lord Fitzwilliam

eight, and so on. Nearly half the membership of the house represented in this way private interests rather than a public constituency.

Near the end of the eighteenth century, about the time the war with France began, the question of this evil had been raised in Parliament, and hopeful measures for reform were under way. The extremes of the Revolution led to a reaction which continued for some years after the close of the war, but with the beginning of reforms in other directions this too was taken up. Early in November, 1830, Earl Grey, who had been a leader in the eighteenth-century attempt, expressed in debate in the House of Lords the hope that this reform might not be long delayed. The prime minister, the duke of Wellington, answered in absurdly extravagant praise of conditions as they were, saying among other things that if he had been called upon to form legislative institutions for any country he could not hope to do as well, "for the nature of man was incapable of reaching such excellence at once." These words proved the spark which fired the train and revealed how broadly preparation had been made in the public mind for a decided change. On the fifteenth of November Wellington's ministry was defeated in the House of Commons and resigned. The king sent for Earl Grey who formed a Whig ministry and went on without asking for a new election. The House of Commons had nominally a Tory

majority, but public opinion had declared itself so clearly for reform that there seemed a chance of securing a majority for it without an appeal to the country.

The bill was introduced on the first of March by Lord John Russell, who for twenty years had advocated a measure of the kind in speeches and motions in the House of Commons. It passed its first and second readings, but on the second reading the majority in its favor was only one in a vote of over six hundred. In Parliamentary practice a small majority on the second reading is considered a defeat. The passing of the second reading means that the House adopts the principle of the bill, but the details have still to be settled in committee of the whole, and experience shows that more members are ready to accept the general principle of any measure than will agree together on all the details. This proved to be the case at this time, and on the nineteenth of April the cabinet was defeated by a majority of eight. Then the ministry appealed to the country. Parliament was dissolved and a new election ordered, which was held with electoral reform as the chief issue of the campaign. The election was one of unusual excitement and of clear determination on the part of the reformers. Some pocket boroughs even were carried against their owners, and a great majority for those days was secured for the government. So quickly was all this done that on June 24 Lord John Russell introduced

practically the same bill again, and its second reading was carried on July 8 by a majority of one hundred and thirty-six, and on September 21 it was finally passed by a majority of one hundred and nine. The House of Lords was naturally opposed to a measure which seemed about to destroy the political influence of the aristocracy, but the reformers made a brilliant defence, and it was only after one of the ablest debates in the history of the House that the bill was rejected by forty-one majority in a vote of three hundred and fifty-seven. The defeat of a government measure in the House of Lords does not call for the resignation of the ministry and, sustained by a vote of confidence immediately passed in the House of Commons, the cabinet decided to prorogue Parliament in order that a new session might allow the reintroduction of the bill.

In the interval between the two sessions the public excitement reached the highest point that had ever attended any question before Parliament or perhaps that has ever been known since that time. All measures familiar to English and American politics to impress public opinion upon the legislature were employed, monster meetings, impassioned speeches, processions and petitions, newspaper articles and pamphlets; in places there was even rioting by the more radical supporters of the bill who expected larger results from it than it really produced. The House of Lords met in the new

session under no misunderstanding as to the temper of the majority of the nation.

On December 12 a new bill was introduced considerably improved by the experience of previous debates, and after another thorough discussion was passed by the Commons on March 23 and sent to the House of Lords. Everybody knew that now the real battle was to come, and the pressure on the Lords was tremendous. It was generally understood that King William IV had agreed, though with reluctance, to create a number of Whig peers large enough to carry the bill through the House, if this should prove to be the only way in which it could be saved. On the other hand, it must not be forgotten that the country had hardly yet recovered a reform disposition from the reaction which the extravagant policies of the French revolutionists had caused, that their excesses were still fresh in mind, that only two years before there had been another outbreak of revolutions on the continent, and that this measure seemed to strike at the very foundations of government as they had existed for centuries, a belief which the radical supporters of the Reform Bill did nothing to remove. The mind of a conservative aristocracy, naturally timid of experimenting with the unknown, had some defence for itself on this occasion.

Public pressure and the known plans of the government were, however, too strong for many minds in the

House, which were wavering either in opinion or as to the best policy for the Lords to follow. When the vote on the second reading was taken, it proved that seventeen peers had changed to the affirmative, that some, including Wellington, had stayed away, and that a net gain had been made from among the absentees of 1831. The second reading was passed by a majority of nine. The fate of the measure was, however, undecided because it had yet to undergo the dangers of amendment and of adverse votes in committee of the whole, and in reality such a vote was carried against the ministry on May 7.

It was now evident that the number of Whigs in the House of Lords must be increased to a working majority or the bill be abandoned, and the cabinet asked of the king the fulfillment of his promise to create peers, offering him the alternative of their resignation. It seems clear now that the king had never agreed to increase the membership of the House of Lords by so large a number as the ministers thought necessary. He was himself conservatively minded and somewhat afraid of the reform, though on the whole loyal to the ministry, as his constitutional position demanded. When brought face to face with the necessity of swamping the majority in the House of Lords in order to carry the bill, he could not bring himself to act and instead accepted the resignation of the cabinet.

It then became the practical question whether the Tory party in support of the action of the king could form a cabinet which would be able to carry on the business of the country, including some measure of electoral reform which it was now clear to everybody must be adopted. The duke of Wellington made the attempt to construct the ministry, but Sir Robert Peel, who was indispensable, and others refused to serve; the House of Commons passed a vote of confidence in Lord Grey's cabinet by a large majority; and renewed public excitement gave warning of trouble. After a few days of hard effort, Wellington was obliged to inform the king that he could do nothing and advised him to recall Earl Grey. William was forced to yield, though yielding meant agreeing to the cabinet's demands. He attempted in vain to persuade them to consent to important modifications of the bill, but he gave them his promise in writing to create as many peers as might be necessary. Then of his own motion he took a further step of more doubtful propriety constitutionally which, though not objected to at that time, certainly would be today, by directing his private secretary to suggest to Wellington and certain others that all difficulties would be removed by their absenting themselves from the House when the vote took place. This course had been already resolved upon by many and the bill was finally allowed to pass by a large majority.

It has seemed worth while to relate the history of this episode in such fulness because there is no case in which are illustrated in so many points of detail the practical workings of the cabinet system of government by a responsible ministry, which is the especially characteristic result in the constitution whose historical development we have been following. From 1832 to the present time the operation of this system has remained the same with only slight modifications, which will be noticed later. The relation to one another of three of the great factors in the government is clearly brought out in the history of the passage of the Reform Bill and that of the fourth is implied. The king, the lords, and the cabinet are shown as they operate together, not of course in the business details of administration, but in the higher determination of government policy and the foundation of all in the House of Commons is indicated.

The king has ceremonial and social functions to perform which are of great importance in an old society which, however democratic politically, is still aristocratic in social spirit, but in the determination of government policy upon any measure his position is fairly shown in the relation of William IV to the passage of the Reform Bill. He cannot insist that the ministry change the details of a measure to make it accord more nearly with his own views. He may present his views to the cabinet, either orally through

some member or in writing, and urge their acceptance, and they will always be considered respectfully and fully. In matters of form, as in the famous case of the note of Lord Palmerston's government to Washington on the Trent affair in our Civil War, which was modified at the suggestion of Queen Victoria, or in unessential details, the advice of the sovereign may often be accepted, but if the cabinet decides against his views he must yield.

In William IV's time when the ministry asked of the king an act to which he was strongly opposed, it was thought his right to accept their resignations and to try the experiment of forming a government which would not require such an act of him. But when the leaders of the king's way of thinking, from whom the new cabinet must be made, came to the conclusion that no government could be formed which could carry on the business of the country, then the king must abandon the attempt. It is hardly likely that any student of the British constitution would deny the king the same right at the present day, but the elimination of the king from the practical government of the country in thought and habit has gone so far since 1832, that it is exceedingly doubtful if any sovereign will ever try the experiment again. The attempt would be from the start so hopeless and public excitement so great, for it would only be made on a question of great importance, that the king

would probably always yield rather than take an appeal against the cabinet.

It may be said without qualification that William's conduct in allowing his views about the Reform Bill to become known would be thought improper in a sovereign of today. Theoretically the king is supposed to have no political opinion but that of his ministers, and it would be a serious breach of etiquette for an English political speaker to quote the king in support of his argument. This principle is very correctly stated in a letter of Edward VII's which has been published. When he was asked in writing as to the truth of a rumor that he was opposed to any change in the policy of free trade, he replied: "The king never expresses any opinion on political matters except on the advice of his responsible ministers, and therefore the statement must be inaccurate."

The only political function which the king can perform is to support his cabinet loyally and completely in such ways as are possible to him, which are not many. Much was said during the reign of Edward VII of the activity of the king in the field of foreign relations, and it is quite possible that he may often serve as a particularly useful ambassador because of the peculiar access he may have to the inner circles of government. As Mr. Gladstone has said: "personal and domestic relations with the ruling families abroad give openings, in

delicate cases, for saying more, and saying it at once more gently and more efficaciously than could be ventured in the more formal correspondence and ruder contacts of governments." It is certain however that in such a mission the king could take no position which had not been previously agreed upon or which was not in harmony with the policy of his government.

The last work which was necessary in bringing the nominal sovereign into so complete harmony with the real sovereign in the practical carrying on of government was done by Queen Victoria in the course of her long reign. Her letters, which have been published, reveal in how many ways and with what sympathetic understanding this work was carried on, and Queen Victoria's personal place in the future history of England may very likely be determined more by her assistance in this development than by anything else she did. So entirely is the British sovereign at present in harmony with the constitution that it is very possible that the question of the government's remaining in name a monarchy or being changed in form into a republic will be determined by other than political considerations.

More decided and dramatic changes have taken place in the relation of the House of Lords to the other factors in government than in the case of the kingship, and yet all the changes which have occurred were virtually involved in the position of the House as it was revealed

in the struggle over the Reform Bill. That struggle clearly showed that the Lords might safely oppose the popular will, as expressed by the House of Commons, to a certain point but not beyond it. Their first rejection of the Bill was clearly their constitutional right, an appeal to the people with the question: Is this your deliberate and mature desire? Their second rejection, after a general election upon the specific question had declared the popular will unmistakably, was of more doubtful propriety; and the third rejection after continued evidence of a national determination certainly endangered their historical position. What followed, the determination to coerce the House by the creation of peers, the failure of the king's attempt to avoid the necessity, and the final acceptance of the bill as the only way of escape, revealed for the first time the fact that the long progress towards the realization of the sovereignty of the people in government had overcome the aristocracy as well as the king.

A general understanding of this fact was however only slowly reached. A few years later, on the repeal of the corn laws, the protectionist legislation in the interest of the landlord class, the House of Lords was strongly tempted to resist the reform. Only the great influence of the duke of Wellington, who explained to the House clearly and for the first time the powerlessness to which it had been reduced in the consitution, pre-

vented a repetition of the experiences of the Reform Bill. From that time on to near the end of the century, it was the custom to say that the House of Lords served the purpose of a brake on the wheel of too rapid advance, served to make sure that a reform was really demanded by the mature judgment of the country. Before the close of Victoria's reign, however, the complaint became very frequent that the brake was applied only to the measures of a Liberal ministry, never to those sent up by a Conservative cabinet. Although the Liberals during these years had raised more men to the peerage than the Conservatives had done, it had yet been found exceedingly difficult to keep a family liberal in the atmosphere of the Lords. The Earl of Rosebery a few years ago declared in a speech that in his experience as Liberal leader of the House he had never been able to count with certain confidence on more than thirty votes in a membership of over six hundred.

It was a growing sense of the unfairness of this situation and of the danger of a permanent rejection of some important measure with its probable effects in public excitement, enforced and deepened by recent experiences in the adoption of tax reform measures, that led to the passage of the Parliament Bill of 1911. If we regard the English constitution with special reference to the character of its long historical development, there is nothing revolutionary about this measure. It

takes away the power of the House of Lords to postpone for more than two years the enactment of a bill passed by the House of Commons which it has been made clearly manifest during that time that the public opinion of the nation demands. This is doing no more than to describe in statute form, with the time of delay definitely measured out, the position which the passage of the Reform Bill of 1832 had shown was really that of the Lords in the constitution, and this position was clearly the logical result of the previous development. The power of the Lords was as much involved in the seventeenth-century struggle with Charles I and James II as was that of the king. The final triumph of the sovereignty of the people demanded as complete and cordial a recognition of the results from the House of Lords as from the crown.

The position of the cabinet both in ordinary action and in times of crisis is illustrated with equal fulness in the passage of the Reform Bill. This date, 1832, is the earliest to which we can assign with certainty the completion of the cabinet system in all its working details, though it is very likely true that a somewhat earlier test, had it been applied, would have found its practical operation as fully understood. The Reform Bill was a government measure. That is, it was framed by the ministry, introduced by one of its members, and remained in his charge during its passage. If it should

be defeated, or if an amendment upon a vital point should be carried against the ministry, then the cabinet must either resign or appeal to the country for its support upon the issue by dissolving Parliament and bringing on a general election. A new election can be the cabinet's choice only under a heavy responsibility. An appeal to the country upon insufficient grounds, without some evidence of general support, or merely to save the ministry time, would be sure to be followed in the election by severe condemnation, but in this case the government had every reason to believe that the country was behind it, and the event proved the opinion correct. A greatly increased majority for the cabinet was returned by the electors, and the vote was considered a mandate from the country to go on with the measure.

On the defeat of the second bill in the House of Lords, the case was different. An election had lately been held and the government had still a large majority in the Commons. An appeal to the country was unnecessary and would have been improper. Instead the cabinet prorogued Parliament to permit a reintroduction of the bill in a new session. When the government was again defeated on an amendment in the Lords, matters came to a crisis which illustrates the action of the cabinet at such a time. In asking the king to take a step, the creation of peers, which it was known that he was very reluctant to take, the prime minister offered him at the

same time the alternative of the cabinet's resignation. At that time, whatever might be done today, the king chose that alternative, but while the attempt to form a cabinet of the opposite party was made, the old cabinet remained in office and carried on the routine business of the government. When the king was obliged to admit that his attempt had failed, it resumed its position as cabinet with reference to Parliament, but now with the certainty that its advice would be accepted by the king. The crisis reveals also what it is in the British system which keeps a cabinet in power or turns it out of office. It is its ability or inability at any given time to determine and direct the policy of the government. If the House of Commons will do business with the cabinet, then it goes on; if the House of Commons will not do business with it, no other power can maintain it in office. If a ministry should attempt to retain power in the teeth of a hostile House of Commons, the business of government would shortly fall into chaos and the attempt would mean revolution. But with the House of Commons and the opinion of the nation against it, no ministry would ever make the experiment. This is the whole theory of government by a responsible ministry. The House of Commons reflects the opinion of the people in regard to the policy proposed by the government and its judgment, which is the judgment of the nation, is final in the question before it.

The position of the House of Commons has been already clearly indicated. It supports the ministry so long as the policy of the ministry has the support of public opinion. In times of crisis it may hold up the hands of the cabinet by a direct vote of confidence, which is equivalent to a formal declaration to all opponents that the country is behind the government's policy. If public opinion turns against that policy, corresponding changes will take place in the House of Commons and then in a crisis conceivably the House may adopt a vote of want of confidence which is a formal declaration to the cabinet that it has lost the support of the nation and should resign. If the ministry should prove unwilling to resign, or an attempt be made to bring into office a ministry which does not have the sanction of the people, the House of Commons would refuse to allow any items of its policy to be enacted into law, and it would be unable to go on. It is also of course the business of the House of Commons to discuss the measures proposed by the government and to amend and improve them, but this is a duty which it still shares with the House of Lords.

CHAPTER XI

THE PROGRESS OF REFORM

The results of the Reform Bill of 1832 disappointed both its friends and its opponents. It was not followed by the consequences which had been hoped or feared. Most pocket and rotten boroughs had been disenfranchised and seats had been given new centers of population, and these were changes which had been desired. But though the number of voters had been largely increased, no important change was manifest in the character of the membership of the House of Commons, and no evident progress had been made towards democracy. Corrupt voting was not entirely extinguished, difficult formalities in the process of registration kept down the number of voters, and the natural local influence of family and property combined with all the rest to reduce the significance of the reform. The radical supporters of the Bill had never been satisfied with the concessions which that measure secured and it was not long before agitation began for supplementary reforms. The agitators had much material to build with in the rather general discontent of the working class,

discontent which was quite as much due to economic as to political conditions.

The agitation, which reached its height in 1839, is known in history as the Chartist movement from the so-called People's Charter in which the radical demands were stated. These were six in number: universal manhood suffrage; vote by ballot, to prevent intimidation; annually elected Parliaments, to maintain the responsibility of members; payment of members of the House of Commons, to make possible the election of poor men; the abolition of the property qualification for membership in the House, for the same reason; and the formation of electoral districts of equal population.

The movement was a failure. None of the demands set forth in the charter was granted by Parliament, but the agitation did not cease in other ways. The democratic cause won gradually more and more support among the classes which controlled Parliament, and the programme of the People's Charter may be taken as an epitome of the progress since that day. Three of the demands, the second, fourth and fifth as given above, have been fully secured; the first also, with very slight exceptions which are now about to be swept away and the limitation implied in the word manhood dropped as well. The sixth has been fully obtained in principle and in practice as nearly as some peculiar difficulties of the situation allow. The second has not been secured

in form, but the possible life of a Parliament has been reduced to five years, and the responsibility of members to their constituents more indirectly but sufficiently secured. The leaders of the movement of 1839 would be astonished at the England of today, if they could return to it, and would be obliged to say that, according to the standards which they proclaimed, it is a democracy, and that in some things which they had at heart, the legal protection of the workingman for instance, progress has gone far beyond their wildest dreams.

For many years after the passage of the Reform Bill of 1832, there was no serious movement towards a further lowering of the qualifications for suffrage. It was not until the time of Lord Palmerston's ministry during our Civil War that it became clear that further reforms must be made. The Liberal party of that day was so divided within its own ranks that it was not able to perfect and carry a measure on the subject, and the second reform bill was enacted in 1867 by the Conservative ministry of Lord Derby under the leadership of Mr. Disraeli. It was a further advance along the line which had been opened up in 1832 but it was plainly a temporary measure only. It struck out no new principle and it stopped halfway along the road. In the boroughs, however, the suffrage was made almost democratic. It was made possible at least for anyone who would take the required trouble, except a very few,

to obtain the right to vote. The number of voters was increased, but the same sort of tests, virtually property qualifications, were to be used as in 1832; and more boroughs were deprived of representation and new and increased representation given to others and to the counties.

The interval between the second and third reform bills was shorter. Reform had lost its terrors during half a century in which no national calamities had followed from it. Society had not been disrupted; property had not been made insecure; and the radical party had not obtained permanent possession of the government. Not merely in the intellectual convictions of men, but in habits of thought and action, democracy had made great progress, and in 1884 England was ready for a step which was nearly final. By the act of that year the franchises which had been given the boroughs in 1867 were extended to the counties and the qualifications for the suffrage in these two kinds of electoral districts were made, with some slight exceptions, uniform for the first time in Parliamentary history. The change did not quite introduce universal suffrage. It gave the right to vote to any man occupying a separate dwelling house, or a part of a house used as a separate dwelling, without regard to its value, and to those occupying lodgings of the value unfurnished of ten pounds per year. A young man living in his father's family, a servant living in his

master's house, could not vote, but anyone earning day wages or having an equivalent income who was willing to meet the conditions was really enabled to do so. Under this act practically as many votes in proportion to the population have been cast in a Parliamentary as in an American congressional election.

At the same time an act redistributing seats and rearranging electoral districts was passed, making far more radical changes than ever before. The principle of the representation of equal units of population is not quite so exactly realized in England as in the United States, but there are inequalities with us, and perfect exactness of measure is not possible anywhere. In the meantime other acts, perhaps less strictly constitutional in character, had made the way of democracy easier. The Australian secret ballot had been adopted; registration had been simplified in the interests of the elector; and a Corrupt Practices Act had greatly reduced the opportunity to influence elections improperly.

Since 1885 in everything except a few points, less important practically than theoretically, England has been a democracy. It is indeed fair to say that, so far as the immediate influence of public opinion upon government policy is concerned, England has been for a generation more democratic than the United States. The cabinet system of government, the ministry responsible to the House of Commons, losing office when it

loses its majority, provides a way by which almost automatically, without waiting for a future election day, a change of national judgment is carried out in a change of government policy, provided always that opinion changes in the House of Commons with the change of opinion outside. It has done so certainly in the past and may be expected to do so in the future.

As a further step in the line of development which we are now following, the progress of the constitution towards democracy, the enactment of the Parliament Bill of 1911 should not be overlooked. It has been described already sufficiently for our purpose, but it should be remembered in its chronological place that it did away in law with the power formerly possessed by the House of Lords of absolute veto of popular measures which they had already lost in theory. There was no doubt natural reluctance to have the powerlessness of the peers so bluntly stated in statute terms, but the law really did no more than to remove all possibility of a serious collision between the two houses which came so near to occurring more than once in the nineteenth century.

In one particular the Parliament Bill is a distinct departure from the ordinary English practice. It is the embodiment of a constitutional principle in a statute; that is, the principle is legalized in definite words which state exactly what shall and what shall not be, an

approach on a single point towards a written constitution. In this respect it is in line with the Bill of Rights of 1689 and with some provisions of the Act of Settlement in 1701, rather than with the general trend of English history, which has left the constitution to be expressed in unwritten custom and convention.

But a written constitution is not out of harmony with English history, as is shown by the acts mentioned and by other legislation in earlier history which has become obsolete. The reason why the English constitution is unwritten is not because there is any especial political virtue about that form of constitution which was foreseen and chosen. The unwritten constitution was as little intended as a Parliament of two houses. It was an accident of the situation and was due to the fact that the work which England was doing in constitution making was new to human experience. The constitutional future could not be foreseen nor planned in detail, nor the needs of government provided for in advance, because this road had never been traveled before. The constitution was slowly made, not according to any theoretical ideal, but by finding a practical solution for every problem as it arose. The result in each case was rather a way of doing things than a formal provision, though it might be and often was afterwards put into statute form as a single detail.

It would be absurd to argue from England's un-

written constitution that the results of her experience should not now be expressed in a written constitution; that would be to elevate an accidental attendant of past growth into a law of the future. Nor does such a formulation in writing of the British constitution, as has been made in whole or in part by so many states, prevent among them its steady enlargement or modification by the continued new creation of custom and convention. The relation of the president to legislation in our government is quite different now from that intended by the constitution, as is that of the Senate to foreign affairs and to the government in general. Other instances of enlargement or amendment without formal enactment could easily be cited. The embodiment of a principle in statute form never prevents its modification by the development of custom and precedent so long as a nation remains politically and institutionally alive. A written constitution is as truly in harmony with English history and its methods of advance as an unwritten one.

In America in conversation and in discussion in print, the question is often raised whether England will not before long become a republic in form, or why she does not do so. It has been reported that long ago, while he was still Prince of Wales, Edward VII predicted that he would be the last king of England. If he ever did make such a prediction, there has been since his acces-

sion no progress that can be detected towards its fulfillment. There is no body of opinion in England in favor of such a change, and it is difficult to point out any political advantage that would be gained by it. The peculiar and characteristic features of the English constitution are certainly as easily adaptable to a republic as to a monarchy, but such a change of external form would not make the actual government more popular or more democratic. On the other hand, as has been already said, there has been a great advantage, in the influence of the British constitution on the world derived from the retention of the monarchy, and it is not yet clear that this advantage may wisely be given up. This may be added that the house of Windsor since its accession has acknowledged so formally and so unreservedly that it has no title to the throne except the will of the nation that it will never be likely to offer any objection to the change to a republic, if it should be seriously proposed.

Perhaps the history, considered as constitutional history in the strict sense, should close with the Parliament Act of 1911, but a series of important reforms, parallel in time with the later steps towards democracy, has materially changed the conditions of private life and business in England, and they are important factors in the great change which has taken place in the atmosphere, spirit and significance of public life. England

has been transformed in a hundred years in every direction, and these reforms to be briefly named are at once signs of the changes taking place and essential portions of them. The simplification of judicial procedure and of the organization of the courts might properly perhaps be called constitutional. Out of the uninstructed and undirected development of the middle ages the system of criminal and civil justice descended to the nineteenth century full of anomalies and crudities, with an intricate complex of courts of overlapping jurisdiction and a cumbrous and dilatory procedure which favored numerous abuses and made litigation expensive and tedious. The practical results are familiar to us today through the novels of Charles Dickens. By a series of acts beginning in the first reform period of the century, the system has been greatly simplified and expense and delay greatly reduced. There are many differences which strike one between the organization and administration of justice in England and in the United States, but the points of similarity are equally striking in courts and procedure and in the fundamental law administered.

The progress of democracy in general government was accompanied step by step with the same progress in local government. The first reform act on this subject was passed within two years of the first Reform Bill, and since that date local and municipal government has

been made over in the interests of economy, efficiency, and popular control. About the same time reforms in the administration of poor relief began, and a little later in the care of public health, and later still an almost revolutionary system of public schools and popular education was organized. Along with these, other laws were passed regulating work in factories, improving other working conditions, and protecting the interest of labor in many ways, while by a series of acts the Irish church was disestablished and land and other abuses, of which the Irish had long justly complained, done away with. It would be absurd to maintain that no abuses of any kind or in any direction remain to be destroyed, or that the work of the reform age is finished. But if a condensed statement of the progress of the nineteenth century in these ways seems like an exaggeration, the impression would be incorrect. The advance has been beyond question rapid and significant, and the England of today is a different country from the England which emerged from the war with Napoleon a hundred years ago.

As this writing comes to an end in the midst of the great world war, all minds are occupied as much or more with the future as with the past. Of the great changes which seem foreshadowed by recent events, one directly concerns our subject—the federation of the British Empire. The British colonial empire was slowly formed,

mainly in the eighteenth and nineteenth centuries, and like the British constitution with no foreseen purpose and no definite adaptation of means to end. The process was for a long time drift and accident, and only by slow degrees and by hard experience did England learn how to govern her colonies. The lesson was not really learned until after the Canadian Rebellion of 1837, but it was in the end thoroughly learned.

From the middle of the last century an even more profound change has been taking place, a change in the meaning of empire from the idea of dominion and power and exploitation to the idea of national expansion, a change which may be characterized in a word by saying that the term "British empire" is dropping out of political discussion and the term "British Commonwealth of Nations" is taking its place. The great British colonies have become self-governing republics, democratic in character, and practically independent in everything that concerns their government and law. At least it is clearly recognized that there is nothing in which the power of coercion remains to the home government. In the meantime other bonds than legal ones have grown stronger and these have been tested and further strengthened by the war.

Soon after the middle of the nineteenth century these new ideas of empire and union began to find expression in the discussion of imperial federation, of plans for

a united government of the British commonwealth of nations. As yet these plans have led to no practical result but they have grown steadily in definiteness of purpose and detail, and the Boer War and the present war have given them great forward impulse. The proposal of a common constitution for so large a portion of the earth's surface makes a powerful appeal to the imagination. Possibilities to be attained and problems to be solved in constitution making for the British world seem vaster than ever dreamed of heretofore. When the obvious difficulties, however, of bringing together in one government dwellers in five continents are confronted with the tremendous progress in the annihilation of space and time since 1787, they do not seem relatively greater than those attacked and overcome in the formation of the American constitution. No actual constitution has yet been proposed in any official way nor any official suggestion made looking towards the making of one, but a history of the English constitution may well close with the anticipation of this still greater result to come in the not distant future for it is a normal outgrowth of the past and the next forward step naturally to be expected in the long development which has been sketched.

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Notes for Review:

1) Adams' peculiar approach to Eng. Cons. history

2) Adams a pure institutionalist, interested in "seed" rather than "soil"

3) The tendency of recent scholarship to emphasize feudal & Norman-French origin of Eng. institutions; e.g. McIlwain, Baldwin, Haskins, White

4) This the first popular treatment of the ~~Post~~ Eng. Cons. by Adams

5) Hist of Eng ~~Eng~~ pol. institutions is the history of [illegible] [illegible]

6) In writing like Adams', human nature is politely left out. Thus Adams' description of the crisis of 1215 or 1399 or 1688 is like that of a man who should write the history of the struggle bet. Pope and the other Sovereigns of Europe in terms of the conflict of Papal domination v. national sovereignty.