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Under the Direction of the

Departments of History, Political Economy, and Political Science

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THE SELF-RECONSTRUCTION OF MARYLAND, 1864-1867

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CONTENTS.

PREFACE.

In the year 1901 I published in the JOHNS HOPKINS STUDIES (Series XIX) a monograph upon the subject of the Maryland constitution of 1864. The present study is a continuation of the earlier work in point of time, and I have endeavored to show the method by which Maryland entered upon a process of self-reconstruction during the years 1864 to 1867, and the relation of this movement to national politics.

It is with pleasure that I acknowledge my great indebtedness to Professors John Martin Vincent and Charles M. Andrews, and to Dr. Bernard C. Steiner, of the Johns Hopkins University, to my relatives Mr. Isaac T. Norris, Mr. J. Olney Norris, and Mr. W. Starr Gephart, of Baltimore, and to numerous surviving leaders of the period, for their unfailing counsel, and for aid in opening up new and valuable sources of information. I have also availed myself of the kind help of Mr. George W. McCreary, Librarian of the Maryland Historical Society, on numerous occasions.

W. S. M.

PRINCETON, N. J.

THE SELF-RECONSTRUCTION OF MARYLAND, 1864–1867.

CHAPTER I.

The Union Party in Control.

The late autumn of the year 1864 found the Union men strongly intrenched in power in Maryland. Aided by the sympathy of the national government—both active and passive—they had during the preceding six months elected a state convention, formed a new constitution which abolished slavery and made many radical changes in the government, and accomplished its adoption at the polls.

A narrow majority of 375 out of a total of 59,973 votes cast had been secured for the constitution only by the somewhat doubtful expedient of permitting Maryland soldiers in the field to vote on the question, their overwhelming approval altering the adverse result in the State at large.[1] But the Union party leaders felt no uneasiness as far as the future was concerned, for the constitution of 1864 was designed, rightly or wrongly, not only to free the slaves but to secure a permanent hold of the party in power.

This element was known as the "Union" party during the war, and was composed of the more loyal and active citizens of the State, who not only desired that Maryland should "stand by the Union," but believed that the South should be conquered and that President Lincoln and the national administration should be given hearty and unswerving support. The party included men who had been of various political affiliations in times past, and it held

[1] See the writer's monograph on "The Maryland Constitution of 1864" (Johns Hopkins Studies, Series XIX, Nos. 8–9) for a detailed account of the political conditions in the State during the years 1863–4.

together fairly well in spite of radical differences of opinion on many topics of state and national policy. The Republican party did not exist under that name till at least a year after the close of the war, and the process of its formation will be shown in the events about to be narrated. The Democratic party in the State, defeated and discredited, still kept up all the active opposition of which it was capable. It condemned the policies of Lincoln and his administration, and more or less acknowledged the right of the Southern States to secede, though all the while protesting its loyalty to the Union, and its hope that Maryland would remain in the old federation.

The new constitution is worthy of careful attention. The Union party based their hopes on those provisions which were designed to exclude from the franchise all Southern sympathizers and other disloyal persons, and furthermore they intended so to carry out its mandate for a registration of the voters of the State[2] that their opponents would be further rendered powerless at the polls.

Article I, Section 4, provided that

"no person who has at any time been in armed hostility to the United States, or the lawful authorities thereof, or who has been in any manner in the service of the so-called 'Confederate States of America,' and no person who has voluntarily left this State and gone within the military lines of the so-called 'Confederate States or armies' with the purpose of adhering to said States or armies, and no person who has given any aid, comfort, countenance or support to those engaged in armed hostility to the United States, or in any manner adhered to the enemies of the United States, either by contributing to the enemies of the United States, or unlawfully sending within the lines of such enemies money or goods, or letters, or information, or who has disloyally held communication with the enemies of the United States, or who has advised any person to enter the service of the said enemies, or aided any person so to enter, or who has by any open deed or word declared his adhesion to the cause of the enemies of the United States, or his desire for the triumph of said enemies over the arms of the United States, shall ever be entitled to vote at any election to be held in this State, or to hold any office of honor, profit or trust under the laws of this

[2] Art. I, Sec. 2.

State, unless since such unlawful acts he shall have voluntarily entered into the military service of the United States, and been honorably discharged therefrom, or shall be on the day of election, actually and voluntarily in such service, or unless he shall be restored to his full rights of citizenship by an act of the General Assembly passed by a vote of two-thirds of all the members elected to each house."

Again, every voter was required to take the following so-called "iron-clad" oath (same section):—

"I do swear or affirm that I am a citizen of the United States, that I have never given any aid, countenance or support to those in armed hostility to the United States, that I have never expressed a desire for the triumph of said enemies over the arms of the United States, and that I will bear true faith and allegiance to the United States and support the Constitution and laws thereof as the supreme law of the land, any law or ordinance of any State to the contrary notwithstanding; that I will in all respects demean myself as a loyal citizen of the United States, and I make this oath or affirmation without any reservation or evasion, and believe it to be binding on me."

Furthermore, the same article provided that

"any person declining to take such oath shall not be allowed to vote, but the taking of such oath shall not be deemed conclusive evidence of the right of such person to vote; and any person swearing or affirming falsely shall be liable to penalties of perjury, and it shall be the duty of the proper officers of registration to allow no person to be registered until he shall have taken the oath or affirmation above set out, and it shall be the duty of the Judges of Election in all their returns of the first election held under this Constitution to state in their said returns that every person who has voted has taken such oath or affirmation."

A special oath of allegiance was required[3] of every person holding office under the constitution or laws of the State, which included this additional test:—

"That I have never directly or indirectly, by word, act or deed, given any aid, comfort or encouragement to those in rebellion against the United States, or the lawful authorities thereof; but that I have been truly and loyally on the side of the United States against those in armed rebellion against the United States; and I do further swear or affirm that I will to the best of my abilities protect and defend the Union of the United States; and not allow the same

[3] Art. I, Sec. 7.

to be broken up and dissolved, or the Government thereof to be destroyed, under any circumstances, if in my power to prevent it; and that I will at all times discountenance and oppose all political combinations having for their object such dissolution or destruction."

The constitution directed,[4] in addition, that the legislature should pass laws requiring the voter's oath to be taken by "the president, directors, trustees, or agents of corporations created or authorized by the laws of this State, teachers or superintendents of the public schools, colleges, or other institutions of learning; attorneys-at-law, jurors, and such other persons as the General Assembly shall from time to time prescribe." Moreover, a very dangerous power was placed in the hands of the judges of election, who alone were permitted to decide as to what was "conclusive evidence" of the right of a person to vote. The sinister effects of this provision soon made themselves felt, and as we shall see, almost led to bloodshed in the exciting days that followed.

The aspect of military affairs in the South at this time could only add to the confidence of the Union men of Maryland. It was during the autumn of 1864 that Grant, after the awful slaughter of the Wilderness and Cold Harbor, was at last tightening his grip on Lee at Richmond and Petersburg. Sherman, by his masterful campaign from Resaca to Atlanta, overcame the brilliant strategy of Johnston and the reckless bravery of Hood, and entered upon his "March to the Sea." Sheridan defeated Early and drove him out of the Shenandoah Valley, and finally, to crown all, Thomas annihilated Hood's army at Nashville. Surely the Confederacy was in its death-throes and the Union would be saved. This was no time to look for weak-kneed sympathy with rebellion.

An election for national and state officials was to take place on November 8, 1864. Governor Augustus W. Bradford on November 3 issued a proclamation or open letter addressed to the "Judges of Election," giving it as his opinion that this would be the first election under the new con-

[4] Art. III, Sec. 47.

stitution,[5] and saying that it was obligatory upon the judges to observe the requirements and administer the test oath to all applying to vote.[6]

A large number of these officials who were to conduct the election in Baltimore City, said to have been about one third of the total for that district, held a meeting in the criminal court room on November 3, and unanimously decided to administer the oath to all voters. This oath was not to be taken as conclusive evidence of loyalty, but in addition citizens were to be sworn to give true answers to such other questions as should be propounded to them, in order to satisfy the judges of their right to the ballot.[7] A second and more largely attended meeting of the judges was held in the same place on November 7 to consider the question which had arisen and caused some controversy, as to whether they had the right to commit for perjury, and if so, whether or not they should proceed to use it. After some debate, it was decided to leave this question to individual discretion, but to keep a list of the rejected votes for future action.[8] This matter seems in the end to have made little trouble at the election, which was very quiet, many persons of doubtful patriotic status refraining from an attempt to vote. There were few arrests by order of the judges.[9]

Great interest in this election was aroused by the fact that not only was a full state ticket to be voted upon, but electors for president and vice-president also were to be chosen. The Union party ratified the national Republican nominations of Abraham Lincoln and Andrew Johnson, and held its state convention on October 18, 1864, in Temperance Temple, Baltimore. A very patriotic platform was adopted, declaring the determination to "stand by the Administration until this wicked rebellion has been crushed

[5] By executive proclamation of Oct. 29, it went into effect on Nov. 1, 1864.

[6] Baltimore American, Nov. 4, 1864; Sun, Nov. 5 and 8, 1864.

[7] American, Nov. 4; Sun, Nov. 5, 1864.

[8] American, Nov. 8; Sun, Nov. 8, 1864. See also Sun for Nov. 5 and 7 for various arguments on the subject. These two Baltimore papers were the "organs" of their respective political parties.

[9] Sun, Nov. 9, 1864.

out, and every Rebel made to bow in submission to the Constitution and the laws of the land, and every foot of territory brought under the dominion of the Federal Government." Candidates were nominated for all the state offices,[10] headed by Thomas Swann of Baltimore City for governor, and Dr. Christopher C. Cox of Talbot County for lieutenant-governor. The Democratic party made its nominations through its state central committee, which met in Baltimore on October 27, and arranged a ticket including Judge Ezekiel F. Chambers of Kent County for governor, and Oden Bowie of Prince George's County for lieutenant-governor.[11]

The result of the election was, as had been expected, a victory for the Union party, the vote being as follows: for governor, Swann, 40,579, Chambers, 32,068; Swann's majority, 8511. For lieutenant-governor, Cox, 41,828, Bowie, 32,178. Lincoln carried the State by 7432 majority, and for Congress, Edwin H. Webster, of Harford County, Charles E. Phelps of Baltimore City, and Francis Thomas of Allegany County were successful in the second, third and fourth districts respectively. The Democrats, however, carried two districts, electing Hiram McCullough of Cecil County in the first,[12] and Benjamin G. Harris of St. Mary's County in the fifth.[13]

In the General Assembly of the State, the Union party secured a large majority in the House of Delegates,[14] but the results of the election showed that the membership of the Senate would stand—Democrats, 13, Union party, 11. Fortunately for the latter, W. M. Holland, Democratic senator-elect from Dorchester County, resigned on November 15, saying that circumstances of a domestic character, beyond his control, made it extremely inconvenient for him

[10] American, Oct. 19; Sun, Oct. 19 and 20, 1864.
[11] Sun and American, Oct. 28, 1864.
[12] "Eastern Shore" of Maryland.
[13] This district, largely in the southern part of the State, was called by the American the "political Egypt of Maryland." For official returns of the election see American, Nov. 29, 1864, and January 11, 1865; Sun, Nov. 29, 1864; Scharf, History of Maryland, III, 642–643.
[14] Union 54, Democratic 26.

to serve.[15] A special election was held on December 23, to fill the vacancy, and Thomas K. Carroll, the Union candidate, was elected by a good majority.[16] This made a tie on a party vote, but the deciding vote would be cast by Lieutenant-Governor Cox. In spite of test oaths, partizan judges of election, and the supporting influence of the national government, the Democratic party in Maryland had made a fairly good showing, and there was a possibility of the Union control being shaken, or even broken, at any time. This was evidently realized, and efforts were at once made by the leaders of the latter party to guard against any such contingency. An editorial in the Baltimore American on the preceding October 19 had said:—

"It is of the utmost importance that the control of the affairs of Maryland should be in the hands of capable, honorable, and loyal men, who will administer them, not only to the direct benefit of the State itself, but with regard to the maintenance and prosperity of the entire Union. The fortunes of Maryland and of the Union are indissolubly linked together, and to fill the State offices with men who have the integrity of the whole Union at heart is the true way to advance the interests of the State itself."

This statement voices the opinion of the more sober and responsible leaders in the Union cause, and gives a very fair idea of the principles upon which they based their actions during the political struggles of the following two years.

The General Assembly met at Annapolis on January 4, 1865. In his message[17] Governor Bradford recommended for passage various measures designed to carry out certain provisions of the new constitution, and in addition he desired that action be taken looking toward the procuring of compensation from the national government for slaves emancipated under the state constitution, in accordance with President Lincoln's message of March 6, 1862. Also, he argued sensibly that "some other time and tribunal than the day and Judges of Election" be provided, to determine

[15] American and Sun, Nov. 18, 1864.
[16] Sun, Dec. 12 and 29, 1864; American, Jan. 6, 1865.
[17] Documents of House of Delegates, 1865, Doc. A.

who may vote under the new laws and regulations. The neglect on the part of the legislature of this common-sense matter of justice and order was another cause of the turmoil and trouble of the succeeding years.

According to Article II, Sections 1 and 2, of the new constitution, the term of office of Governor Swann and Lieutenant-Governor Cox was to commence on January 11, 1865, but the new executive was not to enter upon the discharge of his duties until the expiration of the term for which Governor Bradford had been elected. The latter had been inaugurated on January 8, 1862, hence he held office till January 10, 1866, and continued the able administration he had given the State during the preceding years of trial and perplexity.

The inauguration of the new executive and his subordinate took place in the senate chamber at Annapolis on the appointed day. Governor Swann's inaugural address[18] called upon the legislature to "forget the dissensions and heart-burnings of the past, and come together once more, in a spirit of conciliation and harmony, to give our best energies, as one party, to the work of reconstruction and reorganization upon which we are entering with such prospects of admitted and assured success." He favored foreign colonization of negroes, recommended an attempt to procure national compensation for the slaves, and significantly closed as follows:—

"It is not a very agreeable reflection to the State of Maryland, in looking back upon the past, that many of her citizens have entertained, and not infrequently expressed sympathies with the objects of this rebellion. Such evidences of disaffection at the South have been summarily dealt with heretofore, by the offer of the alternative of the oath of allegiance to the so-called 'Confederate States,' or prompt expulsion beyond their lines. The recognition of such a rule here would doubtless have been received as in the highest degree tyrannical and oppressive. It is hardly reasonable to expect, however, that this Government will permit itself to be sacrificed by those upon whom it has a right to rely, and who have made their election to share the protection of its laws. In standing by the Union,

[18] House Docs., Doc. C.

Maryland will know how to discriminate between its friends and enemies, and the time has passed when those who really desire its dissolution will be permitted to make a virtue of their disloyalty, or to claim participation in the political power of the State. Differences of opinion upon National and State politics may exist without treason; but the paramount obligation of loyalty cannot be compromised, and the citizen who turns away from his duty of allegiance to his Government—no matter upon what pretext—forfeits the privileges which it confers, and the protection which attaches to the rights of citizenship."

Lieutenant-Governor Cox immediately entered upon his duties as president of the Senate, the office of lieutenant-governor having been created by the constitution of 1864. The Senate on February 14, by a vote of 11 yeas to 10 nays, unseated, on the ground of disloyalty, Littleton Maclin, Democratic senator from Howard County, and his Republican opponent, Hart B. Holton, was declared elected.[19] Samuel A. Graham of Somerset County contested upon the same grounds the seat of Levin L. Waters, the Democratic senator from that county, but the matter was deferred to the next session of the legislature in order that further testimony in the case might be taken, and was finally dropped,[20] perhaps in consideration of the fact that a Union party majority in the Senate was now secured.

Turning our attention to the work of the legislative session, we find that on February 1 Governor Bradford submitted to both houses the thirteenth amendment to the Constitution of the United States. It was advanced to its third reading on the same day by the House of Delegates, passing its second reading by a vote of 53 yeas to 24 nays. The Senate referred it to a committee and on February 3 finally passed it by a strict party vote of 11 affirmative from the Union party, 10 negative from the Democrats. The House immediately passed it on its final vote, by acclamation.[21]

[19] Senate Jour., 1865, 115–117. For testimony, etc., see Senate Docs., 1865, Docs. E, G and H.

[20] Senate Jour., 342; Docs. F, I and L.

[21] House Jour., 1865, 120–122, 145; Senate Jour., 69–70; American, Feb. 2 and 4, 1865.

Some little strife was stirred up over the question of the election of a United States senator to fill out the unexpired term of the late Thomas H. Hicks, but John A. J. Creswell of the Eastern Shore was finally chosen by a large majority on March 9, his leading opponent, Lieutenant-Governor Cox, having withdrawn from the contest.[22]

Two most important bills were passed by the Assembly at this session. One was the act dealing with the status of the colored population of the State, and was voted by large majorities on March 24.[23] "All the disabilities which had necessarily attached to the negro as a consequence of the institution of slavery were removed, with two exceptions, one disqualifying negroes from being witnesses in cases where white men were concerned, and the other authorizing negroes to be sold for crime for the same period that a white man might be confined in the penitentiary for the same offence."[24]

The other bill[25] was to provide for the registration of the voters of the State according to the requirements of the new constitution. It was reported in the House of Delegates, on March 8, 1865, and after a hard struggle against it on the part of the opposition it was passed on March 22, by the vote of 51 yeas to 23 nays. The Senate,[26] after more vain opposition on the part of the Democrats, passed it finally on March 24, by a vote of 13 to 6.[27] This act, famous in the history of the State, which formed a center for most of the political strife of the period, provided that the governor was to appoint three citizens "most known for loyalty, firmness and uprightness" as registers in each ward or election district, also three men to register the soldiers and sailors of the State, who were to visit the several regiments, camps and hospitals, and have the results placed upon the books of the various districts. "From

[22] House Jour., 386–387; Senate Jour., 209; American, March 3, 7, 8, 9, 10, 1865.
[23] Senate Jour., 385–386; House Jour., 752–753.
[24] Quoted from Sun of Jan. 11, 1867.
[25] Statutes of 1865, Ch. CLXXIV.
[26] Senate Jour., 357–369.
[27] House Jour., 1865, 375, 585–600, 627, 736.

these lists, entry on which was indispensable in order to exercise suffrage, they were to exclude all disloyal persons, and might even refuse to permit them to register, after taking the oath of allegiance."[28]

To these officers of registration was further given[29] power

"to compel the attendance of witnesses for the purpose of ascertaining the qualifications or disqualifications of persons registered; they shall have power to issue summons, attachments and commitments of any Sheriff or Constable, who shall serve such process, as if issued by a Judge of the Circuit Court, or a Justice of the Peace, and shall receive the same fees and in the same manner as allowed by law in State cases."

The intent of the act was well summed up in an editorial of the Baltimore Sun of July 11, 1865, as follows:—

"It will be seen that the question of the right of suffrage under the Constitution and the law, is left entirely to the discretion and judgment of the various officers of registration, who are to be appointed by the Governor, in the city and counties, from which judgment there is no appeal—and the disqualification is perpetual unless the person is restored to civil rights through military service or a vote of two-thirds of all the members elected to each House of the General Assembly."

The following clause included in the bill as originally reported to the House of Delegates was stricken out by a majority of only one vote in that body:[30]—

"Section 19, *Be it enacted.* That the officers of registration for the purpose of ascertaining more fully whether any person is disqualified under the fourth section of Article first [of] the Constitution, shall, if such person's right is challenged, or they have not personal knowledge, propound the following among other questions: Have you ever given aid to the rebellion by advice, by giving or sending information? have you ever given or sent money, clothing, provisions, medicine or any munitions of war to persons engaged in the rebellion? have you ever given shelter or protection to persons engaged in the rebellion? have you ever advised or encouraged any person to enter the rebel service? have you ever assisted any one

[28] Steiner, Citizenship and Suffrage in Maryland, 47–48.
[29] Sec. 13.
[30] "To strike out," yeas 35, nays 34, Jour. House of Delegates, 1865, 609. Docs. House of Delegates, Doc. W. Also see Sun, July 11, 1865; Scharf, History of Maryland, III, 668–669.

to enter such service by furnishing them with money, provisions, advice, letters or information? have you ever in conversation or by writing, justified those engaged in entering into the rebellion? have you ever expressed a wish or desire for the success of the rebel arms or for the defeat of the Union arms? have you ever rejoiced over any of the successes of the rebel arms or defeat of the Union arms? have you ever desired or wished that the rebel forces might defeat the Union forces?"

It would be difficult to imagine a more stringent or dangerous measure, one more hostile to the idea of a constitutional and orderly democratic government, or one more open to abuse.

After spasmodic attempts to pass a measure requiring the oath of allegiance of all officers of corporations,[31] and another calculated to secure compensation for emancipated slaves from the United States government,[32] but from which nothing ever came, the legislature finally adjourned on March 27, 1865.

It is now necessary, in order to make our narrative complete, to retrace our steps a little in point of time. During this period the important question of the negro population was agitating the people of Maryland. All slaves had become free on November 1, 1864, when the constitution went into effect, and there were now nearly 90,000 "freedmen" to be dealt with, besides a nearly equal number of negroes who had been free when abolition was accomplished.[33] When we think of this herd of human beings, little more than half civilized, poor, ignorant, and helpless, suddenly raised in legal status from a position of servitude to the proud estate of man, with all the attendant duties and obligations, we must realize that they still remained completely under the power of the white population. A few wished to treat them as being what they were in fact, children in intelligence with an almost unlimited potentiality of physical power, but the larger number naturally looked upon them with the contempt of former masters. Sometimes, at

[31] Senate Jour., 247; House Jour., 39.
[32] House Jour., 190–191, 336–337.
[33] See my Maryland Constitution of 1864, 10, for statistics.

the other extreme, there was foolish talk about immediate social and political equality.

When the October election showed the adoption of the constitution, the major part of the people of Maryland loyally acquiesced in the result, but many of the more tenacious slaveholders speedily took advantage of an old provision in the "Black Code" of state laws that negro slave children could be bound out for terms of apprenticeship without the consent of their parents. With the more or less open connivance of many of the court officials they had the slave children whom they owned apprenticed to them for the term of their legal minority, and usually with absolute disregard of the wishes of the parents, who were so soon to come into their natural rights. This was in many cases done before the first of November, when constitutional abolition took effect, and before the parents had any legal right to object. Even after this date the same practice was continued, negro children being in many instances forcibly taken from their homes, and all their newly given rights ignored.

Realizing the danger that a species of slavery or peonage would thus be perpetuated in spite of the emancipation movement, and being besieged by the negroes and their white sympathizers with complaints of illegal treatment, Major-General Lew Wallace, commander of the Middle Department of the United States Army with headquarters in Baltimore, decided to take matters into his own hands until the Union party could cause the proper measures of protection to be taken at the ensuing session of the General Assembly. On November 9, 1864, he issued "General Orders, No. 112," which created a "Freedmen's Bureau" for the department, with Major William M. Este, A. D. C., in charge.[34] The "Maryland Club House," on the northeast corner of Cathedral and Franklin Streets, Baltimore, was ordered to be used as headquarters of the bureau and as a

[34] For a more complete account of this matter, and unimpeachable testimony that the above-mentioned abuses took place, see Gen. Wallace's report to the legislature of 1865, in Senate Docs. J. See also Scharf, History of Maryland, III, 598–599, for a somewhat different account; also daily papers of the period.

negro hospital, under the name "Freedman's Rest."[35] The reasons for this action were stated in the following preamble to the order:—

"Official information having been furnished, making it clear that evil disposed parties in certain counties of the State of Maryland, within the limits of the Middle Department, intend obstructing the operation, and nullifying, as far as they can, the emancipation provision of the New Constitution; and that for this purpose they are availing themselves of certain laws, portions of the ancient slave code of Maryland, as yet unrepealed, to initiate as respects the persons heretofore slaves, a system of forced apprenticeship; for this, and for other reasons, among them that if they have any legal rights under existing laws, the persons spoken of are in ignorance of them; that in certain counties the law officers are so unfriendly to the newly-made freedmen, and so hostile to the benignant measure that made them such, as to render appeals to the courts worse than folly, even if the victims had the money with which to hire lawyers; and that the necessities of the case make it essential, in order to carry out truly and effectively the grand purpose of the people of the State of Maryland, . . . [therefore] there should be remedies extraordinary for all their [i. e., the freedmen's] grievances,—remedies instantaneous without money or reward,—and somebody to have care for them, to protect them, to show them the way to the freedom of which they have yet but vague and undefined ideas."

The order provided further that all freedmen were to be considered under special military protection until the legislature should by its enactments make such protection unnecessary, that provost-marshals in their several districts, "particularly those on the Eastern and Western Shores," should "hear all complaints made to them by persons within the meaning of this order" and "collect and forward information and proofs of wrongs done to such persons, and generally . . . render Major Este such assistance as he may require in the performance of his duty." Finally,

"lest the moneys derived from donations, and from fines collected, prove insufficient to support the institution in a manner corresponding to its importance, Major Este will proceed to make a list of all

[35] The Maryland Club was considered to be an organization peculiarly obnoxious to loyal people, on account of the known Southern sympathies of many of its members. This part of the order, however, was revoked.

the avowed rebel sympathizers resident in the city of Baltimore, with a view to levying such contributions upon them in aid of the 'Freedman's Rest' as may be from time to time required."

Early in January, General Wallace abolished the Freedmen's Bureau in Maryland and made his report to the General Assembly. A reading of this report and the documents submitted therewith should fill every fair-minded person of today with a deep sympathy for the negroes in their helpless condition at this time. The details there disclosed of all the suffering, sorrow, and injustice which they endured render one heart sick, even though an allowance be made for the exaggerations of heated partizanship and an excited state of public feeling.

As we have seen,[36] the legislature, in response to the report, passed a bill removing practically all the disabilities from the negro population which had been laid upon them under the slave code, and affairs gradually settled themselves according to the new economic and social conditions which are still in existence today. This readjustment did not come all at once, but only after much injustice and many wrongs had been committed by both whites and blacks.[37] Richmond fell before Grant's victorious army on April 3, 1865, and by the end of the month both Lee and Johnston had surrendered. This was the practical ending of the military operations of the Civil War. About 20,000 men from Maryland had taken service in the armies of the Confederacy,[38] and the survivors were soon paroled and began to return home in large numbers. The Union men were much elated and joined in a hearty celebration of the national triumph of their cause, but as the ex-

[36] Page 18.

[37] At as late a date as Nov. 1, 1866, Gen. O. O. Howard, chief of the national "Freedmen's Bureau," stated in his report to the secretary of war that "frequent complaints are received of outrages and atrocities without parallel committed against freedmen" in portions of Maryland. Reports of Sec. of War, 2nd Sess., 39th Cong., 750.

[38] Scharf, Chronicles of Baltimore, 649; U. S. Docs., House Misc., 1st Sess., 40th Cong., Doc. 27. McPherson (Political History of the Rebellion, 399) says, "The estimate of Maryland must be excessive."

Confederates began to show themselves about the streets and to frequent their old haunts and a large immigration from the South, particularly from Virginia, began to set in, this feeling gave way to alarm, too often accompanied by signs of prejudice and vindictiveness. The party in power at once began to foresee and to fear what finally took place—an active coalition between the Democrats and the Southern sympathizers and the eventual overthrow of the Union party in the State. The registration act had been passed just in time, and when signs of opposition to it began to appear its advocates decided to fight to the last ditch to keep it on the statute-books and in active operation.

The assassination of President Lincoln on April 14, 1865, threw the Union people for a time into a panic, and naturally increased hostility toward the ex-Confederates, whom they imagined to be undertaking a new method of warfare, by means of murder and secret criminal intrigue. General W. W. Morris, for a short time in command of the Middle Department, issued orders on April 15, placing Baltimore under stringent martial law, and including a provision that

> "paroled prisoners of war (Rebels), arriving in this department are hereby ordered to report at once to the nearest provost-marshal, in order that their names may be registered, their papers examined, and such passes furnished them as may be necessary for their protection. Such prisoners of war will not be permitted to wear the uniform of the army and navy of the so-called Confederate States, but must abandon their uniforms within twelve hours after reporting to the provost-marshal, and adopt civilian dress."[39]

General Wallace, who resumed command a few days later, extended these repressive measures, and was actively assisted by the officers of the United States Army stationed in various parts of the State. After the death of J. Wilkes Booth and the capture of the other conspirators, the military bonds were gradually relaxed, the national government wisely leaving the settlement of the various difficulties in Maryland to the people of the State.

As a good illustration of the temper of this particular

[39] Scharf, History of Maryland, III, 650–651.

time, the following is quoted from an editorial in the Baltimore American for May 6, which was entitled "The Brand of Cain." After stating that "Jeff" Davis "stands convicted as a common felon" and charging him with all manner of crimes, it proceeds:—

"He has sanctioned and commissioned agents of piracy, arson, and butchery. He has sent secret employees to throw passenger trains from railway tracks, incendiaries to burn Northern cities, pirates to destroy commerce, to fire merchant vessels, and to slaughter their crews. He has stolen the money belonging to others, and deposited it abroad to his own credit. He has plotted offences against society which have no parallels in brutality and outlawry in the annals of civilization. And now he is branded as one of the infernal cabal whose intrigues, carried on for more than eight months, have resulted in the murder of Abraham Lincoln."

This same journal described the ex-Confederate soldiers in Maryland as "defiant and pompous,"[40] and stated that they strutted around like conquerors. All sorts of accusations were made by this paper against Southerners, even charging them with an attempt to introduce yellow fever infection from Bermuda into the northern cities.[41] On May 9 a leading editorial said:—

"To the more conspicuous leaders of the Rebellion, civil and military, should be awarded the extreme penalty of the law. Nothing short of expiation on the gallows would satisfy the simplest demands of justice. As to the masses of the people who have been so terribly duped by these miscreants, we think there can be but one feeling, that they have already been subjected to such untold losses and sufferings and humiliations that they are fairly entitled to executive clemency."

On April 24, 1865, the first branch of the City Council of Baltimore passed resolutions requesting General Wallace to close certain "disloyal churches," and thus to "save our city from this degradation and shame by removing these cesspools, the miasma arising from which taints the moral atmosphere with treason."[42] Further resolutions passed the

[40] May 1, 1865.
[41] May 8, 1865.
[42] Journal, 1st Branch, 1864–5, 470. Also Scharf, History of Maryland, III, 651–654.

same day by a unanimous vote protested against allowing "Rebels" to return to the city.[43]

On April 25 a meeting of citizens of Cumberland, Md., was held in the market-house, and presided over by the mayor, Dr. C. H. Ohr. It was then resolved that "those persons who voluntarily left their homes in this county [Allegany] and have taken up arms against the Federal Government, or otherwise aided the rebellion, shall not be permitted to return again amongst us." It was threatened that such as returned would be "summarily dealt with," and a vigilance committee of twenty-five members was appointed, with power to add to this number.[44]

In general, the Union people were not so bitter against Confederates from other States as against those from Maryland. Perhaps the fact that the latter might become voters under a new regime added to the feelings of hostility. Finally, their contention was that "rebels should acknowledge they were wrong, if they want to be forgiven."[45]

Very different was the attitude of the Baltimore Sun, the leading Democratic newspaper in the State, and with good reason, for it had escaped suppression during the four years of war only by a discreet handling of the news, and by refraining from editorials for the most part, except on such truly non-partizan occasions as Christmas and New Year's Day. The Sun now began to pluck up courage as the use of the military power lessened, and on May 23 it stated that

> "such of our citizens and youth as had strayed away and made common cause with the South in rebellion, are now returning, and realizing the advantages of the terms of surrender, [are] generally willingly renewing their allegiance. No where now are Southern men more generously met than in Baltimore."

Later on, it heartily entered into the movement to raise money to aid Southern sufferers from the war, particularly those in the Shenandoah Valley.

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[43] Jour., 468–469, 485. Also see Jour., 2d Branch, 1865, 270, 276, 288, 305–308, 325–326.
[44] American, May 1, 1865.
[45] American, May 13, 1865.

As time went on, and the feelings caused by the first flush of victory passed away, milder counsels began to prevail among the Union people. The City Council of Baltimore took care to state that their "anti-Rebel" resolutions, lately adopted, did not refer to Southern merchants coming to the city for purposes of trade, but "only to the return of those who formerly had a residence among us, but who went South to aid in the overthrow of the government. It was thought best they be not permitted to return amongst us until they came as prodigals, seeking, not claiming a home, confessing their errors and asking to be received as repentant sons."[46] Also the American stated on June 20, 1865, that it was anxious to let the Southern sympathizers alone, that it would do so if they kept "their proper positions" and showed "some indications of humanity and contrition," and also disavowed any feelings of bigotry or vindictiveness. Most unfortunately, many of the leaders in the Union party, as we shall see, found it to be to their personal advantage to keep alive the controversies and hatreds of the past, for by this means they hoped to overcome all opposition both within and without the party. This caused the crisis in political affairs which came in the year 1866.

[46] Jour., 1st Branch, 1864–5, 584–586; Jour. and Proc., 2d Branch, 322, 338; American, May 30, 1865.

CHAPTER II.

National and State Politics in 1865.

The condition of national politics at this time had strong influence on the situation in Maryland. Andrew Johnson succeeded to the office of president in April, and decided to carry out a conciliatory method of executive reconstruction of the conquered Southern States, according to the plans of his predecessor in office. The mere fact that he was following in Lincoln's footsteps was for the moment enough to satisfy the Union party in Maryland, and the Democrats, not forgetting that Johnson had been of their political faith before the Civil War, were, most naturally, filled with delight when he assumed a conciliatory attitude toward the erring Southern brethren. They were perforce compelled to incline toward him politically. Both parties in a measure "rested upon their oars" in the State, at the same time zealously keeping watch over the President and over the political conditions in Maryland.

Johnson seems early to have realized that he would meet strong opposition in Congress from the radical element of what was nominally his own party, led by men like Thaddeus Stevens and Charles Sumner, and he evidently desired to gain enough recruits from his former Democratic friends to fill up the gaps in the ranks of his own following in the Republican party, in case the extremists should "bolt" from his leadership.[1]

Mr. A. Leo Knott, of Baltimore, published a few years ago an important article[2] on political conditions in Maryland at this period, which deserves special notice on account of the significant information given in regard to the relations between President Johnson and the Democratic lead-

[1] See Dunning's Reconstruction, Political and Economic, 43–44.
[2] In Nelson's Baltimore, published 1898.

ers in Maryland. Mr. Knott was then, as he has been during the forty years since that time, a man prominent in the councils of the Democratic party, and is in a position to know whereof he writes. He states that Francis Blair, Sr., and his son Montgomery Blair were "anxious that representatives from Democratic organizations should call on President Johnson to assure him of their sympathy and support in the struggle which they saw was imminent and inevitable between him and the Republican Congress on the grave question of the reconstruction of the Southern States." So, upon their suggestion and at their instance, a committee representing the Democratic state central committee of Maryland waited upon the President at Washington on July 19, 1865. This committee was composed of Colonel William P. Maulsby, of Frederick, Colonel William Kimmel, of Baltimore, and Mr. Knott himself. It laid before Johnson a memorandum setting forth the political conditions in Maryland, and stated that under the registry law two thirds of the voters of the State were disfranchised, this number constituting the larger part of the Democratic party; also, that the President's "friends[3] in the Republican party in Maryland must realize the utter helplessness of their cause without the aid of the Democratic vote, which could not be given without a change in the Constitution, or a repeal or an essential modification of the existing registration laws."

Mr. Knott continues:—

"Mr. Johnson listened with attention, and at the close assured the committee of the interest he felt in the political situation in Maryland, and his sympathy with the aims and purposes of the committee; that without committing himself to any definite proposition, he felt that where there was a community of views, a common ground of action could no doubt be reached. For himself, he added, that having been a Democrat on principle and conviction, and having acted with the Republican party only so long as the country was at war, and the Union in danger, now that the war was over and its

[3] *i. e.*, the Conservative or Johnson wing of the Union party, which during the following year deserted the Radicals and helped to form the "Democratic-Conservative" party.

purpose accomplished, he was in favor of a policy of conciliation. . . . Several interviews subsequently took place between President Johnson and the members of this sub-committee. And it is but just to add that the Democratic party of Maryland owe to the memory of that statesman a debt of gratitude for the valuable aid he gave to it, at more than one important crisis in the long and arduous struggle it maintained for the rights of the people against a desperate and an intolerant faction of the Republican party, which did not number at any time during its usurpation of power, as the election subsequently showed, more than one third of the voters of the State."[4]

The state election in the autumn of 1865 was not of great importance, only local officers being voted upon, except in Baltimore City, where several members of the legislature were to be chosen, and in the second congressional district, where a successor was to be elected to fill the place of Edwin H. Webster, who had been appointed collector of the port of Baltimore.

The first vague whisperings of a new question could now be heard, a question which, along with the registry law, was to cause the shipwreck of the Union party. This was negro suffrage. It is a fact that by the constitution of 1776 the suffrage had been given to all freemen of age in Maryland who held a certain amount of property, and some free negroes voted in the few years following. An amendment to the state constitution, adopted in 1810, limited the right of suffrage to the white citizens,[5] and under the influence of the "Black Code" and the events of the war the people of both parties by 1865 had come to look with great aversion upon negro participation in politics. Consequently, when negro suffrage was adopted as a party measure by the national Republican leaders, many of the most conservative Union men in Maryland went over to the Democratic party.

According to the terms of the registry law as passed by the legislature,[6] three registers were to be appointed in each

[4] For the complete account of the above see Nelson's Baltimore, 553–555.

[5] Brackett, The Negro in Maryland, 186–187.

[6] See pp. 18–20. This was the first registry law ever passed by the State of Maryland, see Steiner, Citizenship and Suffrage in Maryland, 47.

election district of the State. Governor Bradford seems to have had difficulty in performing his part of the duty, as many of his appointees resigned, and an effort had to be made to induce others to sink private differences and act for the public good.[7] However, this being accomplished, the question arose as to what means should be taken in order to determine the right to vote of people of doubtful loyalty, who had nevertheless taken the prescribed "iron-clad" oath of allegiance.

For the purpose of comparing their views as to the true interpretation of the law, and of adopting a system of registration uniform throughout the State with respect to matters confided to their discretion and judgment, a state convention of the officers of registration met on August 2, 1865. A list of twenty-five questions to be asked intending voters was adopted which formed such a strict catechism of political faith and activity that a Democrat who was once tainted with a breath of disloyalty would have difficulty in ever convincing his partizan judges of his character for loyalty. The most searching of these questions were as follows:—

"II. Do you consider the oath just taken as legally and morally binding as if administered by a judge of the court or a justice of the peace?

"IX. Have you ever at any time been in armed hostility to the United States or the lawful authorities thereof?

"X. Have you ever been in any manner in the service of the so-called 'Confederate States of America'?

"XII. Have you ever given any aid, countenance or support to those engaged in armed hostility to the United States or [to] the so-called 'Confederate States of America'?

"XIII. Have you ever in any manner adhered to the enemies of the United States or the so-called 'Confederate States' or armies?

"XIV. Have you ever contributed money, goods, provisions, labor or any such thing, to procure food, clothing, implements of war or any such thing for the enemies of the United States or the so-called 'Confederate States' or armies?

"XV. Have you ever unlawfully sent within the lines of such enemies money, goods, letters or information?

[7] See American, editorial of July 20, 1865.

"XVI. Have you ever in any manner disloyally held communication with the enemies of the United States or the so-called 'Confederate States' or armies?

"XVII. Have you ever advised any person to enter the service of the enemies of the United States, or the so-called 'Confederate States' or armies . . . ?

"XVIII. Have you ever, by any open word or deed, declared your adhesion to the cause of the enemies of the United States, or the so-called 'Confederate States' or armies?

"XIX. Have you ever declared your desire for the triumph of said enemies over the armies of the United States?

"XX. Have you ever been convicted of giving or receiving bribes in elections, or of voting illegally, or of using force, fraud or violence to procure yourself or any one else nomination for an office?

"XXI. Have you ever deserted the military service of the United States and not returned to the same or reported yourself to the proper authorities within the time prescribed by . . . proclamations . . . ?

"XXII. Have you ever on any occasion expressed sympathy for the Government of the United States during the rebellion?

"XXIII. During the rebellion, when the armies were engaged in battle, did you wish the success of the armies of the United States or those of the rebels?

"XXIV. Have you voted at all the elections held since the year 1861, and if not, give your reasons?

"XXV. Have you, in taking this oath or in answering any questions propounded to you, held any mental reservation or used any evasion whatever?"

It was decided that the names of all white male persons resident in, or temporarily absent from, their district should be placed on the registration books, so that the status of all those not making application should be permanently fixed as disqualified voters. Of course this would disfranchise them irretrievably, unless they should make application to the legislature for a pardon by a two-thirds vote of that body, or enter the military or naval service of the United States.[8]

The result was, that not only were the ex-Confederates and Southern sympathizers prohibited from registering, but many other citizens of the State made no attempt whatever to do so, and an exceedingly small number, in proportion

[8] See Sun, Aug. 3, 1865; Scharf, History of Maryland, III, 669–670.

to the population, were designated as qualified voters.[9] In the writer's opinion, at least one half of the voters were disfranchised, and of these an overwhelming proportion was Democratic.[10]

It seems certain that a part of this number was rightly disfranchised. It was, in fact, neither right nor expedient that those who had been in arms against, or in active opposition to, the United States government should have the ballot given them for some years to come, the length of time to be determined by the actions of the ex-Confederates, who should have opportunity to show their acceptance of the new situation. The radicals in the Union party of Maryland had, therefore, a large measure of justice on their side. It was rather the extremely sweeping character of the methods used, and their efforts, at times, to maintain party supremacy by unjust means, that should be condemned.

The first serious move against the registry law was made in the summer and autumn of 1865 under Democratic auspices. Naturally and reasonably, legal means were used in order to test the constitutionality of the act, before a definite political agitation was worked up against it. Two important cases before the State Court of Appeals decided the constitutionality of the law. The first was that of Hardesty *vs.* Taft (23 Md. Reports, 512). Many voters, unable to give a satisfactory answer to the list of questions decided upon by the convention of the officers of registration, were refused enrollment. Therefore, to test this action, an injunction was prayed that the registers should not hand over, nor the judges of elections receive, the registration books, but that the election might be conducted according to the law in force up to this time.

[9] Sun, July 18 and Sept. 29, 1865.

[10] Says Mr. Knott: "The officers of registration were swayed by a spirit of bitter and uncompromising partisanship and . . . the Republican party was determined to perpetuate its ascendancy by the entire disfranchisement, if necessary, of its Democratic opponents." Nelson's Baltimore, 555. The writer would add that Mr. Knott is so partizan in his opinions that he is apt to exaggerate to the detriment of those who disagreed with him.

It was insisted by the appellants that the new law was unconstitutional, since it gave judicial powers to the officers of registration, and that the provision of the constitution excluding from voting those citizens who could not take the required oath was void, as enacting an ex post facto law, and hence contrary to the Constitution of the United States. It was illegal for the officers of registration to inquire into acts done prior to the adoption of the new constitution, and they had no right to put questions which tended to incriminate voters, nor to exclude them from registration in case they should not answer such questions.

On the eve of the fall election the court decided that it would not grant an injunction to the effect that the election might be held in a manner different from that designed by law. The court held further, that it had no power to give authority to the judges of election to receive the ballot of a person not on the roll of qualified voters—a ballot not only not conferred, but expressly taken away by the General Assembly. The decision distinctly stated that a court of equity could not be invoked to prevent the performance of political duties such as those of an officer of registration, but that if a citizen should be wilfully, fraudulently or corruptly refused a vote by the register, or election judge, he might sue for damages at law.

The second case was that of Anderson *vs.* Baker (23 Md. Reports, 531), in which a mandamus was asked to compel a register to place the name of a voter on the lists. The appellant claimed that the provisions of the constitution and of the registry law were void because unconstitutional and contrary to the " fundamental principles of justice and reason and of American republican government." A mandamus was the proper remedy, since a suit for damages would not give a wronged person his vote.

On November 2, 1865, the opinion of the court was delivered by Justice Bowie, Justices Cochran, Goldsborough and Weisel assenting, and Justice Bartol dissenting. It was as follows: The right of suffrage, being the creature of

the organic law, may be modified or withdrawn by the sovereign authority without inflicting any punishment on those who are disqualified. The power of the registers was a police or political power, and hence constitutional.[11]

In commenting on this decision, the Sun on November 3, 1865, said that it looked upon the question as a political rather than a legal one; hence it did not expect any redress from the courts. It was rather an opportunity to appeal to the sense of public justice and political right of the people. From now on the Democratic party adopted this latter method, backed up by a judicious amount of shrewd political tactics, with the usual accompaniment of trickery and wire-pulling then common to both parties. Meantime, however, neither party had waited to see the results of the legal contest, but both had made nominations, and considering the comparative insignificance of most of the offices at stake, the campaign was fairly active and interesting.

The "Unconditional Union City Convention," which met in Temperance Temple, Baltimore, on July 13, adopted resolutions by a majority of about three to one, endorsing Andrew Johnson and his policy.[12]

A meeting of about 1500 citizens of Howard County who were in favor of supporting the reconstruction policy of the President was held at Clarksville on August 26. Addresses were made by Montgomery Blair, who attacked Secretary Stanton and the Maryland registry law, and by W. H. Purnell. A letter was read from Governor Swann, who regretted his inability to be present, and praised President Johnson.[13]

The Union convention of the second congressional district met at Broadway Hall, East Baltimore, on September

[11] I have drawn this account of the election cases largely from Dr. B. C. Steiner's scholarly little book entitled Citizenship and Suffrage in Maryland, 47–50. Also see Sun, Aug. 30, Nov. 2 and 3, Dec. 5; American, Sept. 6 and 15, Oct. 20, Dec. 16–29, 1865.

[12] American, July 14, 1865.

[13] American, Aug. 28; Sun, Aug. 28 and Sept. 14, 1865.

26, and unanimously nominated John L. Thomas, Jr., to succeed E. H. Webster.[14]

The proceedings of the county conventions of the same party are significant, as foreshadowing the varied counsels and final disagreement of the next year. Most of them passed resolutions endorsing Johnson and opposing negro suffrage.[15] Washington County also endorsed the registry law, and Dorchester County declared in favor of a moderate amendment of the same. The radical Union organ, the Baltimore American, strongly supported the President, took a conservative attitude toward negro suffrage, and was heartily in favor of sustaining the registry law as placed upon the statute-books.[16] On September 30 it commented on the campaign as follows:—

> "Party spirit is running high, and the party that [formerly] denounced the President without stint is running a tilt with the party which sustained him, for his exclusive possession."

That this comment was true is shown by the fact that the county Democratic conventions generally endorsed Johnson and his reconstruction policy, while they condemned the registry law and negro suffrage.

The Democratic state central committee on September 2 published in the Baltimore Sun an address to the people of Maryland, calling upon the latter to rise up and oppose the registry law, which it condemned for being "in marked contrast and hostility to the wise and just policy of conciliation which distinguishes the dealings of President Johnson with the Southern States." It was signed by Oden Bowie, chairman, and A. Leo Knott, secretary. It is significant that practically all these expressions of Democratic opinion were given after July 19, the date of the interview with President Johnson at the White House in Washington.

In a thoughtful and able editorial of July 11 the Sun had already foreshadowed the position and policy of the

[14] Sun and American, Sept. 27, 1865.
[15] See daily papers of the period for accounts of same.
[16] See in particular the issues for July 6, Sept. 14, Sept. 23.

Democrats and the conservative wing of the Union party as follows:—

"It may reasonably be supposed that the framers of the Constitution and those who legislated to carry out its provisions . . . were influenced more or less by the then existing state of the country, torn and distracted as it was by civil war. . . . [But] the motives and purposes which actuated our legislators may now be presumed no longer to possess the same force. The General Assembly may perhaps, therefore, be brought to consider at an early day . . . [the modification or removal of] the constitutional and legal disabilities which . . . affect a considerable portion of [the] citizens. The provision of the Constitution which empowers the General Assembly by a vote of two-thirds of the members of both Houses to restore any person to his 'full rights of citizenship,' may, we presume, be made applicable to all persons disqualified, or to separate classes of such, by the passage of a general law."

The same journal, in its issue for August 31, said that should the Republican party adopt negro suffrage, it would throw President Johnson upon the support of the Democratic party, with which he was identified for so long, but that it hoped that such a "mischievous policy" would not be undertaken.

Some question arose in the State as to the effect of the President's amnesty proclamation upon the working of the Maryland registry law. Governor Bradford seems to have set this matter at rest by an open letter to E. L. Parker, one of the officers of registration in Baltimore County, dated July 20, 1865, written as an individual citizen, but concurred in by Alexander Randall, state attorney-general. In it he emphatically affirmed that neither the pardon by President Johnson nor even an act of Congress could make those who had participated in the recent rebellion voters of Maryland against the state constitution.[17]

The committee appointed by Governor Bradford to register all Maryland soldiers entitled to vote went to hospitals

[17] American, July 24; Sun, July 25, 1865. The former journal in an editorial of Sept. 16, 1865, notes a difference of opinion between Andrew Johnson and Thaddeus Stevens in regard to Southern reconstruction. This is, in point of time, the first mention of the matter that the writer could find in the Maryland papers of the period.

at Washington, Alexandria and Fortress Monroe, and to others in Virginia from Fredericksburg to Richmond. They registered altogether 295 soldiers.[18]

The election was held on November 7, 1865, and the Union party was generally successful, getting a stronger hold on the legislature and sending J. L. Thomas, Jr., to Congress. In many places the election was almost a farce, particularly in Baltimore City, where only 10,842 citizens were registered, and of these 5338 did not vote. In the seven "lower" wards Thomas received 2040 votes, and William Kimmel, his Democratic opponent, 54.[19]

As might have been expected from such a grant of absolute power to election officials, many illegal and even criminal acts were perpetrated both in registering the voters and in receiving the ballots. A few illustrations will suffice.

In Caroline County the officers of registration sat behind closed doors, admitted voters to register one at a time, and would not inform the individual whether they had registered his name or not.[20] The testimony in contested election cases before the legislature during the ensuing special session shows that

> "the judges of election in the 5th, 8th, 10th and 15th Election Districts of Somerset County illegally received, counted and returned in their certificates, a large number of illegal votes. . . . The testimony . . . offers most conclusive and painful evidence of flagrantly vicious conduct, and a reckless disregard of the law, on the part of the judges of election."[21]

It is charged in another instance that one of the judges of election

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[18] American, Sept. 5, 1865.

[19] Article by Wm. M. Marine (of little value), in Nelson's Baltimore, 163. See also Scharf, History of Maryland, III, 671–672. He estimates that there was in Maryland at this time a voting population of about 95,000, of which 35,000 were registered and all the remainder disfranchised. Of those qualified by registration, he gives 15,000 to the Democrats, which would leave 20,000 to the Union party, little more than one fifth of the total. Mr. Scharf's history, however, is biased and partizan, and the writer has found it very inaccurate, except when public documents are quoted.

[20] American, Sept. 1, 1865.

[21] House Jour. and Docs., 1866, Doc. H.

"made an improper offer to register a voter if he would vote the Republican ticket, and others they repeatedly refused to register upon the ground that they belonged to the opposite party. . . . Voters are frequently disfranchised without the assignment of any reason . . . [and] almost every form of error is displayed throughout the lists."[22]

Other examples of gross wrong and injustice will appear in the course of the narrative.

The end of the year 1865 saw the passing away of what might be called the typical conditions of Civil War times. Almost coincident with the new year began the self-reconstruction of Maryland. In the ensuing period the registration act was finally repealed and the defeated Union party split up into two factions. The radical wing became the Republican party in the State, and the conservatives joined the triumphant Democrats, in whose hands lay the destinies of Maryland for many years.

[22] House Jour. and Docs., 1866, Doc. I.

CHAPTER III.

Formation of the "Democratic-Conservative" Party and Defeat of the "Radicals."

On January 10, 1866, Thomas Swann, inaugurated the year before, entered upon the active discharge of the duties of governor. The Baltimore American of the next morning said of Governor Swann:—

"There is no public man in Maryland who seems to be so popular with the masses,—so popular with the 'bone and sinew' of the great Union party that has kept Maryland true to her position as 'The Heart of the Union' throughout the late rebellion."

On January 10 the General Assembly met at the call of the governor in a special session, which lasted thirty days by constitutional provision, in order to pass needed legislation designed to ease the financial burden on the State. A long message[1] was received from Governor Swann, in which he not only stated the objects of the session, but also brought to the notice of the law-making body "other and perhaps not less important measures of domestic policy." He desired the encouragement of immigration, a new ship channel to the harbor of Baltimore, a reorganization of the militia, provision for the maintenance and support of maimed and disabled Union soldiers, a complete revision of the laws concerning the status of the colored population, and the grant to the negro of the privilege of testifying in the courts.

Perhaps the most important part of Governor Swann's message, in view of his future position in state politics, is that dealing with the agitation for the repeal of the registry law, and giving his views on national affairs. It is well worthy of careful notice.

Said the governor:—

[1] House Jour. and Docs., Doc. A.

"The Act passed for the registration of voters . . . has been threatened, I regret to say, with resistance, in some parts of the State, chiefly among those, who, in face of the decision of our highest judicial tribunal, persist in denying its Constitutionality, and object to the oath of allegiance which it imposes. I trust and believe that such threats are confined to a very small class of our citizens. The intention of both the Constitution and the registry law, was simply to protect the State against treason, and to show distrust of those who had been connected with it. . . . The law would have been less liable to abuse had it embodied the feature of appeal to some competent tribunal. . . . If these acts [of the Union men] were radical and ultra, much more so was the attempt to revolutionize the State, and break up the Union. . . . It has been alleged, that the dominant party, who now control the State, represents a *minority* of her aggregate population. If it be so, it is the more to be regretted, that so large a number of our citizens shall have identified themselves with the rebellion as to suffer the power, which the majority controlled, to pass into other hands. Small, however, as the minority may be, it cannot be denied that it is the fair and legitimate representative, of whatever there is of loyalty among our people. . . . Our citizens engaged in this Rebellion, have been received with kindness and toleration; they come back, however, to be dealt with as the people in their wisdom may deem most expedient. Threats of resistance to the Constitution and Laws could hardly be expected to facilitate them in resuming the privileges of citizenship which they have deliberately abandoned. . . . The repeal of the Registration Act, in my judgment, will not materially benefit any class of voters who have been heretofore disfranchised under its provisions. . . . As the Executive of the State, I do not feel authorized to recommend a repudiation, by the Legislature, of the organic law of your State, by any radical modification of the terms of the Registration Act. . . . The regular stated meeting of the General Assembly under the Constitution takes place in January next. The Delegates who will compose that body may be expected to represent the wishes of the people upon this subject, as the agitation now going forward will show its results in the ensuing fall elections. No other practical mode of dealing with this question occurs to my mind than by its reference to the Representatives of the people, who shall compose that body."

Further, Governor Swann unreservedly endorsed President Johnson and his reconstruction policy, and no less decidedly opposed the granting of negro suffrage.

Lieutenant-Governor Cox, in calling the Senate to order,

delivered a grandiloquent panegyric on Johnson,[2] which well illustrates the style of oratory of the man who was soon to become a leading opponent of Thomas Swann among the "Radicals." It also shows that the Union party in Maryland was as yet undivided on the question of Southern reconstruction. Among other things he said:—

"Scarcely had the reins of power fallen from the nerveless grasp of the dead President when they were gracefully but firmly seized by his successor, and the State, shrouded in shadow and gloom, was guided with a master hand in safety through the fearful crisis which threatened it. As the sad realization of war gave way to exultation at the return of peace, so the deep sorrow at the death of Abraham Lincoln became merged into thanksgiving to God for the gift of Andrew Johnson. History affords no such instance of colossal grandeur and sublimity as that of the man, who, elevated by his own unaided merit to the loftiest civil distinction, stood forth in the hour of his country's peril, unswayed by prejudice, unseduced by flattery, undismayed by menace, and dared to do his duty. . . . Not a year has elapsed since Andrew Johnson assumed the office rendered vacant by the death of the lamented Lincoln, and already has he impressed the world by the greatness and magnanimity of his achievements, and made himself a reputation lasting as time itself."

Cox concluded by exhorting the Senate to show a conciliatory spirit, and to give education and the right of testifying to the negro.

The acts of this legislature are of importance in this connection only so far as they relate to the political movements of the time. There was a Union majority of two votes in the Senate, and of twenty-eight in the House of Delegates, *i. e.*, more than two to one.[3] As might be expected, it was uncompromising in support of "Radical" principles. On February 3, 1866, the Senate passed resolutions enfranchising all members of the General Assembly not hitherto registered, by the vote of 16 yeas to 2 nays.[4] This passed the House on February 6 by the vote of 56 to 18.[5] On February 7 the same body after some debate passed

[2] Senate Jour. and Docs., 1866, 3–7.
[3] American, Jan. 9, 1866.
[4] Senate Jour., 176–177, 205.
[5] House Jour., 356–357.

resolutions introduced by the speaker, John M. Frazier, of Baltimore City, which endorsed President Johnson and his reconstruction policy, and protested against "any attempt by Congress, or other co-ordinate branch of this government, to force universal negro suffrage without the consent and sanction of the States." The vote on this was 48 yeas to 24 nays. A section likewise endorsing Secretary of State Seward was stricken out.[6]

The next day the Senate adopted the report of the committee on Federal relations which favored the policy of leaving questions of reconstruction, negro suffrage, etc., to Congress, and further

"Resolved, That this General Assembly have entire confidence that the integrity, patriotism and firmness of President Johnson and his administration, co-operating with Congress, will restore the Union of the States on the best and surest foundations, for the glory and honor of this people."[7]

It is now necessary to go back a little in order to trace the origin of the organized movement which finally succeeded in overthrowing the registry law and the Union party. In January, 1866, an informal gathering of Democratic leaders in the State resolved to call a convention of all persons who were opposed to the registry law. The committee which was placed in charge of the affair issued on January 10 a circular letter addressed to prominent citizens urging coöperation in the primaries to be held for this purpose. The Democratic members of the legislature likewise issued a call to the same effect.[8]

The movement was at once taken up in all districts, and the local Democratic leaders, actively supported by the different newspapers of their political faith, called the meetings which prepared for the coming convention. It was held by this party that the makers of the constitution of 1864 went beyond the necessities of the occasion in putting into

[6] House Jour., 37–38, 402–407.
[7] Senate Docs. G; Jour., 248–250. The vote on the adoption of the resolutions was yeas 19, nays 5.
[8] Scharf, History of Maryland, III, 672–675; Sun, Jan. 6, 11 and 13, 1866.

the permanent organic law of the State provisions which were needed to meet a temporary condition only; that the oath clause was an ex post facto law and therefore in contravention of the United States Constitution; and furthermore that the law was unjust in that a majority of the voting population was disfranchised. A definite attempt was to be made to influence the legislature to remove all disabilities under a general law by a two-thirds vote as required by the constitution.[9] The assertion was made that "the only plea that [could] be urged in support of a continuance of the present registry law, and the Constitution, . . . [found] its origin in political vindictiveness."[10]

Pursuant to the call, the convention met in Temperance Temple, Baltimore, on January 24. It organized by electing as president Hon. Montgomery Blair, a former member of Lincoln's cabinet. The Sun of January 25 says there was "a full attendance constituting an imposing assembly." The American of the same date remarked that there was present "quite a number of political old hunkers who used to flourish under the dynasties of former years, and who have been silent so long that few people knew of their existence."

On the second day of meeting a set of resolutions was adopted, which endorsed President Johnson's "restoration policy," as it was generally called by the Maryland Democrats at this time, stated the determination to persist "in the effort to regain the freedom that is now most unjustly and tyrannically withheld from the majority by the minority of the citizens of the State," and urged that "there should be no cessation to the struggle to recover such freedom until equal liberty to all citizens of the State [should be] made triumphant." The registry law was condemned as "odious and oppressive in its provisions, unjust and tyrannical in the manner of its administration, the fruitful source of dissension among the people, calculated to keep alive the memory of differences which ought to be forgotten, and that

[9] Frederick (Md.) Republican Citizen, Jan. 12 and 26, 1866; Baltimore Sun, Jan. 4, 15, 16, 17, 24, 25, 1866.

[10] Frederick Republican Citizen, Jan. 26, 1866.

sound policy, enlightened statesmanship and positive justice demand[ed] its immediate repeal." It was further resolved that

"the provisions of the Fourth Section of the First Article of the Constitution which prescribe conditions to the elective franchise, before unknown to the people of Maryland, [are] retrospective, partaking of the nature of an *ex post facto* law, and repugnant to the terms of the Declaration of Rights, as well as the Constitution of the United States."

An address was also issued to the people of Maryland, calling for their assistance in the fight for justice. Committees were appointed to present the address and resolutions to the legislature, to procure signatures to petitions to that body, and an executive committee was to take general charge of the movement and direct further agitation.[11]

Both houses of the legislature duly received the following communication:—

"*To the Senate and House of Delegates of the General Assembly of Maryland.*

"The undersigned, a committee on the part of a convention which assembled in Baltimore on the twenty-fourth inst.; in discharge of the duty imposed upon them by the said convention have come to the city of Annapolis, to ask leave to appear before your Honorable Bodies, to present the proceedings and prayer of said convention. The convention, in asking this hearing from the Legislature of the State, have supposed that the very large proportion of the people, which it is known they represent, and the paramount interest to the whole people of the subject for which they claim attention, would be a sufficient justification for this appeal.

"We are, with great respect

"Your obedient servants,

M. Blair, Ch'r.	Thos. O. Jenkins.
Anthony Kimmel.	A. H. Davis.
James Wallace.	A. Leo Knott.
Isaac D. Jones.	F. Lewis Griffiths.
James U. Dennis.	Thos. D. Esgate.

"ANNAPOLIS, MD., Jan. 26, 1866."

This request was at once acceded to, and on the same day a joint session was held, when the committee was cour-

[11] See daily papers for a full account of the movement, also Scharf's History of Maryland and Nelson's Baltimore.

teously received and allowed to present its petition, whereupon Montgomery Blair made a speech of some half an hour in length. Says the Sun:[12] "The whole proceedings were worthy of the representatives of the people in the respective capacities in which they came together."

As soon as the houses had resumed their separate sittings, J. E. Pilkington, of Baltimore City, offered a resolution in the House of Delegates that the "sending of large committees to Legislative Halls was a piece of unparalleled presumption and [un]warranted impertinence." This was defeated, by a vote of 51 against 18.[13]

The Union party had not been idle. Said the American of January 26:—

"It is plain from what has occurred within the last few days that the issue between the loyal and disloyal people of Maryland is at last made up. It remains to meet it with becoming fortitude and determination. The Convention [of January 24] has enrolled every Rebel in the State in an attempt to overthrow the Registry Law. It remains to be seen if it has not compacted the loyal men for its defence."

The Cumberland (Md.) Civilian[14] stated in an editorial:—

"We contend that the necessity for the existence and enforcement of the Registry law in the State of Maryland is today tenfold greater than ever it was before."

The Frederick (Md.) Examiner, another Union party sheet, expressed its sentiments as follows, on January 24:—

"We hope, earnestly hope, our Legislators at Annapolis will promptly dismiss all petitions that shall be presented to them asking for the modification or repeal of the Registry law. To do otherwise would be opening the road to the re-instatement of the very men who labored so zealously throughout the rebellion to force Maryland out of the Union. As in the past so in the future, we can get along without the assistance of rebels or traitors. They deserted the State in the hour of trial, and we have no need of their service now that all danger is over. Those who proved false to their native State when treason and crime threatened its existence, would prove false in any position."

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[12] Jan. 27, 1866. House Jour., 188–193; Senate Jour., 84–87, 90–92.
[13] House Jour., 194.
[14] Quoted in American of Jan. 29, 1866.

Not to be behind their opponents, the example of the Democrats was followed, and a union city convention of all those opposed to a change in the registry law was held in the same place in Baltimore on February 2. All wards were represented with the exception of two. Resolutions, addressed to the legislature, were passed protesting against any change in the constitution or the registry law. It was claimed that

> "the time has not arrived for extending the right of suffrage to those unfaithful citizens of the State to whom it is denied by the Constitution. . . . The Convention, through its committee, and in behalf of the patriotic and loyal people of Baltimore, indignantly repudiates the insolent and impudent assumption that traitors and the aiders and abettors of treason constitute a majority of the people of that City, or of our State. . . . We will defend and maintain the Registry Law of this State until the permanent safety of the Republic is forever guaranteed and secured."

In addition, the convention expressed

> "its confidence that Andrew Johnson and the two Houses of Congress will be able to labor together to secure the loyal people of the country against a substitution of rebel political power to control the Government, for the armed efforts to overthrow it."

A committee of twenty members, with C. Herbert Richardson as chairman, promptly brought the resolutions before another joint session of the legislature on February 5.[15] Meanwhile the General Assembly, which must adjourn by constitutional limitation the second week in February, was flooded with petitions from all parts of the State, praying for the repeal of the registry law. One petition from Baltimore City contained the names of 11,274 citizens, and asked that "all persons, who, under the old constitution were entitled to vote, shall hereafter be allowed to exercise that right, upon taking the oath of allegiance to the Government of the United States and to the State of Maryland." There were also numerous petitions from various individuals begging

[15] House Jour., 322, 324, 330–334; Sun, Feb. 3, 1866; Nelson's Baltimore, 163.

to be restored to personal rights of citizenship. A very few were granted.[16]

As might have been expected, the legislature listened respectfully to the prayers of the Democrats, but refused to make any change in the law of the State. In the Senate, a bill to repeal the registry law was laid on the table by a vote of 13 to 10.[17] A dignified protest against the law was made by the Democratic Senators in these words:—

"The popular heart is aroused as it never was before in the State. Petitions are pouring in signed by men of all shades of political opinion, for some legislative action. Meetings are held in every county in the State. . . . While the law-making power should never be influenced by mere loud clamor or noisy demonstrations, it should ever regard the calm, deliberate, temperate demands made for redress of wrongs which permeate the political organism of the State."

An able argument was made on the question of submitting amendments to the constitution to effect this, and a bill proposed specifically to enfranchise all persons, provided they took the oath of allegiance contained in the registration act.[18] In the House of Delegates, the majority of the committee on registration in its report upon the various petitions presented, uncompromisingly refused any repeal of the laws, and recommended their rigorous enforcement. The report said in addition, "There is no repentance acknowledged, and it is not mercy that is asked, but rather the clamor of an unshrived multitude demanding justice." Let things remain as they are until the government and institutions be shaped "in conformity with the new order of things, and until [the petitioners] shall make it manifest that their purpose in clamoring for the ballot is not that they may make it the instrument of attaining the infamous end which they sought, but failed to reach by the bullet." The report concluded with this rather peculiar opinion, judged from the standpoint of constitutional government:—

[16] See House Docs. L, M and N; House Jour., 124, 136, 164–166, 178, 182–184, 202, 203, 237, 239, 259–260, 276–277, 295–296, 309–310, 319, 321, 351, 352, 394, 397, 431, 432, 435; also Senate Jour., 60, 65, 84, 86, 87, 90–92, 106, 136, 149, 163–164, 176, 179, 180, 183, 230, 279, 280.

[17] Senate Jour., 234.

[18] Senate Doc. E.

"All doubt of the power of the General Assembly under the Constitution as it stands is removed. That power is limited to the perfection of the [registry] law; it does not extend to its repeal."[19]

The minority of the committee offered amendments to the constitution removing all disabilities from the Southern sympathizers, requiring simply an oath of allegiance to the state and the national government, to the effect that

"I will protect and defend the Union of the United States, and not allow the same to be broken up and dissolved, or the Government thereof to be destroyed, under any circumstances, if in my power to prevent it, and that I will at all times discountenance and oppose all combinations having for their object such dissolution or destruction."[20]

When the legislature adjourned, the Baltimore Sun of February 12 said:—

"The results of the called session of the Legislature, which has just terminated, seem not to have been of that character of immediate importance which its professed objects would have led us to expect. . . . We find very little effected through the measures which were proposed for immediately relieving the State of its indebtedness, caused by the extraordinary demands . . . growing out of the rebellion."

The Frederick Republican Citizen, on February 2, while the General Assembly was still in session gave vent to the following:—

"Our Legislature is composed, for the most part, of men of narrow views and limited experience. Their whole thought seems to be directed to the surest means of retaining political power, rather than to the establishment of justice, the increase of fraternity, and the promotion of public welfare. . . . The thief repented on the cross, and these men may, by the grace of God, be converted even on the last day of their session, and restore to their fellow-citizens those 'inestimable rights' of which they have helped to rob them."

After the adjournment of that body, the same paper on February 16 said of the law-makers:—

"Their sin of omission is so great that we have not the heart to look into their sins of commission."

[19] House Docs., 1866, M.
[20] House Docs., N.

The convention of January 24 had declared for continued and persistent agitation against disfranchisement, in case relief should be denied by the legislature. In accordance with this determination, the Democratic leaders continued their propaganda, and soon a number of the more conservative men in the Union party began to weaken in their support of radical principles. This was perhaps more noticeable among the leaders than in the rank and file of the party.

An important factor in the situation was the antagonism between the President and Congress, which became definite and open at precisely this period by the veto of the Freedmen's Bureau bill on February 19[21] and of the Civil Rights bill on March 27, 1866.[22] The Democrats in Maryland heartily supported Johnson and his "restoration" policy as it was always called by the speakers and newspapers of their party in the State. The radical wing of the old "Union" party, now in its death-throes, after some hesitation finally cast its lot with the supporters of Congress, and it became the Republican party in Maryland, which has preserved its organization to the present day. Of the conservative Unionists, it may be said that a few of them, such as Montgomery Blair and Reverdy Johnson, had begun to act with the Democrats as early as the fall of 1864, in opposition to the new constitution of that year. In 1866 they were joined by many who were opposed to the registry law, and when the Fourteenth Amendment passed Congress in June of that year, large numbers followed their more decided brethren, and a definite alliance was formed of all the forces opposed to the Republican party as then constituted in Maryland. This alliance was first called the "Democratic-Conservative" party in the summer of 1866, and became the "Democratic" party in the autumn of 1867, although for years the names were considered synonymous. It will now be our object to see how this new alignment was brought about, which was both the cause and the result of the overthrow of

[21] Richardson, Messages and Papers of the Presidents, VI, 398–405.
[22] Richardson, Mess. and Pap., VI, 405–413. See, for the period, Dunning, Reconstruction, Political and Economic, 51–70; Burgess, Reconstruction and the Constitution, 62–73.

the drastic legislation of the Civil War period and of the constitution of 1864.

The first definite move in the political game was the calling of a large mass-meeting in support of Andrew Johnson. This was held in the Maryland Institute, Baltimore, on February 26, 1866, under the joint auspices of the Democrats and Conservatives. Mr. Knott's article, quoted above,[23] throws valuable light on the arrangements for this meeting, as well as upon the entire period with which we are at present dealing. He says[24] that negotiations were then going on between the Democrats and Conservatives looking toward a union, but nothing had so far been accomplished. It was the desire of some of the Conservatives that the object of the meeting should be exclusively devoted to an endorsement of Johnson, and that no reference be made to local issues. On the other hand, the Democrats insisted that since a great majority of the Republicans (*i. e.*, "Unionists") in Maryland were opposed to the President's policy, success in the State would be dependent upon Democratic aid, and local politics would of necessity have to be considered.

President Johnson having been appealed to, the views of the Democratic leader were sustained. The meeting was large and enthusiastic. Said the Sun of the next day: "A more spontaneous and earnest demonstration was never made in the city of Baltimore, nor one animated by a better spirit."

The American of the same date charged that many persons were present who during the preceding five years had held aloof from all expression of sympathy with the Union cause. Strange to say, in the light of his future course, Lieutenant-Governor Cox presided, and made a speech in which he said that they "met on one common platform—the platform of the Constitution," and that they had "met to sustain the acts of the statesman who had already proved himself 'the right man in the right place.'" Among the

[23] Page 28.
[24] Nelson's Baltimore, 557–558.

speakers were I. Nevett Steele, of Baltimore, selected to represent the Democrats, John M. Frazier, of the same city, Union speaker of the House of Delegates, and Senators Edgar H. Cowan, of Pennsylvania, and James R. Doolittle, of Wisconsin.

The result of this meeting was that a strong foundation was laid upon which the fabric of the Democratic-Conservative party was subsequently erected. For this organization the Democrats provided the rank and file of membership, but the adherents furnished by the Conservatives, while not large in number, were of great influence and ability. Most important of all, many of the latter had been prominent Union men during the war, and their participation in the reform movement sufficiently answered any charges of disloyalty which could be brought against it. Without their aid, the Radicals would undoubtedly have been successful in their attempts to induce Congress to include Maryland in the military reconstruction of the Southern States.[25]

The Radicals met this "reform" movement by calling a mass-meeting of "those who voted for Abraham Lincoln" and now "supported Congress and the registry law." This assembled in the Front Street Theatre, Baltimore, on the evening of March 1, 1866,[26] and appears to have been a great success. The house was filled to its utmost capacity, and many could not gain admittance. William J. Albert presided, and resolutions were adopted which, be it carefully noted, endorsed Governor Swann by saying:—

"We heartily approve the declared purpose of His Excellency to maintain the registry law of this State; and we hereby declare that we are in favor of its rigid enforcement, which denies political power to those only who have voluntarily forfeited their right to it."

Speeches were made by Senator John A. J. Creswell and Congressman John L. Thomas, Jr., of Maryland, and also by Senator Lyman Trumbull of Illinois, Senator J. W.

[25] Mr. Knott expresses the same opinion, *op. cit.*, 558.
[26] American, Feb. 28; Sun, March 1, 1866.

Nye of Nevada, and Congressman Samuel McKee of Kentucky.[27] The Republican party in Maryland may be said to date its inception from this time, while the "Union" party really passed out of being in the State. The Republican party was thus a second time ushered into existence, and for the first time since the presidential campaign of 1860 a permanent state organization was formed. Among those who were its sponsors and leaders were Joseph M. Cushing, Henry W. Hoffman, John A. Needles, R. Stockett Matthews, C. Herbert Richardson, Henry Stockbridge, Archibald Stirling, Jr., William M. Marine, George L. Perry and John T. Graham.[28]

The American of March 2 claimed that this was no new party organization, and that the people were merely rallying around the old Union party. We shall see that it soon had to change this opinion, for many of the leaders now definitely went into the Democratic-Conservative camp. Among them were William H. Purnell, Charles E. Phelps, Augustus W. Bradford, John V. L. Findlay, John S. Berry, John M. Carter, Edwin H. Webster, and last and most important of all, Governor Thomas Swann. It seems almost impossible to state just when the last named definitely decided to leave his party. He must have hesitated for some weeks, for he did not openly declare himself till about the middle of May, 1866, under circumstances about to be narrated.

For about two months following the conventions described above, political affairs in Maryland were in a turmoil. Mass-meetings were held in all parts of the State for the purpose of endorsing Andrew Johnson, while the "Radicals" or Republicans, as we may now call them, were trying to stem the tide of defection, even calling in assistance from outside the State.

A crisis was not long delayed. The Union party state executive committee met at the post-office building in Baltimore at the call of its chairman, William H. Purnell,

[27] Daily papers for March 2, 1866.
[28] See article by Wm. M. Marine in Nelson's Baltimore, 164–165.

postmaster. John V. L. Findlay submitted resolutions which "endorsed the restoration policy of Andrew Johnson as wise, patriotic and constitutional, and in harmony with the loyal sentiment and purpose of the people in the suppression of the rebellion." Further, they "believed Mr. Swann in accord with" the resolutions and pledged their support of his administration. This was carried by a vote of eight to four, the minority casting their votes for a substitute introduced by John L. Thomas, Jr., opposing a repeal of the registry law, which was lost by the same vote.[29] The four minority members of the committee were, in addition to Mr. Thomas, Samuel L. Evans, Robert M. Proud and W. Kimball. They published in the Baltimore American of May 5 an address to the "Loyal Registered Voters of the State of Maryland," appealing from the action of the majority of the committee, and charging that the Democrats, with the sympathy of President Johnson and Governor Swann, were engaged in overthrowing the registry law. They called upon the people to organize and prevent it, directing them to come together in primary meetings and elect delegates from the counties and the city of Baltimore to a state convention, to be held in the latter place on June 6 following.

The above-mentioned journal on the day before with great promptness had already repudiated the action of the majority of the committee, and had called upon the Union party to organize, making the statement that nine tenths of the members of the party would refuse to follow the committee. On the succeeding days a series of strong editorials followed, by which the minority of the committee was sustained and the call for the convention endorsed. It had at last recognized the fact that the "old Union party" no longer existed, and that a new organization was necessary. In the issue for May 14 the American printed a list of sixteen county newspapers which endorsed the minority action.

[29] Wm. M. Marine in Nelson's Baltimore, 165–166; American, May 1 and 2; Sun, May 3, 1866.

Meanwhile Governor Swann addressed an open letter to the "Editors of the Baltimore American," dated Annapolis, May 10, 1866. The letter was published in the American on May 12, and in the Sun on May 14. In it Governor Swann stated that he was "for keeping the control of this government in the hands of loyal men exclusively," was in favor of admitting Southern representation to Congress, supported Andrew Johnson and desired to maintain the integrity of the Unconditional Union party.[30] He said further:—

"I am utterly opposed to universal negro suffrage and the extreme radicalism of certain men in Congress and in our own State, who have been striving to shape the platform of the Union party in the interests of negro suffrage. . . . I look upon negro suffrage and the recognition of the power in Congress to control suffrage within the States as the virtual subordination of the white race to the ultimate control and domination of the negro in the State of Maryland.[31] . . . I consider the issue upon this subject . . . as well made in the fall elections, and the most important that has ever been brought to the attention of the people of the State of Maryland."

He endorsed the course of the majority of the committee and found fault with much of the course of action of the Radicals during the preceding months.

The American on May 14 published a striking editorial entitled "The Position of Gov. Swann," saying, among other things:—

"The letter which we published on Saturday from Governor Swann, defining his position on National and State politics, has been received by *his earnest personal and political friends* in this city with astonishment and outspoken mortification. They had insisted up to the last moment, that those who doubted the position of the Governor were in error. . . . At least nine-tenths of the Union men of Maryland have taken position with the Congress of the United States. . . . The Governor will find, when too late, that

[30] Even during the years of the Civil War there had been a radical wing of the Union party which called itself by this name, and formed a large part of the Republican party in 1866–7.

[31] The future "Fourteenth Amendment" was now being discussed in Congress. It was passed on June 13, 1866, and was rightly looked upon by its opponents as opening the way to negro suffrage. See the Sun, May 21, 1866.

he will not be followed by a corporal's guard of those who placed him in his present position in the course he has taken, and that his future affiliation must be with the disloyal, whilst his antagonists will be the true and loyal men of Maryland. . . . The Governor is understood to *aspire to be chosen by the next Legislature as a Senator from Maryland.*[32] It is needless to say that with his present views he cannot be sent there by the Union party. . . . What has heretofore been in doubt is now made stubborn fact by this definition of the views of the Governor, and he has thrown his influence into the scale with those who are endeavoring to sell out the party in Maryland. . . . We must now go into the coming contest with new leaders, as most of those whom we have hitherto delighted to honor have proved faithless to the trust reposed in them."

There have been few men in Maryland who have been subject to such diversity of judgment and opinion as Thomas Swann. At that time, and even to the year of grace 1908, the mention of his name in conversation is often sufficient to call forth torrents of abuse or extreme praise. He was certainly entering upon an unusual course, which became more and more difficult to explain as time went on. It will perhaps never be possible to reach a complete or authentic estimate of the man and his work, and for this reason the writer feels most strongly how inadequate must be the attempt on his part to set forth with clearness the political course of the governor.

General Ferdinand C. Latrobe, a person in an unusually favorable position to know,[33] has told me that the registration act and the negro question were the causes of Swann's secession from the Union party. In addition to this, there is no doubt that he wished to be United States senator from Maryland, and it is said on the best of authority[34] that some time during the summer of 1866 a definite understanding existed between him and the leaders of the Democratic party that he should have the office in return for his assist-

[32] The italics are mine.

[33] A prominent Democrat and office-holder in Maryland for the last forty years. He was the son-in-law of Gov. Swann and on terms of peculiar intimacy with him.

[34] Hon. James R. Brewer, of Baltimore, a leading Democrat of the period.

ance in the repeal of the registry law.[35] That such an understanding existed appears to be borne out by the course of events during the next year. In all likelihood, Governor Swann was sincerely opposed to the measures of the "Radicals." He was an able man of fine presence, though a "labored" public speaker, and a skillful politician. Of this last there can be no doubt. He was also in a position where his aid could be all-powerful in overthrowing the registry law.

The rank and file of the old Union party seemed loath to believe that the governor had deserted them. As late as June 13 the Frederick Examiner supported him in an editorial and said it did not believe the reports that he was going to desert his party; that he was in favor of the registry law and would carry out its provisions. Not till a month later[36] was the Examiner willing to accept the change of base, and then it warned Swann that he did not know whither he was going, frightened by the chimera of negro suffrage.

The Frederick Republican Citizen, the Examiner's bitter rival, was naturally jubilant over the governor's defection, as were the Democrats generally. The Citizen expressed its feelings in vigorous, if not choice, language in its issue for July 6:—

"We understand a number of the officials here speak very harshly of their Governor. . . . They thought he was a very proper man to be elected Governor when the State and the Union were in most imminent peril. But these *wise* and *virtuous* officials, now that Mr. Swann can't go the radical programme, and consent to '*eat dirt*' all the days of his life, and say his dying prayers at the knees of Thad. Stevens or Charles Sumner—say they '*never did think much of him.*' Some say he is a '*knave*'—others say he is a '*fool*'—and some men go so far as to say that he is a '*traitor.*'"

The Democratic newspapers and leaders in general were quick to seize on the advantage given them by the popular opposition to negro suffrage, and made the State fairly ring

[35] The American on Sept. 25, 1866, made definite charges to this effect.

[36] Issue of July 18, 1866.

from one end to the other with the foolish cry of "negro equality,"[37] till many doubting and hesitating members of the old Union party fled panic-stricken into the fold of their opponents. It was altogether in vain that the Republicans denied their advocacy of negro suffrage[38] and attempted to stem the tide of defection.

In pursuance of their policy of an active and aggressive campaign looking toward the definite organization of the Republican party in the State, the Radicals held a mass-meeting in Hagerstown on May 14, at which addresses were made by Senator John A. J. Creswell, Congressmen Francis Thomas and John L. Thomas, Jr., General James A. Garfield, of Ohio, and Congressman Horace Maynard, of Tennessee. These speeches endorsed in general the congressional plan of reconstruction, the registry law and the action of the minority of the state executive committee in calling a convention for June 6.[39]

On May 17 the Radical "City Unconditional Union Convention" of Baltimore was held in Rechabite Hall, Fayette Street, all the wards being represented with the exception of the fourth. Resolutions were adopted by a vote of 40 to 19 which favored the registry law, upheld the minority

[37] The two quotations that follow are taken from the Frederick Republican Citizen. March 30, 1866, it said: "If the Union is restored, the abolition and shoddy patriots who have ruled the country for the last five years, and almost ruined it, will be hurled from power with the curses of the people upon their guilty heads. This deserved retribution they are seeking to prevent by a revolution in the fundamental principles of the government, and the elevation of the negro to an equality with the white man politically, so that by the aid of negro votes they may retain political supremacy." On June 22, 1866, it said: "Rampant, fanatical Abolitionism gloated with its success, drunk with blood, raving with its insane heresies is pressing furiously onward to its legitimate consequences, the goal of full social equality for the negro with all the degrading horrors of amalgamation. Be not deceived; our very fire-sides are threatened; and unless men act, and act with vigor, even *race itself*, as well as home, will be prostituted to the orgies of this great moloch of America."

[38] The Frederick Examiner of May 16, 1866, opposed negro suffrage and said it was a campaign lie that the Union party favored it, adding: "The Union party to a man is opposed to admitting the blacks to the right of voting. There is no difference of opinion on the subject, all are equally opposed to it."

[39] American, May 15, 1866.

of the executive committee, and repudiated the action of the majority, saying that they had "forfeited all claim to be regarded as an exponent of the views and sentiments of loyal men of Maryland."

Later in the same evening another convention under the same political name was held at Temperance Temple, composed of delegates who were in accordance with the views of the majority of the committee. At this meeting resolutions were passed which opposed negro suffrage, endorsed President Johnson and repudiated the action of the rival convention. James Young presided over both conventions.[40] The following evening a Radical mass-meeting endorsed the action of the first convention.[41]

On June 6, in conformity with the call of the minority of the executive committee, the "Unconditional Union State Convention" met at Front Street Theatre, Baltimore. Although the definite organization of the Republican party really took place at this meeting, yet the old name of "Unconditional Union" was still retained, perhaps to sustain the claim of party loyalty and political consistency made by its members. John L. Thomas, Jr., called the meeting to order, and Dr. C. H. Ohr of Allegany County was chosen to preside. A new state central committee was appointed, and the principles of the Radical party were definitely stated in resolutions as follows:—

"That the registered loyal voters of Maryland will listen to no propositions to repeal or modify the registry law, which was enacted in conformity with the provisions of the Constitution, and must remain in full force until such time as the registered voters of the State shall decree that the organic law shall be changed. . . . It is the opinion of this convention that if disloyal persons should be registered it will be the duty of the judges of election to administer the oath prescribed by the Constitution to all whose loyalty may be challenged, and, in the language of the Constitution, to '*carefully exclude from voting*' all that are disqualified. . . . The question of negro suffrage is not an issue in the State of Maryland, but is raised by the enemies of the Union party for the purpose of dividing

[40] Sun and American, May 18, 1866.
[41] Sun and American, May 19.

and distracting it, and by this means to ultimately enable rebels to vote."

The convention also cordially endorsed the reconstruction policy of Congress, and adjourned *sine die*.[42] The newly appointed state central committee met on June 20 and organized with Robert M. Proud as president.[43]

Meanwhile, the Conservatives had held on May 19 at Westminster a large out-of-door meeting of those in favor of President Johnson's policy and of reform in state affairs. Addresses were made by Senator T. A. Hendricks, of Indiana, Congressman L. H. Rousseau, of Kentucky, and others.[44] On the twenty-ninth the "Unconditional Union State Central Committee," as formerly constituted, met in Baltimore. It refused to recognize the call for the convention of June 6, by the minority members of the executive committee, but instead it called another convention to meet in Baltimore on the fourth Wednesday of July (twenty-fifth), and endorsed President Johnson and the recently published letter of Governor Swann.[45]

A large Conservative mass-meeting was held in Monument Square, Baltimore, on June 21, in pursuance of a call "by the friends of President Johnson, Governor Swann and the opponents of negro suffrage," and "by order of the Executive Committee of the State Central Committee and City Convention of the Unconditional Union Party of Maryland." These men also valued old names and made use of them in proving party regularity, so they also were "Unconditional Union." One of the mottoes that decorated the speakers' stand was "No affiliation with Rebels or Radicals." Governor Swann presided and made a speech, in which he said: "I desired to be understood as occupying a conservative, middle position between those who were en-

[42] American and Sun, June 7, 1866; Nelson's Baltimore, 166; Scharf, History of Maryland, III, 678–679. The American of the next day said that this convention "represented very fairly the intelligence, character and principle of the loyal men of Maryland," and that its object was to organize the Union party.

[43] American, June 21, 1866.

[44] Sun, May 21.

[45] Sun and American of May 30.

deavoring to drive us into universal negro suffrage on the one side, and the support of disunionists on the other." He also declared that he stood for the enforcement of the registration law, as he had stated in his message to the legislature of the preceding January.[46] Since it was upon the statute-book it should be executed, but not in a spirit of intolerance and oppression, of which there had been too much in the past. This was a distinct recession from his former position, and evidently a hint of the method he was to pursue in aiding the Democrats, who, if not already, were soon to be his allies. Addresses were also made at the same meeting by ex-Governor A. W. Randall, of Wisconsin (later postmaster-general in Johnson's cabinet), Mr. Perrine of New York, and General Charles E. Phelps.[47]

On the next morning (twenty-second) an editorial in the Baltimore Sun made the statement that the meeting marked "the inauguration under the auspices of the highest executive officer of the State, of what appears to be a more rational and conservative movement in the politics of the State, than has been clearly recognizable heretofore."

It will be remembered by the student of national politics that during the summer of 1866 President Andrew Johnson and his friends made a definite attempt to organize all the forces throughout the country which favored his reconstruction policy, so as to procure a majority in Congress, with which to defeat Thaddeus Stevens and the so-called congressional plan of reconstruction. An organization known as the "National Union Club" had been formed in Washington with this object in view, and during the latter part of June it issued a call for a convention to meet in Philadelphia, August 14, 1866. This call was signed by men prominent in the Democratic and Conservative ranks in the nation. As yet President Johnson openly kept up his alliance with the Republicans, and when his cabinet was changed by the resignation of three of its former members, he appointed no Democrats in their places.

[46] See page 41.
[47] Sun and American, June 22; Nelson's Baltimore, 166.

The call for the Philadelphia convention was eagerly welcomed by the Democrats, particularly those of the South, and the movement was taken up by the more weighty element among the ex-Confederates, as well as by the conservative element among the Republicans, such as the anti-registration forces in Maryland.[48] Following the call of its central committee, the conservative wing of the Union party held its state convention on July 25 in the New Assembly Rooms on Hanover Street, Baltimore. A platform was drawn up which endorsed the course of Andrew Johnson and Thomas Swann, opposed negro enfranchisement and the registry law, and favored the call of the Philadelphia convention, electing as delegates-at-large to it Montgomery Blair, Thomas Swann, J. W. Crisfield and Reverdy Johnson. Colonel William J. Leonard, of Worcester County, was unanimously nominated as candidate for state comptroller for the November election.[49]

The Democratic state convention met in Rechabite Hall, Baltimore, on August 8, E. G. Kilbourn, of Anne Arundel County, serving as president. It endorsed Andrew Johnson and also the Philadelphia convention, to which it chose as delegates-at-large Thomas G. Pratt, of Baltimore City, H. G. S. Key, of St. Mary's County, Judge Richard B. Carmichael, of Queen Anne's County, Isaac D. Jones, of Somerset County, and E. G. Kilbourn. By making no nomination against Leonard for comptroller, the Conservatives and Democrats joined their forces, and took as the objects of their alliance the support of Johnson and a change in both the state constitution and the registry law.[50]

The Philadelphia convention cemented this alliance in

[48] Rhodes, History of the United States since the Compromise of 1850, V, 614–616; Dunning, Reconstruction, Political and Economic, 72–74; Burgess, Reconstruction and the Constitution, 90–92, 98–99. Sun, June 29, 1866.

[49] Sun, July 26, and American of same date, which says that Montgomery Blair was the "controlling spirit" in the convention. Mr. Wm. M. Marine states (Nelson's Baltimore, 166–167) that a large number of the delegates held places under Johnson in the Federal offices in Maryland.

[50] Sun, Aug. 9, 1866.

Maryland more firmly and paved the way for its identification with the Democratic party.

The "Southern Loyalists Convention," which was called by the radical elements in the Republican party of the nation, and which met at the same place on September 3, was an attempt to counteract the effects of the gathering just described. The Loyalist speakers denounced President Johnson with great unanimity; but the affair soon degenerated into an unseemly struggle between the advocates and the opponents of negro suffrage. The Maryland Radicals were represented by delegates to this meeting, but were not much helped by it in their state campaign.[51]

Meanwhile a state convention had been held on August 15, in Baltimore, at the call of Robert M. Proud, chairman of the newly constituted "Unconditional Union State Central Committee." The platform called Montgomery Blair and Thomas Swann "traitors," condemned the latter for abandoning the principles of his party, favored the congressional plan of reconstruction, and proposed to uphold the constitution of 1864 and the registry law "until such time as the safety of the State and Nation will warrant modification or amendment." Colonel Robert Bruce, of Allegany County, was nominated for comptroller.[52]

Both parties made nominations in all five congressional districts of the State. General Charles E. Phelps, an ex-Union soldier, was the conservative candidate in the third district. In his address accepting the nomination he made the following significant statement:—

"I have never been a Republican, I am not a Democrat, and I do not expect to be. I believe in Republican principles, and though the majority must rule, the minority must be heard."[53]

It now began to appear that the Democrats had really won the deciding position when they persuaded Thomas

[51] Rhodes, History of the United States, V, 621–622; Dunning, Reconstruction, Political and Economic, 76–78; Scharf, History of Maryland, III, 679; Sun, Sept. 4, 1866.

[52] Sun and American for Aug. 16, 1866.

[53] American and Sun, Sept. 8, 1866; Nelson's Baltimore, 167.

Swann to break away from his party. The true significance of his policy was now made perfectly clear, namely, to do away as far as possible with the practical effects of the "iron-clad" oath of the constitution and the disfranchising sections of the registry law, and to give the ballot to the opponents of the Radical party.

According to the provisions of the registry law, the executive of the State was empowered to appoint the registers and judges of election in each district, and to these officials was given the final determination as to the right of each citizen to register, while from their decision there was no appeal.[54] Governor Swann now began to appoint new election officials in all parts of the State, and to instruct them to interpret the oath and registry law as liberally as possible and to let the people register and vote.[55] Mr. Knott says that these men, "while adhering strictly to the law, so fairly and justly interpreted its provisions as to register a very large number of Democratic voters throughout the State and . . . secured them . . . in their rights to the elective franchise."

The Frederick Republican Citizen in its issue of August 3, 1866, told every Democrat to register, saying that Swann's registers would discharge their duties "in the spirit of republican self-government" and would not insult Democrats at the polls, or meet them in a spirit of partizan vindictiveness. In its issue of the tenth of the same month it further said, "The present Governor of the State *wants you all to register.*" On the other hand, the Baltimore American on September 11 pointedly said that Swann, with the United States Senate as his object, advised the registers to give "liberal construction" to the law.

This action of course threatened the ascendancy of the Republican party in the State. During the preceding two

[54] See page 19.

[55] Authority of Gen. F. C. Latrobe, who told the writer that at one time he had in his possession the correspondence between Gov. Swann and the judges of election which contained these instructions, but burned the letters by direction of the governor. Swann was often called the "great emancipator." Also see Scharf, III, 679–680; Nelson's Baltimore (Knott's article), 558.

or three years the old Union party had been able to hold its place only by the use of most strenuous measures. It could hardly be supposed that this radical section of the old party would be able to overcome the Democrats reinforced by the Conservatives and the newly registered citizens. However, they did not give up, but stuck to the fight with grim determination.

An election was to be held in Baltimore City on October 10 for the choice of mayor and other municipal officials. On September 18 C. L. L. Leary, city solicitor, in a report handed to the City Council, gave his opinion that the corrected list of voters then being made under act of assembly could not be used at the municipal election, hence only those citizens registered a year before could vote.[56] Hon. Alexander Randall, attorney-general of the State, in response to an inquiry by Governor Swann, affirmed this opinion.[57] In direct opposition to this Senator Reverdy Johnson and John H. B. Latrobe published in the Sun, for October 2, the view that the registry law did not apply to the municipal election at all, on the ground that the constitution only professed to establish a government for the State and not for municipal corporations, these latter being created by the legislature and being corporations endowed only with such rights of voting as the law creating them should provide. If this were not the case the constitution

[56] Sun, Sept. 19, 1866.

[57] Sun and American, Oct. 9, 1866. Governor Swann, in his message to the legislature in the following January, wrote as follows in discussion of this point (House Docs., 1867, A): "The act relating to the registration of the voters of the State, passed March 24, 1865, places the limitations within which the returns of the officers of registration were required to be made, beyond the period appointed by law for holding the municipal elections of the city of Baltimore. This virtually disfranchised, according to the opinion of the Attorney General of the State, more than one half of its voting population. That the Legislature could not have contemplated any such construction of the law, I am fully convinced; and the omission to name an earlier day, for the returns of the Officers of Registration, so as to include the municipal election, strengthened the belief that the law was not meant to apply to corporations, but only to general State elections. Some of the most eminent jurists in the State entertained this view."

would have to be applied to voting in corporations of all kinds, *i. e.,* insurance, banking, etc.[58]

The judges of election formally agreed to accept the published opinion of the attorney-general, and that only the registration lists of 1865 would be used as their guide in admitting or rejecting votes at the municipal election.[59] This meant, at least, that the Radicals were sure of electing the city officials.

The opposing candidates for the office of mayor were John Lee Chapman on the Radical ticket, and Daniel Harvey on the Conservative. Both parties entered upon the campaign with vigor, and since the municipal and state elections were less than a month apart, the party organizations worked for both of them at the same time. Thus the Conservatives and Democrats held a grand parade and a mass-meeting on September 27, in Monument Square, presided over by William Price. Many leading men of both parties were present. The resolutions endorsed both Andrew Johnson and the Philadelphia convention.[60] Then the Radicals had their parade and mass-meeting at the same place on the evening of October 4. Thomas Kelso presided and among the speakers were Senator John A. J. Creswell and Joseph J. Stuart. The resolutions condemned the Conservatives who had "betrayed" them, expressed "detestation of the treachery of Andrew Johnson," and concluded by resolving

"That, making no threats, insisting only on the Constitution and the law, we look to the judges of election 'carefully to exclude from voting' all disloyal persons whom the conspiracy of the Governor and his registers have [*sic*] placed on the lists, and that

[58] See also editorial in American, Oct. 8, 1866; Scharf, III, 680. It appears that the year before this, Wm. Price, city counsellor, in a letter dated Sept. 11, 1865, and addressed to James Young, president of the first branch of the City Council, held that the fall election of that year must take place under the registration of the year before (see American, Aug. 20, 1866). The question of the vote in municipal elections of citizens hitherto unregistered had been agitated in the American of May 14, 1866.

[59] American, Oct. 9; Scharf, III, 680.

[60] American and Sun, Sept. 28, 1866.

the Union party of Maryland has the will and the power to protect the judges and defend the ballot box."[61]

On October 9, the day preceding the election, there was some disorder. A mob collected in front of the Conservative headquarters at the corner of Baltimore and North Streets, and pulled down a United States flag bearing the inscription "Headquarters of the National Union Party of the State of Maryland." This inscription was torn off, and the mutilated flag raised again amid cheers.[62]

Mr. Knott says:[63]—

"The Board of Police Commissioners, composed of Mayor John Lee Chapman *ex officio,* Samuel Hindes and Nicholas Wood, refused to appoint a single Democratic judge or clerk of election, but selected their appointees for those offices from the ranks of the most bitter and uncompromising partizans, many of whom were men of notoriously ill repute. The officers, in violation of the registration law went behind the lists of registration, and examined the voters on oath as to their qualifications . . . made inquisition into their thoughts and opinions, and put any hypothetical case that their caprice or malevolence suggested, and required [them] to answer it under the penalty of exclusion from registration. The consequence of this conduct was the disfranchisement of a great majority of the Democratic voters of the city."

The election passed off in a remarkably quiet manner, considering the excited state of political feeling. Very fortunately, a heavy rain set in during the afternoon, which cleared the polls of bystanders. A printed list of voters as registered in 1865, containing many typographical errors, was used in each precinct. Chapman was elected with the entire Radical Municipal ticket. It was stated that the Conservatives generally decided to remain away from the polls, hence a small total vote of 7993 was cast, of which Chapman received 5392 and Harvey 2601. The total vote of Baltimore City in 1860 was 30,156, and it is reasonable to suppose that the city had largely increased in population

[61] Sun and American, Oct. 5, 1866.
[62] Sun and American, Oct. 10, 1866. The latter paper calls it a "disgraceful act."
[63] Nelson's Baltimore, 558.

during the succeeding six years. It was very evident that the Radicals formed a minority of the inhabitants.[64]

The Conservatives and Democrats were at once aware of the significance of the results of this election, which seriously menaced the success of their movement. Not only would the government of the city continue to be entirely in the hands of their opponents, but also at the state election on the sixth of November following, the voting in this important district would be subject to the wishes of the same judges of election, backed up by the police commissioners. The leaders determined to act at once.

A " Conservative City Convention " met in Rechabite Hall on October 16. Resolutions were passed that the police officials should be arraigned before the governor of the State, and a committee of twenty-five members was appointed to collect evidence and lay the matter before the governor.

This committee lost no time, and within two days they had so far succeeded in their task that they were enabled to visit Annapolis (on Thursday, October 18), armed with charges and evidence contained in a memorial to Governor Swann signed by 4300 citizens of Baltimore. The petition prayed for the removal of the police commissioners for misconduct in the management of the election. The governor promised to give immediate attention and to execute the laws " without fear, favor or affection." Nor did he fail his newfound political allies, but that very same evening proceeded, in accordance with the thirteenth and fourteenth sections of Article 42 of the Code, to summon the commissioners to appear for trial on Monday, October 22. It was of course necessary that definite action should be taken in time to insure to the Democrats and Conservatives the appointment of new judges of election in the city by the day of the state election.

The commissioners answered the summons with a protest against the jurisdiction of the state executive, and re-

[64] Sun and American, Oct. 11, 1864. See also Gov. Swann's message to the legislature, Jan., 1867 (House Docs., A).

fused to appear in person, retaining Archibald Stirling, Jr., T. S. Alexander and Henry Stockbridge to defend them. The committee on the other hand placed their case in the hands of William Schley and John H. B. Latrobe. The counsel on the opposing sides were thus among the ablest members of the Baltimore bar.

The Radicals also bestirred themselves, and a meeting of the "Boys in Blue" on October 19 passed resolutions condemning the interference of Swann in municipal affairs, and calling for a city convention of Radicals to meet on the twenty-third to protest against his action. These same "Boys in Blue" and the members of the several Union leagues were busily engaged on the following day (the twentieth) in canvassing the city and enrolling the names of "such of the loyal citizens" as pledged themselves to "support the city authorities in resisting Mr. Swann's interference."[65]

As might well be supposed, popular excitement became intense. On the twenty-second the governor issued a proclamation, as follows:—

"Whereas it has come to the knowledge of the Executive that military and other combinations are now forming in the city of Baltimore, for the purpose of obstructing and resisting the execution of the laws of this State. And whereas there is reason to believe that similar combinations are attempted to be organized in other States, with the intention of invading the soil of the State of Maryland, to deprive her citizens of their just rights under the laws, and to control the people of the State by violence and intimidation: Now, therefore, I, Thomas Swann, Governor of the State of Maryland, do, by this my proclamation, solemnly *Warn the Leaders* of all such illegal and revolutionary combinations against the peace and dignity of the State that, in the event of riot or bloodshed growing out of these revolutionary proceedings, they will be held to the strictest accountability, and the power of the State will be exhausted to bring them to prompt and merited punishment."

The situation was rendered much more dangerous by the fact that the State of Maryland at this time possessed no militia, nor was there any law by which the governor could organize an armed force. The militia act of March

[65] American, Oct. 22, 1866.

10, 1864,[66] expired by limitation on March 1, 1866, and the legislature had failed to enact any substitute.

On October 24 General U. S. Grant, commander in chief of the United States Army, addressed a letter to President Johnson in which he stated that upon receiving verbal instructions from the President to "look into the nature of the threatened difficulties in Baltimore," he had ordered General Canby, whose department included the State of Maryland, to proceed to Baltimore in person, in order to investigate the causes of the impending trouble. Since the return of his subordinate to Washington he (Grant) had conferred with him and also with Governor Swann, who were united in the opinion that "no danger of riot need be apprehended unless the latter should find it necessary to remove the present police commissioners of Baltimore from office, and to appoint their successors." General Grant concluded by saying:—

> "I cannot see the possible necessity for calling in the aid of the military in advance of even the cause (the removal of said commissioners) which is to induce riot. The conviction is forced upon my mind that no reason now exists for giving or promising the military aid of the government to support the laws of Maryland. . . . So far there seems to be merely a very bitter contest for political ascendency in the State. Military interference would be interpreted as giving aid to one of the factions, no matter how pure the intention, or how guarded and just the instructions. . . . If insurrection does come, the law provides the method of calling out forces to suppress it. No such condition seems to exist now."

Meanwhile Governor Swann proceeded with the trial of the commissioners, and after hearing the evidence and arguments of counsel on both sides, he decided that the parties complained against were guilty of official misconduct as charged by the committee of twenty-five. He removed Samuel Hindes and Nicholas L. Wood from office, but John Lee Chapman still remained a member of the board, in virtue of his office as mayor of the city.

On Friday, November 2, the governor appointed James

[66] Chapter 284 of the Maryland laws.

Young and William Thomas Valiant[67] as police commissioners. These gentlemen immediately qualified and took oath before Judge R. N. Martin of the Superior Court, then went at once to the office of the late board in the "Old Assembly Rooms" on the northeast corner of Holliday and Fayette Streets. Here they were informed by Deputy Marshal John Manley that the board had adjourned and that no business could be transacted until the next morning. The new commissioners made three unsuccessful efforts to see Mayor Chapman, and then rented temporary quarters at No. 1 North Street till possession of the office on Holliday Street could be obtained. They published in the papers of the next day (Saturday, November 3) an "Address to the Police," stating that they had been appointed by Governor Swann, and expressing their determination not to interfere with the police force as at present organized, or to remove any person connected with it on account of his political opinions, provided that such person observed the laws then in force for the government of the police of the city. They also called upon the police and the citizens for aid in preserving order and in following out the measures inaugurated by the authority of the governor.

The next morning Young and Valiant made a second call at the office of the old board and were informed by the clerk at the door that "any communication that was to be made must be in writing." They at once sent in writing a demand that the headquarters, station-houses, fire alarm system, etc., should be surrendered to them, requiring Hindes and Wood to cease acting as commissioners, and warning them that they would continue to do so at their peril. No reply to this was received, so the same day they issued orders to the police which were printed in the Evening Telegraph, requiring their obedience and commanding them to disregard any orders from the old board.

A large crowd having gathered in the street in front of

[67] The American of November 3 prints a rumor that Swann first offered appointment to John T. Ford, George R. Berry and John W. Horn, all of whom declined.

their office, the two commissioners ordered William Thomson, sheriff of the city, to summon a *posse comitatus* for their protection. The sheriff was proceeding to do this, when he and Young and Valiant were arrested on two bench warrants issued by Judge Hugh Lennox Bond of the Criminal Court. After a hearing, Judge Bond ordered bail of $5000 for each one of the three, on the charge of conspiracy. The court also ordered that the two commissioners give security in the sum of $20,000 to keep the peace toward the "existing commissioners" and those under their authority, and that they desist from all attempts to act as and exercise the powers of commissioners till they should have established their claims by law, and that the "present commissioners" continue in de facto exercise of their office.

Valiant and Young refused to give bail, and were sent to the Baltimore City jail on two commitments each. Their counsel, William Schley, John H. B. Latrobe and John M. Frazier, applied to Judge James L. Bartol, of the State Court of Appeals, for writs of *habeas corpus,* which were made returnable on the following Monday, November 5, the day preceding the election. "The warden, influenced by the threats or persuasions of the Republican leaders, availed himself of a law recently passed, giving to the respondents in *habeas corpus* proceedings four days after the service of the writ within which to make answer and return." Judge Bartol was therefore compelled to postpone the hearing to November 8, two days after the election.[68]

It will at once be seen that the Radicals had won in the first skirmish, and most important of all, the old commissioners and their judges of election would conduct the state

[68] Knott, in Nelson's Baltimore, 560. On Nov. 2, 1866, the first branch of the City Council passed resolutions that "the attempted removal of the Police Commissioners . . . by Thomas Swann, Governor of this State, is a deliberate attempt to trample upon the Constitution and Registry Law of the State of Maryland, and to place in power those who, during the entire war, were enemies of the United States government. Resolved, that the attempt to remove the Commissioners without just cause, and for political purposes alone, calls for the condemnation of the Union men throughout the country" (Jour., 26, 28, 29, 33, 40). This was passed by the second branch the following day (Jour., 23–24).

election in the city the next day. This seemed to offer a hope that the Conservative forces would not be able to overthrow their opponents in spite of the active help of Governor Swann. Meanwhile popular excitement had reached such a pitch that there was imminent danger that violence and bloodshed would occur at any moment.

To go back a little. On the preceding Friday, November 2, President Johnson issued the following order addressed to Edwin M. Stanton, secretary of war:—

"There is ground to apprehend danger of an insurrection in Baltimore against the constituted authorities of the State of Maryland, on or about the day of the election soon to be held in that city, and that in such contingency the aid of the United States might be invoked under the acts of Congress which pertain to that subject. While I am averse to any military demonstration that would have a tendency to interfere with the full exercise of the elective franchise in Baltimore, or be construed into any interference in local questions, I feel great solicitude that, should an insurrection take place, the government should be prepared to meet and promptly put it down. I accordingly desire you to call General Grant's attention to the subject, leaving to his own discretion and judgment the measures of preparation and precaution that should be adopted."

On the same day General Grant ordered General Canby, commanding the Department of Washington, to hold troops in readiness for service, and the latter officer at once came to Baltimore.

The excitement on Saturday, November 3, was intense.[69] The new commissioners having been placed in jail, Governor Swann went to Washington during the evening to confer with the national authorities. Said the Sun of Monday (November 5):—

"It is understood that a long conference took place yesterday [Sunday], at the presidential mansion, between the President, General Grant, Secretary Stanton, and Attorney General Stanbery, with

[69] The writer is informed by Mr. Isaac T. Norris of Baltimore that some years after the events narrated, Judge Bond stated to him in a private conversation that excitement was so great at the time of the arrest of the commissioners that he "did not know whether he would ever get back home from the Court House." The same judge was also prominent in the trial of the Ku Klux Klan cases in the South a few years later.

reference to the extraordinary conditions of affairs in this city. The result of the conference, it is stated, is to the effect that the civil and military authorities of the general government will be governed by the opinion of the law officer of the government, Attorney General Stanbery, that the military power of the government cannot be used to intervene in the political complications which have arisen in this city, except in case of actual riot, or overt acts involving a breach of the peace."

In confirmation of this may be given the following account of the matter as contained in a special message addressed to the legislature by Governor Swann on February 5, 1867:—

"No correspondence[70] of any description has passed between the President of the United States and myself in regard to the late municipal election in Baltimore City, or the removal of the police commissioners. My communications to the President were directed to the single point as to the power of the Executive when appealed to by the civil authorities of a State, in case of an emergency, to furnish military aid in the execution of the laws. . . . I felt it to be my duty in the then threatening aspect of affairs in the city of Baltimore to guard by proper precautionary measures against any outbreak likely to compromise the peace of the commonwealth. Secretary Stanton, Generals Grant and Canby, and the Attorney General, were fully cognizant of what passed between the President and myself upon this point, and I am not aware that there was any difference of opinion in regard to the construction of the law in case a proper requisition had been made. The only telegram between the President and myself was an inquiry from me a short time before the election whether any change had taken place since my interview with him in relation to the matter. . . . The result of the election shows that I had no wish to resort to the military unless driven to it by the most urgent necessity, and to prevent anarchy and bloodshed, which, as Governor of the State, I was powerless to control."

The governor returned to Baltimore at 8.30 p. m. on Sunday, November 4. General Grant accompanied him, being sent by President Johnson as his private representative.[71] He made his headquarters at the Eutaw House at the corner of Eutaw and Baltimore Streets. The next

[70] Sun, Feb. 6, 1867.

[71] Mr. Knott, in Nelson's Baltimore, 561. Also stated as a fact by Gen. F. C. Latrobe.

morning (November 5) he sent the following telegram to Secretary Stanton:—

"This morning collision looked almost inevitable. Wiser counsels now seem to prevail, and I think there is strong hope that no riot will occur. Propositions looking to the harmony of parties are now pending.

"U. S. GRANT, General."

Mr. Knott gives some further very interesting information in regard to the situation at this time. He states that early on the same day (November 5) General Grant and General Canby had an interview with the leaders of the Radical party and then called upon Swann and the Democratic-Conservative committee at the governor's Baltimore residence.

"They expressed to the Governor and to the Committee their hope for a peaceful solution of the difficulties, and their belief that under the arrangements which had been made by the old Commissioners, a fair and honest election would be held. General Canby further assured the Committee that he had obtained from these Commissioners the promise that they would appoint a Democratic judge and clerk at each of the polling places and urged the Committee to furnish such list at once. This was all that the Committee had asked and with this assurance they were well content. . . . A list of judges and clerks which had already been prepared was immediately taken by Mr. John T. Ford and General John W. Horn to the office of the Commissioners in the Old Assembly Rooms. . . . But these gentlemen, after being kept waiting for some time in an ante-room, were finally refused admission to the presence of the Board and were informed by one of its counsel through a half-opened door that the judges and clerks of election had been appointed and that no changes would be made. The door was then closed in their faces. In the meantime General Canby had returned to Washington, whither General Grant had already preceded him on an earlier train. There was no redress. . . . General Grant in his interview had made it quite plain to the Governor and to the Democratic Conservative Committee, that in his opinion Federal interference was unnecessary."[72]

In this connection it is only fair to say that the American of November 6 stated that the old board of police commis-

[72] Nelson's Baltimore, 561–562. It will be remembered that Mr. Knott was a member of the Democratic state executive committee.

sioners told General Grant,[73] in reference to his proposed compromise, that they had invited the Conservative party to furnish a list containing the name of a judge of election for each precinct, but they had declined, saying that they would wait until it was decided whether or not Swann's commissioners would have charge on election day. If Young and Valiant were not in power, they would then hand their list to the old board.

The election took place on Tuesday, November 6, and in spite of all their efforts, the Radicals were overwhelmingly defeated in both city and State. Contrary to expectation, the day passed in comparative quiet, there being "little or nothing more of incident than is common on such occasions."[74]

Out of a total of 24,346 registered voters in Baltimore City, a vote of 16,006 was cast, Bruce (Republican) polling 7493 and Leonard (Conservative) 8513.[75] Throughout the State, in a total vote of nearly 70,000, Leonard's majority was about 13,000. The Democrats and Conservatives elected Hiram McCullough, Stevenson Archer, Charles E. Phelps and Frederick L. Stone in the first, second, third and fifth congressional districts respectively, while the Republicans could console themselves with but one district, the fourth, in which Francis Thomas was reëlected.

The rout of the Radicals extended to the legislature, where the Conservatives would have a two-thirds majority

[73] This must have been either late on the night of Sunday, Nov. 4, or very early the next morning.

[74] This is quoted from the Sun of Nov. 7, which would have been quick to note any disorder. Gen. Charles E. Phelps, Conservative candidate for Congress at this election, recently showed to the writer one of the Democratic-Conservative tickets used at the polls in Baltimore. The following was printed at the top, "National Union Ticket, Opposed to Negro Suffrage," and underneath a small picture of a man nailing a United States flag to a mast.

[75] Both Knott (Nelson's Baltimore, 562–563) and Scharf (III, 684–685) state that large numbers of Conservatives, fearing violence, remained away from the polls. On the other hand, John W. Bear, in his "Life," published in Baltimore, 1873, says (page 236): "The Johnson men threw out the hint that every man in the Custom House who had voted the radical ticket would be turned out the next day."

in both houses during the coming session. It was a "quiet revolution," and Maryland was about to "reconstruct" herself on a basis which has lasted almost intact up to the present time.

On the evening of Wednesday, November 7, the day after the election, a crowd collected in Monument Square and then marched to the house of Governor Swann on Franklin Street. The governor came out and in response to vociferous cheers said, among other things of more or less importance:—

"I think it is due to the President of the United States to say that amid all these complications, I have had his countenance and support. . . . When General Grant came here, he came in his individual capacity, and not as a military man. . . . All that I can say in regard to the military preparations which were made for the purpose of protecting this community against riot and bloodshed, is that they were freely and readily made by the President of the United States."

He further stated that he hesitated to use troops, and that the Conservatives had won a great victory for unity and harmony in the state and nation.[76]

Of course the Radicals realized that they owed their defeat to Thomas Swann more than to any other man, and they continued to express their hatred and contempt for him, both as a man and as governor. They persistently reverted to the subject of the United States senatorship, and as appeared later, there was undoubtedly good cause for their doing so.

After the election had taken place, the Frederick Examiner of November 14, 1866, commented as follows:—

"We were betrayed by Governor Swann, who stopped short of no species of villainy which promised success to the unholy plot he conceived to wrest from loyal men the power placed into their hands by their unswerving adherence to the government that traitors, from without and within, endeavored to destroy."

It is now necessary to revert to the case of the police commissioners which we left at the point where Young and

[76] American, Nov. 8, 1866.

Valiant were committed to jail, in default of bail, and were compelled to wait till after the election for the return of the writ of *habeas corpus*. This return was made on November 8, and on Tuesday, November 13, one week after the election, Judge Bartol gave his decision, establishing their right as commissioners from the day of their appointment. He also affirmed that "the Criminal Court had no power to pass such an order, or to commit the parties to jail for refusing to comply with it," and that "such commitment can furnish no legal cause for their detainer."

Governor Swann's opinion on this matter, as expressed by him in his message to the legislature at its next session,[77] was that

> "the power attempted to be exercised by the Judge of the Criminal Court is believed to be without precedent; ignoring alike the Great Seal of the State, and the limitations governing his judicial functions. I refer to the proceedings to show how far I have been sustained in the discharge of my official duty. Representing, as I did, the sovereignty of the State, as well as the power specifically delegated to me, in the recess of the Legislature, I held myself responsible only to your Honorable Body for the course which I deemed it my duty to pursue in the removal of these delinquent officers."

After Judge Bartol had rendered his decision, Young and Valiant entered into their own recognizance in the sum of $5000 each, on the charge of conspiracy, and were then discharged. They immediately went to their office on North Street and sent a written notice to Mayor Chapman, in which they informed him of their entrance upon the performance of their duties as commissioners, under judicial sanction, and invited him to attend, as ex officio member, a meeting of the board to be held that afternoon at five o'clock.

Although the mayor did not appear, the other two members held the meeting, and organized by electing Young president. They notified Thomas H. Carmichael, marshal of police, to report forthwith for orders. He obeyed, and

[77] Docs. of House of Delegates, 1867, Doc. A.

asked for an hour's time for consideration. This was granted, and the marshal finally submitted, the police force following his example. The following day (November 14) another demand was made upon Hindes and Wood for all the property of the police board still in their possession. They returned an answer late in the afternoon, promising to hand over everything the next day, and this was done. The excitement, which had continued up to this time, soon abated, and the Conservative victory was won.[78]

Before closing this chapter, it is only fair to quote from an editorial defense of Hindes and Wood, published by the American on October 31, during their trial. Said that journal:—

"If the police commissioners admitted the Governor's right of removal, and yet refused to submit to his decision, then the Governor would be justifiable in employing force to compel their obedience. But, so far from disobeying any law or judicial process of the State, they openly avow their willingness for a constitutional trial, and, if found guilty, to submit to the penalty inflicted, whatever that penalty may be. They wish to violate no law. The only question with them is, shall they servilely submit to the mandates of Governor Swann, or protect themselves, like citizens conscious of their rights, under the Constitution and laws, against every wrong and usurpation. They choose the latter."

[78] For full particulars of the matter of the police commissioners see Scharf, III, 680, 686; Nelson's Baltimore, 558–563; House Docs., 1867, Doc. A; Senate Docs., 1867, Doc. I, the latter a full and impartial report by the new commissioners. The daily papers contain full reports of the contest, the evidence submitted by both sides, etc.

CHAPTER IV.

The Reform Legislature of 1867.

The General Assembly of Maryland met in regular session at Annapolis on January 2, 1867. The Democratic-Conservative party in the State felt that it had now come into its own, for with a two-thirds majority in each house, and a man of the same political views as executive, it was free to repeal all legislation which remained as a legacy from Civil War conditions. It could reconstruct the government and laws according to its own ideas of what was proper and expedient.

A large part of Governor Swann's message[1] was taken up with the discussion of the affair of the police commissioners and has been already quoted.[2] The message also contained many suggestions and recommendations, which are interesting in the light of contemporary events.

The first of these suggestions was that the legislature look into the question of a new election for mayor and city council of Baltimore. Said the governor:—

> "Of one thing I am strongly convinced, that a continuance in authority of men profiting by their own wrong, forced upon the people, in opposition to the will of more than three-fourths of the qualified registered voters of the city, and by armed combinations of irresponsible officials holding their commissions from the Board of Police, would be a libel upon free government, and a gross and flagrant injustice to an outraged people." He also desired that safeguards should be thrown around the city treasury, to "check the wasteful expenditure which is already beginning to startle the tax-payer."

An act to provide for the organization of a state militia was next urged, and Governor Swann then proceeded to discuss the question of the negro population of Maryland,

[1] House Docs., 1867, Doc. A.
[2] See page 78.

stating that he regretted "to be obliged to refer in this place to the persistent efforts which . . . we are so often called to witness, to bring discredit upon the State of Maryland in her relations with the negro population." He denied any outbreaks of violence or any bad treatment of the negroes,[3] and continued:—

"I have felt encouraged by the general harmony which prevails between the races, and the total absence at this time of any serious disagreement, growing out of the recognized standard of wages or any other exciting cause. . . . The recent discussion in the House of Representatives, in reference to the political disabilities imposed by our laws upon the colored race,[4] can hardly be recognized as dealing fairly with the subject to which reference was made, with so much unnecessary bitterness. There is no disposition in this State, so far as I am informed, to interfere with the civil rights of the negro, and all laws in conflict with them I sincerely hope will receive your prompt attention. . . . The effort on the part of a class of extreme men, to turn to party account occurrences so insignificant in themselves, and susceptible of such conclusive explanation, is only to be accounted for, as connected with the attempt already foreshadowed, to include Maryland in the list of revolted States, awaiting the fiat of territorial subjugation. . . . In committing the unpardonable sin of denying to the negro the privilege of suffrage [Maryland] stands by the side of others of her sister States of the North, not less criminal than herself, and certainly as uncompromising and obstinate in their settled convictions upon the subject."

The governor opposed the Fourteenth Amendment, and further, agreed with President Johnson's idea that negro suffrage should be left to the States. He also approved the President's plan of reconstruction. Finally, he advised the calling of a convention to formulate a new state constitution at an early day, and concluded as follows:—

"If I have saved your State from threatened invasion by men who were ready to plunge it again into the horrors of civil war, and the not less disreputable machinations of revolutionary agitators in your midst—If I have turned back the current of a bitter and

[3] The Sun of Jan. 11, 1867, also denied the stories of ill-treatment of negroes in Maryland.

[4] For a discussion of the general question of the Federal relations of Maryland at this period, see pages 103–110, 129–131.

unforgiving party rancor which threatened the very existence of your political and social fabric—if I have restored to the people of my State their just rights under their Constitution and laws, I may congratulate myself that my administration thus far has not been without its fruits, in maintaining the supremacy of the laws—the freedom of republican institutions, and the credit of Constitutional Government."

The Senate was called to order by the lieutenant-governor, Dr. Cox, who made a few remarks, in the course of which he spoke of Maryland as the first State to shake off slavery, "the incubus so stifling to her prosperity, . . . although she is unprepared now, as she will ever be, for the adoption or sanction of any measure tending to so absurd and revolting a result as the social equality of the races." He favored giving to the negroes the right of testifying in the courts.[5]

The House of Delegates organized the next day (January 3), and elected Oliver Miller, of Anne Arundel County, as speaker by a vote of 57 to 18 for all others. Miller was an able man, and had been prominent in the councils of the Democrats during the preceding years. In accepting the office he spoke against the reconstruction policy of Congress, and in favor of that of Andrew Johnson. The Democrats asserted that this legislature was the first one in several years which in reality represented the will of the people of Maryland,[6] and the popular approval of their work as shown by the succeeding elections in April and November, 1867, tends to prove this claim.

The following resolutions, offered by Marriott Boswell, of Baltimore City, in the House of Delegates were passed by the legislature during the month of January. They showed the opinions on national and state politics of the Democratic-Conservative members of the legislature to be as follows:—

[5] Senate Jour., 1867, 4.

[6] Sun, Jan. 2, 1867. Scharf, III, 689, says: "Very many of the members of both Houses were gentlemen of the highest character and of great political experience, and the majority of the Legislature unquestionably represented the feelings, convictions and views of at least seven or eight-tenths of the people of the State." The present writer is strongly inclined to doubt this last statement.

"Resolved by the General Assembly of Maryland, That in their judgment the policy heretofore announced, and up to this time consistently maintained by the President of the United States, upon the question of the right of the excluded Southern states to their Constitutional Representation in Congress is just, wise and statesmanlike, and is the only practicable mode by which the Union, as created and recognized by the Constitution, can be restored. Resolved, That the General Assembly recognizes in the action of his Excellency, Thomas Swann, in support of this policy of the President of the United States, and in the just and liberal execution by him of the existing Registry Law of this State, a concurrence with the sentiments of a great majority of the people of this State, and a proper recognition of their inalienable right to participate in its Government by the exercise of the elective franchise."[7]

No time was lost in getting to work, and a series of measures followed which aimed to complete the political transformation of the State. The most important act restored to full citizenship and the right to vote and hold office all persons deprived thereof by the fourth section of Article I of the constitution of 1864. This same section had provided that any disqualified person might be "restored to full rights of citizenship by an act of the General Assembly passed by a vote of two thirds of the members elected to each House," and in accordance with this a general bill applying to all the disfranchised citizens was passed by the House of Delegates, after futile opposition on the part of the minority, by a vote of 59 to 19. The Senate passed the same bill by the vote of 16 to 7. The minority here attempted to amend the act by excepting from its provisions all those who had been members of the Confederate army or navy, but were defeated by the same vote. This bill secured to the political outcasts the vote which had hitherto been theirs only by the grace of Thomas Swann and his election officials.[8]

Further legislation was as follows: (1) a bill which repealed Article XXXV, Section 9, of the code of public gen-

[7] House Jour., 13, 28–29, 79–80. Senate Jour., 22, 23, 35, 42. The vote on these resolutions was, House, yeas 47, nays 17; Senate, yeas 13, nays 4.

[8] House Jour., 1867, 38, 51–55, 87–88; Senate Jour., 101–104.

eral laws, thereby relieving judges of election from the necessity of taking the "iron-clad" oath of the constitution of 1864, and substituting therefore merely an oath of allegiance;[9] (2) a bill which repealed the act passed by the legislature of 1864 requiring jurors to take the test oath,[10] and finally (3) a new registration law which required that the election officials and voters should take either the oath prescribed in the constitution of 1864 or a simple oath of allegiance, in conformity with the recent act restoring to full citizenship and right to hold office those deprived thereof by the constitutional provisions. It further required that the judges of election must register all persons qualified to vote, and duly receive and count all votes of such persons registered, and in addition these officials were given the powers of justices of the peace and of sheriffs, that they might issue summons to witnesses. Finally, it required that the judges of election take the vote of the Maryland soldiers and sailors in the national service.[11]

Another important act, but of a somewhat different character, provided for the organization and discipline of a state militia force. This measure passed both houses of the General Assembly on the same day (March 22).[12] The militia law of 1864 had expired by limitation on March 1, 1866, and the legislature at its special session held that year failed to deal with the question. It is said[13] that there was no great opposition to such a force, but that the people merely thought it was unnecessary. In fact, Maryland was for some years under the military government of the United States, for the provost-marshal's office did not cease to exist in Baltimore till January 31, 1866. The events of the preceding November had now evidently awakened the people to a realization of the danger of such a defenseless situation,

[9] House Jour., 285, 314, 800, 926; Senate Jour., 512, 535, 561.
[10] Senate Jour., 153, 201, 235, 813; House Jour., 436, 1137–1138.
[11] House Jour., 503, 625, 627, 919; Senate Jour., 426, 429, 559.
[12] Senate Jour., 794; House Jour., 1117.
[13] Authority of Gen. F. C. Latrobe. There was, perhaps, during the early part of 1866, a temporary opposition to a militia force as dangerous in time of peace.

and the General Assembly followed the recommendation of Governor Swann.

The committee of the House of Delegates on federal relations handed in a majority report on February 21, resolving that the State of Maryland had a good, valid and just claim upon the government of the United States for "reasonable and adequate compensation" for the loss of property coincident with the emancipation of the slaves in 1864. This claim was of course based upon President Lincoln's message of March 6, 1862, and the congressional resolution of April 10 following.[14] The report further suggested that the legislature should provide means for perpetuating the proof of slave ownership.[15] On the other hand, the minority handed in a report on March 1 protesting against compensation, and added a resolution that if perchance any such national appropriation should be made, the money should be used for the benefit of the widows and orphans of Union soldiers of Maryland, and further, that a record should be kept of the destruction, by Confederates, of the private property of loyal citizens of the State.[16] Needless to say, this latter report was overwhelmingly defeated and that of the majority adopted.[17] It is interesting to note that although the Senate also had passed a bill to preserve lists of emancipated slaves, it failed to endorse the action of the House, so the matter was allowed to drop on the last day of the session.[18]

The fourteenth amendment to the Constitution of the United States was passed by Congress on June 13, 1866. It was received by the General Assembly of Maryland at this session, and referred to a joint committee of the two houses, which rendered both majority and minority reports. That of the majority opposed the adoption of the amendment. It began with a long discussion of the subject of reconstruction, claimed that the amendment would interfere

[14] See my Maryland Constitution of 1864, 11.
[15] House Docs., 1867, Doc. EE.
[16] House Docs., 1867, Doc. H.
[17] House Jour., 513–515, 657–658, 1121–1122.
[18] Senate Jour., 502, 523, 606, 780, 806; House Jour., 973, 1091.

with states' rights, and also that it did not pass Congress by the required two-thirds majority, because the Southern States were not represented in that body. The report further insisted that Section 3 of the amendment, which provided for the punishment of ex-Confederates, was an *ex post facto* law, and *that neither Congress nor the Maryland legislature was permitted to pass it,* since it was prohibited by both the national and the state constitutions.[19] In addition, the report also made a long argument for the Southern view of states' rights and secession, and stated that there was "reasonable ground for believing that the seceding States were honest and sincere in their convictions, although they led them to such disastrous results;" hence, in punishing the South, the question of intention should be considered in mitigation of the crime. Finally, protesting against Section 4 of the proposal, which prohibited any compensation for slaves by State or by nation, it was resolved that the General Assembly refuse to ratify the Fourteenth Amendment, and that a copy of the resolutions be sent to the secretary of state of the United States, and to the executive of each State of the union. The report was signed by Isaac D. Jones, of Somerset, A. Leo Knott, of Baltimore City, Richard B. Carmichael, of Queen Anne's, Oden Bowie, of Prince George's, George Vickers, of Kent, Levin L. Waters, of Somerset, and Alfred Spates, of Allegany. Any person familiar with the Maryland of that day will at once appreciate the weight and influence carried by these names.[20]

The minority report, which recommended that the amendment be ratified, was rejected, and on March 23 the Senate adopted the majority report by the vote of yeas 13, nays 4. The House of Delegates did the same by the vote of yeas 47, nays 10.[21] The State thus refused to grant citizenship to the negro, but as a concession to public opinion an act was passed during January by a large majority in

[19] The italics are mine. Of course this reasoning was false.
[20] House Docs., 1867, Doc. MM; Senate Docs., Doc. X.
[21] Senate Jour., 808; House Jour., 1140–1141.

both houses, which prohibited the sale of negro convicts.[22]

Before passing to a consideration of the subject of greatest importance to the Conservatives, that of the call of a constitutional convention and the attendant complications with Baltimore City politics, there must be recorded the attempt of the Democratic-Conservative members to carry out their part of the agreement made with the friends of Governor Swann the year before, to elect him to the United States Senate. The General Assembly in the course of its legislation had very extensively carried out the recommendations of the governor's message. This full political concord, which seems to have extended to national issues also, was another reason for the selection of Swann by the Conservative forces.

In consequence of the agreement, the two houses met in joint session on January 25, 1867, and on the seventh ballot chose Thomas Swann to be senator in succession to John A. J. Creswell. The law which required that one of the senators should be a resident of the Eastern Shore of Maryland was repealed just before this election, and reënacted afterwards.[23]

On Thursday, February 7, the senator-elect attended a banquet given in his honor at the Continental Hotel, Philadelphia, by conservative men of all parties. He delivered a long speech on this occasion,[24] in the course of which he said that the reason for his "split" with the Radicals was the question of "forced negro suffrage,—upon the right of the general government to interfere with the States in the administration of their domestic affairs." Governor Swann denied any underhand dealing in winning the senatorship, saying:—

"They charge me with having thrown the whole energy of my character into a contest in which I had no more part than the

[22] Scharf, III, 694; American, Jan. 28, 1867. See also Gen. Charles E. Phelps' statement in Cong. Globe, 2nd Sess., 39th Cong., 1866–7, Pt. I, p. 619.

[23] House Jour., 101, 128, 133, 150, 159, 170, 178; Nelson's Baltimore, 571. The other senator at this time was Reverdy Johnson, also of Baltimore.

[24] Reported in the Sun for Feb. 12, 1867.

gentlemen who stand before me tonight. That man is not to be found in the State of Maryland who will come to me and say that I ever approached him in the interest of the high position to which the State of Maryland has elected me. . . . I ask no favors. I go to the Senate with a clean record, with a record such as no man can justly assail, and of which I have reason to feel proud."

Difficult indeed would it be to reconcile the many conflicting statements respecting this senatorial election. Swann evidently made some sort of an agreement with the Democrats concerning the office, and was now prepared to take refuge in equivocation. Perhaps he saw some difference between "approaching" a man, and allowing one's friends to have a definite understanding upon a certain subject, but the Radicals failed to discern it.

Not long after this election new complications began to arise. As soon as the governor resigned from office in order to enter upon his duties as senator, Lieutenant-Governor Christopher C. Cox would become his successor. Dr. Cox had at one time during the preceding year wavered in his political allegiance, even going so far as to preside over the large Democratic-Conservative mass-meeting at the Maryland Institute on February 26, 1866;[25] but he had returned to the Radical party, and was now on good terms with its leaders. The Republicans were quick to seize their advantage. With the executive office again in their hands they might perhaps after all save their cause in Maryland. The Congress of the United States in both branches was now completely in the hands of the Republicans, so a clever scheme was planned by the Radicals in Maryland, of which Dr. Cox seems to have been only partly informed. A definite understanding with the Washington leaders was reached, according to which Swann was to be prevented by the Republican senators from taking his seat in the upper house, and in case this matter should not be settled by the Senate before the legislature adjourned, Dr. Cox would have the opportunity to appoint a Republican to fill the vacancy *ad interim*. It is considered probable that Cox knew

[25] See page 51.

nothing of this part of the arrangement, hence his subsequent denial of complicity was honest. The Radicals in Maryland seem to have feared that the new governor might pursue an erratic course while in office, so they decided that John T. Graham of Baltimore City should be appointed secretary of state, in order to "keep an eye" on Cox, and the latter was induced to make a promise to appoint him.

Dr. Cox is another man who was praised by his friends and vilified by his enemies. The writer has talked with a number of those who knew him personally, and the consensus of opinion is that he was clever and brilliant, but lacked balance. He was a graduate of Yale College, a successful practicing physician, and above all an ambitious man. Honest and well-meaning, of fine presence and courtly manner, he had little or no executive ability, while his excessive vanity and limited discernment caused him to be easily "used." There was a certain following of people in the State which was attracted to him but did not appreciate his limitations. His abilities were "showy" rather than solid. He desired the nomination for governor in 1864, but when it was given to Swann, accepted that of lieutenant-governor.

Meanwhile, the Conservatives found out what was going on, for Major Edward Petherbridge, of Baltimore City, turned traitor to the Republicans and informed the Democrats that Swann would not be seated in the Senate.[26] The latter had already intimated his acceptance of the senatorship, and had fixed upon Tuesday, February 26, 1867, as the date of his resignation and retirement from the office of governor. Both houses of the General Assembly thereupon made arrangements for the inauguration of Dr. Cox on that day.

Mr. A. Leo Knott gives valuable information as to what took place among the Democrats.[27] It appears that late on the evening of February 22 Washington Bonifant, United

[26] Authority of Mr. John T. Graham of Baltimore, who, in conversation with the writer, bore witness to the truth of this statement.
[27] Nelson's Baltimore, 571.

States marshal for Maryland, brought news from Montgomery Blair in Washington, of rumors which were current in that city in regard to what was scheduled to take place when Dr. Cox became governor.

1. Swann was to be refused admission to the Senate on the ground that his election was the result of a bargain with the disloyal element in Maryland, and also that it had been a violation of the spirit if not of the letter of the Eastern Shore law when Swann was elected senator.

2. The vacancy caused by his debarment was to be filled by the appointment, by Dr. Cox, of John A. J. Creswell.

3. Dr. Cox was further to use his influence against the enactment of a constitutional convention bill, or against carrying it into effect in case the legislature should pass such an act, and "to that end aid would be given him from Washington even to the extent of sending troops of the United States into the State."

Blair further stated that Dr. Cox had been in Washington for a week, and to his positive knowledge had two interviews, each of some length, with Secretary Stanton at the war office.[28] Mr. Knott adds that Governor Swann told him that he (Swann) had been nettled by lack of support on the part of some of the Democrats,[29] so Judge Richard B. Carmichael and Philip Francis Thomas called upon the governor at the executive mansion in Annapolis on Monday, February 25, in order to allay his irritation.

The present writer has it on the best authority that Swann sent John M. Carter, his secretary of state, to Washington to inquire into conditions there, and must have been satisfied of at least the partial truth of the reports, for Mr. Knott says further:—

[28] Mr. John T. Graham states that Montgomery Blair was largely correct, that there was an understanding (not a bargain) between the national and state Republican leaders according to which the above arrangement was to be carried out, but he doubts the truth of the report that the support of United States troops was promised, saying that, according to his knowledge of the affair, no mention was made of any military aid from Washington.

[29] It will be remembered that it had taken seven ballots for the General Assembly to elect him.

"After fully weighing the matter the Governor, late on the evening of Monday, the 25th of February, invited several of his friends, members of the Legislature, to the executive chamber and informed them that he had concluded to defer his retirement from the office of Governor for the present, and that the inauguration of his successor would not take place on the day following."

Meanwhile Dr. Cox seems to have felt certain that he was to become governor. He visited the executive mansion in Annapolis and told General F. C. Latrobe and Adjutant-General Berry where he intended to place the furniture of the house, and how he would arrange it.[30] It is said that on the morning of Tuesday, February 26, his family and also many of his friends from the Eastern Shore were in Annapolis to attend the inauguration. He may have gotten a hint that trouble was brewing, but hoped against hope that all would turn out well at last.

However, when the Senate was called to order on the day appointed (twenty-sixth), he laid before it the following letter from Governor Swann, which he had just received:—

"EXECUTIVE DEPARTMENT,
"February 26, 1867.

"To LIEUT. GOVERNOR C. C. COX,

"*Dear Sir:* Having informed you of my purpose to resign the position which I now hold as Governor of Maryland, on the 26th (this day), I now state, in order that it may be communicated to the Senate, to whom the announcement has been made, that I do not feel at liberty to take this important step, without further time for deliberation. I shall communicate with the General Assembly at as early a day as practicable, upon this subject.

"With great respect,
"Your obd't servant,
"THOS. SWANN."

Dr. Cox then made the following dignified statement:—

"Senators: in connection with this proceeding, the chair desires to present a simple statement due to himself, the Senate and the public. On Tuesday last, just one week ago, he was sent for by his Excellency, who read to him his letter resigning the Governorship of Maryland, which he took occasion to notify him would be sent in on Tuesday, 26th inst., to take effect on and after that

[30] Authority of General Latrobe himself.

date. This was accordingly, and with his permission, announced to the Senate, on the same day on which the communication was made, and a committee appointed to institute the proper arrangement for the public ceremonies of installation. These progressed and were perfected in good faith. The Chair was in conference with his Excellency, yesterday, but had no reason to anticipate any change in the published proceedings, but on the contrary, was reassured of the certainty of his Excellency's resignation, at this hour today, as previously determined upon; nor was any intimation or knowledge of a different purpose furnished to the Chair, until an hour and a half ago, when the letter just read was received by the hands of Mr. Leary, the Private Secretary. I have deemed, Senators, this simple announcement of facts eminently proper on this occasion, in order that no misapprehension may arise as to the relation of the Chair, or the body over which he has the honor to preside, to the existing disappointment. The onus of explaining to the Senate and the public the cause of the failure of the *programme,* at so late an hour, will rest where it properly belongs."[31]

On March 1 Governor Swann formally declined the election to the Senate in a communication addressed to the General Assembly. He stated that he had intended to accept, since the office had been conferred, "as is well known to the members of the Legislature and my friends throughout the State, without any agency or solicitation on my part." He also said that lately he had been "visited by such appeals from the representative men of the State, urged with an earnestness and unanimity which could hardly be mistaken, who begged him to retain the executive office that he bowed to their judgment that his paramount duty was to the State."[32]

In reply, the legislature passed joint resolutions of appreciation of his action as "an evidence of the same devotion" to the welfare of the State "which has in the past earned for him its highest honours, and will in the future more strongly commend him to the confidence of the people." Also that they were "fully impressed with the opinion" that he had "but complied with the general wish of

[31] Senate Jour., 264, 306–307; also see American, Feb. 27, 28, March 1 and 2, for various rumors about the withdrawal of his resignation by Gov. Swann.

[32] House Jour., 649–650.

the people of Maryland."[33] Finally, on March 12, 1867, Hon. Philip Francis Thomas was elected senator on the first ballot.[34]

Said the American of March 2:—

"The Radicals of Maryland have this to rejoice over. They have driven Mr. Swann out of the Senate, and they have driven him into the Democratic party. Two things to be greatly thankful for."

On March 4, 1867, Dr. Cox stated in the Senate that various reports were being diligently circulated, which he had at first thought it unworthy to notice, but since they had now found their way into the public press, he judged it necessary to deny them. They were, first, that he had entered into a corrupt arrangement with certain parties (in the event of his accession to the governorship) to hand over the affairs of the State to the direction and control of the so-called Radical party, and secondly, that he had bargained corruptly (in the event of becoming governor) to substitute Creswell, now of the United States Senate, in the place of Swann, should the latter be rejected by that body. Dr. Cox made the request of the Senate that a committee of five be appointed at once to investigate these charges. This request was complied with, and on March 21 the committee reported that they had investigated the matter and had

"failed to elicit any tittle of evidence to sustain such a charge. . . . In an interview which your committee held with the chief Executive officer of the State, that officer distinctly disclaimed having based his recent action upon any supposed credibility of these injurious charges, but asserted, on the contrary, that his course had been dictated by high motives of State policy. Your committee have endeavored in vain to find any one who could venture to assume the responsibility of any of the slanderous insinuations above referred to. . . . The unexpected declination by Governor Swann of a high and coveted honor, to which his friends had considered

[33] House Jour., 650–651, 670; Senate Jour., 378.

[34] House Jour., 841; Senate Jour., 559. Mr. Thomas was not permitted to take his seat in the Senate, on the ground of disloyalty, and Mr. George Vickers was elected in his place.

him entitled, and for which they had contended with energy and determination, occasioned a bewildering surprise throughout the State,"

hence various conjectures and charges naturally arose. This report was unanimously adopted by the Senate.[35]

General F. C. Latrobe of Baltimore states that although Governor Swann was very ambitious to become senator, he gave up the office as an act of patriotism and self-sacrifice, for the good of his party and the State of Maryland. He also desired to keep Dr. Cox from becoming governor, and feared that perhaps he would not be permitted to take his seat in the Senate.[36] The Conservatives had carried out their part of the agreement, no matter with whom it had been made, and it was through no fault of theirs that plans had miscarried.

It was the almost unanimous opinion of the Democratic and Conservative forces that the permanency of the reforms made could not be guaranteed or the entire reconstruction of the State completed unless an entirely new constitution were drafted. Governor Swann recommended such a step in his message, and the legislature promptly entered upon its accomplishment.

It is a curious fact that each one of the constitutions formed for the government of the State of Maryland was made in an illegal manner.[37] The constitution of 1867 was no exception. The instrument of 1864 provided in Article XI, Section 2, as follows:—

"Whenever two-thirds of the members elected to each branch of the General Assembly shall think it necessary to call a Convention

[35] Senate Jour., 403, 411, 412, 730. Mr. Knott makes the following extremely partizan statement in regard to these charges against Dr. Cox (Nelson's Baltimore, 573): "There has never been since any reason or ground furnished to change or modify the opinion and belief at that time so generally and authoritatively expressed. On the contrary, subsequent events confirmed that opinion and belief." Mr. Knott makes no further effort to substantiate his statements.

[36] This statement was made by General Latrobe in a conversation with the writer.

[37] See, for example, J. W. Harry, Maryland Constitution of 1851, and my Maryland Constitution of 1864.

to revise, amend or change this Constitution, they shall recommend to the electors to vote at the next election for members of the General Assembly for or against a Convention; and if a majority of all the electors voting at said election shall have voted for a Convention, the General Assembly shall, at their next session, provide by law for calling the same. The Convention shall consist of as many members as both Houses of the General Assembly, who shall be chosen in the same manner, and shall meet within three months after their election for the purpose aforesaid."

When we come to describe the convention bill as finally passed by the legislature, we shall find that it definitely violated each one of the three requirements of the section laid down to control the proceedings in the matter, for a special election was held for the approval of the people, members of the convention were voted upon at the same time, and the representation was not the same as that in both houses of the General Assembly. Of course the Radicals were quick to attack the legality of the bill, and in answer to their opponents the Democratic-Conservative forces passed two series of resolutions through the House of Delegates, which contain some rather interesting vagaries in the realm of constitutional law.

The first resolutions were introduced on January 22, 1867, by Alexander Evans, of Cecil County, and passed February 7 by the vote of yeas 48, nays 17.[38]

"That to prevent anarchy, confusion and irregular unauthorized government, it is expedient that proposals to create, or to alter and amend a Constitution, should emanate from the Legislature.

"2d. That the power of the Legislature at any time, to refer to the people questions concerning the organic law, cannot be constitutionally limited, inasmuch as any limitation would deprive them of the power enunciated in the second Article of the Bill of Rights[39] as inalienable, and inasmuch as the Constitution might defer amendments to remote future time, or might render them impossible; and that one generation cannot, in this manner, bind future generations.

[38] House Jour., 144, 314–316.

[39] Article II of the declaration of rights of the constitution of 1864 reads as follows: "That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole; and they have at all times, the inalienable right to alter, reform, or abolish their form of government, in such manner as they may deem expedient."

"3rd. That subject to the limitation of the first resolution, the people can at any time change or alter the organic constitutional law; but that any attempt to do so by irregular unauthorized action by a portion of the people, would be of dangerous tendency and consequences."

The other resolutions were offered by C. C. Magruder, Jr., of Prince George's County, on February 7, and were also passed the same day, as follows:[40]—

"Whereas, the House of Delegates by their legislation, are engaged in measures of reform, touching the interests of the whole people of Maryland, and to that end are in supposed conflict with the Constitution of 1864; therefore we deem it proper to adopt and publish the following resolutions: . . . That we recognize the existing Constitution of Maryland, as the supreme law of the State, subject to Article 5 of the Declaration of Rights,[41] to which every citizen must yield obedience; but the people have at all times, an inherent and inalienable right to abolish or reform said Constitution.

"That revolutions by the people are always justifiable when their government has failed of its purposes, when 'life, liberty, and the pursuit of happiness' are endangered, and all constitutional provisions for their protection and rights are denied them.

"That we hold to the doctrine, that the three coordinate branches of the State Government of Maryland represent the sovereignty of the people thereof, and that all acts done by them, each in its respective sphere, in pursuance of constitutional authority, are expressive of the popular will; it follows, that the State of Maryland, in the future as in the past, guided by a spirit of public policy, will always endeavor to advance her own interests, as also that of her citizens, without regard to sections or localities.

"That the call for a Constitutional Convention, emanating from this Legislature, is in pursuance of the rights of reform under the existing Constitution; and all efforts to frustrate the wishes of the people for a change in their organic law are without their sanction and authority.

"That the Act already passed, enfranchising those citizens of Maryland, who under the Constitution are compelled to perform militia duty, pay taxes, *etc.*, but are deprived of the right of electors, is indicative of the sense of the people on the subject, and

[40] House Jour., 254–255, 316.

[41] "The Constitution of the United States, and the laws made in pursuance thereof, being the supreme law of the land, every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and is not bound by any law or ordinance of this State in contravention or subversion thereof."

we present the fact to [the] whole country, as evincing their desire to forget the late civil convulsions of the land, and to join in reciprocal endeavors to sustain the enduring fame of the commonwealth."

The House of Delegates, on January 3, 1867, the day upon which it organized, had appointed a committee of five men to meet jointly with a like number from the Senate in order to prepare a bill to take the sense of the people of the State upon the question of calling a convention to frame a new constitution. This bill was reported on January 10, and finally passed the House on February 6, by the vote of 54 yeas to 20 nays.[42]

The Senate received the measure from the House the same day, and on February 16 a majority of the committee on judicial proceedings reported the bill unfavorably, but the minority handed in a favorable report upon it as a "measure demanded by public sentiment and the exigencies of the State." The latter was considered after great delay, and being brought to a vote on March 9, was passed, yeas 15, nays 7. Lieutenant-Governor Cox at once declared the bill rejected, since by Section 2, Article XI, of the constitution of 1864 it must be passed by a two-thirds vote of all members elected, and it had failed to secure this number. An appeal from the decision of the chair was at once taken, and the action negatived by the vote of yeas 7, nays 14. After some further consideration the bill was finally passed only on March 20, when the required two thirds of all the senators elected voted in the affirmative.[43]

The delay was caused by dissension within the Democratic-Conservative forces, which threatened for a time to break the newly formed alliance. To understand these dissensions it will be necessary to retrace our steps to the first few weeks of the session of the legislature. The feeling against the Radical government of Baltimore was so strong that the General Assembly had decided to legislate the city officials out of office. With this object in view, a bill passed

[42] House Jour., 10, 12, 51, 276–279, 1053.
[43] Senate Jour., 158, 247, 510, 517–520, 540, 717.

the House of Delegates on January 21, and the Senate on the next day, which provided that a new mayor and city council should be elected on Wednesday, February 6, 1867, and that municipal elections were to be held in Baltimore regularly thereafter in the month of February instead of in the autumn. The newly chosen mayor was to assume office on February 13, one week after the election, and the city council in March.[44]

Meanwhile, the Baltimore City Council on January 22, 1867, the same day upon which the above bill passed the Senate, by a unanimous vote appropriated $20,000 to be placed in the hands of the mayor, with the instructions that he was to employ counsel and take the necessary legal steps "to test the validity of the action of the General Assembly, in their recent legislation, for the removal of the existing city government."[45] Henry Stockbridge and Archibald Stirling, Jr., were retained as counsel. On January 30, Judge Alexander, of the Circuit Court, upon the application of Allen E. Forrester and John N. Ing, granted an injunction against the mayor and city council, restraining them from spending or contracting to spend the money.[46]

Prior to this, a Democratic-Conservative city convention had met (January 25) and after sessions lasting altogether two days, nominated Robert T. Banks as its candidate for mayor.[47] Banks was of Democratic antecedents, and his nomination caused great dissatisfaction among those Conservatives who had lately allied themselves with the Democratic party, leading to discord and confusion among the members of the legislature, who must act together in order to preserve their two-thirds majority over the Republicans.[48]

In addition, the Conservatives were apprehensive that the Radicals might be successful in fighting the city bill before

[44] House Jour., 9, 46, 64, 89, 136; Senate Jour., 45, 46, 55, 76, 77, 80, 83–85; Sun, Jan. 23, 1867.
[45] Jour. and Proc. 1st Branch City Council, 1866–7, 234; Journal 2nd Branch, 137.
[46] Sun, Jan. 31, 1867.
[47] Sun, Jan. 28, 1867.
[48] See the statement of Wm. Kimmel, of Baltimore, in the State Senate on Feb. 6 as published in the Sun for Feb. 7, 1867.

the courts, since grave doubts of its constitutionality had arisen. It was found to be special legislation, and to be contrary to the general election law of the State which required a much longer notice of an election to be given. The Conservative leaders, in consideration of the legal and political questions surrounding the matter, wisely decided to abandon the bill, which was as yet unsigned by the governor, and it was repealed by the Senate on February 1 by the vote of 19 to 1, and by the unanimous vote of the House on February 4.[49]

However, the jealousies aroused in the Democratic-Conservative party by the nomination of Banks were not to be so easily allayed. Although it had been found at first that the necessary two-thirds majority could not be secured in either house, yet the repeal of the city bill caused the passage of the convention bill by the House of Delegates on February 6.[50] But unfortunately for the speedy success of the latter measure, certain residents of Baltimore continued to demand the removal of the Radical city officials, hence a new bill of the required character was introduced in the legislature by the Conservatives. This caused trouble in the Senate, where a deadlock was threatened.

Mr. Knott, who was a member of the House of Delegates from Baltimore City, gives an interesting account of the

[49] Senate Jour., 134–137, 147 (the single negative vote was cast by a Republican, Jacob Tome, of Cecil Co.); House Jour., 225, 235, 244; Sun, Feb. 2 and 5, 1867. Scharf, III, 691 (note), says: "At the session of 1868, the Legislature appointed a committee of investigation in regard to the alleged corruptions practiced . . . when the following facts were gleaned: Of the $20,000 appropriated by the City Council, Messrs. Archibald Stirling, Jr., Henry Stockbridge and Milton Whitney, the retained counsel of the Mayor, received $2,000 each; the remaining $14,000 was deposited with Alfred Mace, then clerk of the Superior Court, and what became of it could not be learned. Ex-Sheriff Wm. Thomson received $10,000 contributed by individuals and converted it to his own use. Of the $20,000 drawn out of the city treasury by the Mayor, $13,000 was reimbursed by means of assessments on office-holders and of subscriptions made by individuals of the radical party. The city brought suit for the remainder, and the claim was finally compromised." The present writer can find no records of this, and is strongly inclined to doubt the truth of the statement.

[50] See page 97.

way in which the matter was finally compromised. He states[51] that there were two members of the Senate who had become opponents of the convention bill on account of the controversy over the nomination of Banks, and without both of their votes the bill would fail of passage. At this time meetings were being held in Baltimore and delegations were visiting Annapolis, all urging the enactment of a municipal bill, even at the sacrifice of the convention bill. At last, the Conservatives of Baltimore were with some difficulty persuaded that without a new constitution all the reforms for which the allied party stood would perhaps be lost, and that a convention bill could be passed only by the sacrifice of the municipal bill. In addition, the promise was made by the Democrats that the latter measure would be incorporated in the new constitution when finally drafted.[52] To increase the danger to the Conservative cause, the Republican state central committee threatened that Federal aid would be invoked should the convention bill be passed, on the ground that the legislature was illegally elected in violation of the constitution of 1864 and of the registry law, it having been chosen by and being largely composed of disloyalists and "disfranchised Rebels," and that a call for a convention in disregard of the existing state constitution would be revolutionary.

Mr. Knott continues:—

"It was also boldly asserted that should such [a] convention assemble, a government under the Constitution of 1864 would at once be organized, and Frederick City, it was said, was selected as the place for its organization. This government would appeal to Congress for recognition and to the war department—then under the exclusive control of Secretary Stanton—for military support. . . . A caucus of the Democratic-Conservative members of the Legislature was . . . called, two weeks before the close of the session. In this caucus Mr. Knott offered the following resolution: 'Resolved, That the Democratic-Conservative members of the Legislature in caucus assembled, hereby pledge themselves to lay aside for the present every other measure of a political character, including the bill now

[51] Nelson's Baltimore, 566–576.
[52] See Article XI of constitution of 1867.

pending in the Senate for a special municipal election in Baltimore, and to postpone all private business; and to devote the remaining part of the session, if necessary, to the passage of the convention bill and of the military bill for the organization of the militia of the State, to the prompt passage of which measures we hereby pledge ourselves.' This resolution was adopted with great unanimity, after a brief discussion, in which the absolute importance of these two measures was explained and insisted upon. These two bills were immediately put upon their passage and carried through the Legislature, the two recalcitrants in the Senate having been won over by the sacrifice of the Baltimore municipal election bill."[53]

The convention bill as finally passed provided as follows: An election was to be held on the second Wednesday in April, 1867, at which

"every person entitled to vote for delegates to the General Assembly [should] vote on the question of a call for a convention, to frame a new constitution and form of government, with a clause therein prohibiting the Legislature from making any law providing for payment by this State for persons heretofore held as slaves."

At the same time, members of the convention were to be voted for, to have the same qualifications as then required for membership in the House of Delegates. It was at first proposed in the legislature to have the representation in the convention based upon the legislative representation provided by the constitution of 1851, on the ground that the constitution of 1864 had been adopted at the point of Federal bayonets and not by the will of the people of the State. This idea was finally dropped as unfair to Baltimore City, whose representation would be made unduly small, so it was decided to take as a basis the representation contained in the existing constitution with some slight modifications, which gave an aggregate of fourteen more members to the counties of the Eastern and Western Shores, where the Democratic party was especially influential.[54]

[53] It should be mentioned that both houses on March 8 passed a bill by which the General Assembly (in joint session) was in future to elect a board of three police commissioners for Baltimore City. Those chosen at this session were Lefevre Jarrett, James E. Carr, and Wm. H. B. Fusselbaugh (Senate Jour., 508; House Jour., 813–814, 928–929).

[54] American, Apr. 2, 1867; Nelson's Baltimore, 566. See the state-

It was further provided that the governor of the State should declare the results of the election by proclamation, and in case the vote was favorable, the convention should assemble at Annapolis on the second Wednesday of May, 1867. Its members were to take the same oath as to the discharge of their duties as then required of members of the House of Delegates, their pay to be five dollars *per diem* and mileage, and the sessions to continue till the duties were discharged for which the convention was called. The power to judge of the validity of the election and of the qualifications of its members was given to the convention, and it was to prescribe the time, the rules and the regulations according to which the constitution and form of government that should be made were to be submitted to the voters of the State for its adoption or rejection. No clergyman of any denomination, no senator or representative in the Congress of the United States, no judge of a state court, no clerk of any court, no state's attorney, auditor, register of wills or any sheriff was eligible to membership in the convention. Finally, the governor was to receive the returns of the votes cast for or against the new constitution, and if the same were adopted, he was to issue a proclamation declaring the fact, and to take such further steps as the constitution might provide, in order to carry the same into effect.[55]

The General Assembly adjourned on March 23, 1867. As we have seen, it changed radically the political conditions in the State as they had existed at the close of the Civil War. During this period the Republicans had been by no means quiet. The account given above of their actions in regard to the senatorship, the municipal bill and

ment of Francis Thomas in the House of Representatives on March 28, 1867 (Cong. Globe, 1st Sess., 40th Cong., 1867, 415–419). The following fourteen counties were each given one additional delegate—St. Mary's, Kent, Calvert, Charles, Talbot, Somerset, Dorchester, Prince George's, Queen Anne's, Worcester, Caroline, Montgomery, Howard and Anne Arundel.

[55] The complete text of the bill may be found in the Sun for March 22, 1867, also in Proceedings Maryland State Convention, 1867, 38–41.

other matters is ample proof of the fact. They were resolved not to give up the fight without an effort to regain the lost ground, and realizing the utter helplessness of their party at the ballot-box, they began to look to Washington for aid. The national government was now almost completely in the hands of Thaddeus Stevens, Charles Sumner, Henry Wilson, George S. Boutwell, Benjamin F. Wade and others of like views, backed up by large Republican majorities in both houses of Congress.[56] Surely they might be expected to lend a helping hand to their defeated Radical brethren who were right at the doors of the national capital!

As early as January, 1866, when the bill for the extension of the powers of the Freedmen's Bureau was under consideration in the United States Senate, Senator John A. J. Creswell desired that the provisions of the act be extended so as to include Maryland among the late rebellious States, saying that returned Confederate soldiers and other disloyalists were maltreating the negroes there, and sometimes even murdering them. Thereupon Reverdy Johnson, the senior senator from Maryland, vigorously denied this, saying that negroes were as safe in his State as in Massachusetts.[57]

Again, in December of the same year, after the Radicals had been overwhelmingly defeated in the State, Hon. Francis Thomas, of the fourth district, the sole Republican congressional candidate who had been elected in the face of the Conservative tidal wave, proposed to appeal to Congress to "reconstruct Maryland," on the ground that its government was not republican in form. The American said this would be a "patriotic and statesmanlike act" on his part.[58]

On January 21, 1867, Hamilton Ward, of New York, submitted a preamble and resolution in the House of Repre-

[56] See Dunning, Reconstruction, Political and Economic, 86–89.
[57] See the Sun, Feb. 1, 1866, for a report of the debate, as well as a strong article in support of Senator Johnson.
[58] See American for Dec. 4 and 19, 1866.

sentatives which stated that, in consideration of the fact that large numbers of disloyal persons had voted at the last election in Maryland, in defiance of the provisions of the state constitution, and because it was

"alleged that armed forces of the United States were ordered by Federal authority to, and did, cooperate with the executive of the State of Maryland and others who were engaged with him in overriding the constitution and laws,"

it was therefore resolved

"that the committee on elections inquire whether the laws were violated, whether the President used or threatened to use the military, [and] whether [it was] upon [the] requisition of [the] Governor of Maryland. . . ."

This was agreed to by the vote of 104 yeas, 35 nays, 52 not voting.[59] General Charles E. Phelps, of the third district, actively opposed the resolution, both speaking and voting against it. As a consequence, a day or so later both branches of the Baltimore City Council passed resolutions condemning his action in the matter as follows:—

"WHEREAS, it appears from the debates in Congress regarding the resolution of inquiry into the recent Maryland elections, that the Hon. Charles E. Phelps, . . . took it upon himself to assert that the proposed inquiry was not in accordance with the wishes of any great number of Union men of Maryland.

"Be it *resolved,* that the Hon. Charles E. Phelps has no authority to speak for the Union men of Baltimore, as his political connections are such as to prevent him from either knowing or representing their wishes.

"*Resolved,* that the thanks of the loyal people of Baltimore be, and they are hereby tendered, to the Hon. Hamilton Ward, for pressing his resolution of inquiry to a passage, and to the House of

[59] House Jour., 2nd Sess., 39th Cong., 204–206. Cong. Globe, 2nd Sess., 39th Cong., 1866–7, pt. 1, 619. Mr. Ward stated that he offered his resolution "at the instance of prominent Union men of the State of Maryland, they believing that their only remedy is an appeal to the Congress of the United States. They believe that the Executive of the State of Maryland, who in imitation of a higher example has been guilty of apostasy to his party and to the principles upon which he was elected, has handed over the Unionists, bound hand and foot, to the men who, by the Constitution of the State, were deprived of the exercise of the elective franchise, because they had been engaged in rebellion against the United States."

Representatives for the interest manifested in their affairs by its adoption.

"*Resolved,* that the exigencies of the times demand that the late rebellionists and present revolutionists of Maryland, who have acquired power through the treachery of Governor Swann, under the encouragement of President Johnson, should be prevented by the United States from consummating their revolutionary projects, which are fraught with danger to the State and to the country.

"*Resolved,* that in the measure inaugurated, and in part acted upon, by the Legislature of Maryland, the corrupt bargaining away of the rights of the people for a seat in the United States Senate, the unprecedented outrage upon the municipality of Baltimore by an act attempting to set aside certain provisions of its charter, the projected enfranchisement law, and the bill to call a new Constitutional Convention, . . . we recognize the same revolutionary and rebellious spirit which animated the same parties in 1861, and we believe it to be part of another organized Southern movement detrimental to the Union, and calculated to prevent any peaceful adjustment of pending national difficulties.

"*Resolved,* that, as the Constitution of the United States guarantees to every State a republican form of government, . . . that the people of Baltimore, and of the State of Maryland, are entitled to protection from the revolutionary purposes of the Governor and Legislature of Maryland."[60]

On the side of Congress it may be added that on January 29, 1867, the committee on elections was by unanimous consent discharged from further consideration of Ward's resolutions, which were referred to the committee on the judiciary. On March 2, following, the matter was dropped by vote of the House.[61]

On February 27, 1867, a Republican state convention was held in Front Street Theatre, Baltimore, with Dr. Charles H. Ohr, of Allegany County, as president. This convention passed resolutions which denounced the convention bill, then before the legislature, as unconstitutional and anti-republican in form, and demanded that no change be made in the existing constitution except by "impartial manhood suffrage without regard to color." Otherwise, the convention threatened an "appeal to Congress to provide

[60] Jour. 1st Branch City Council, 1866–7, 231–233; Jour. 2nd Branch, 141–143.

[61] House Jour., 2nd Sess., 39th Cong., 284, 609.

for the assembling of a convention in this State, on the basis of the reconstruction bill, and to organize a loyal State government with impartial suffrage."[62] We thus see that the Conservative leaders had been right in their prophecies, and that the Radicals did adopt the policies of their national brethren—negro suffrage and all.

However, none of these threats restrained the legislature, and it proceeded upon the course of legislation mapped out by its leaders, until it had finished its work and adjourned. So the Radicals undertook to carry out their plans, and formally made an appeal to the national government. On March 18, 1867, Hon. Francis Thomas submitted a resolution which was agreed to by the House of Representatives, and which provided that the judiciary committee should "inquire whether the people of Maryland have a State government republican in form, and such as Congress can, consistently with the requirements of the Constitution, recognize and guarantee."[63]

In addition to this resolution, Congress received also several direct appeals from the Radical party in Maryland. On March 25, 1867, a memorial from the minority members of the legislature was "respectfully presented," in which "the alarming condition of affairs in this State" was set forth as follows:—

> "The General Assembly of Maryland [is] about to adjourn after a session, . . . memorable for evil. . . . Elected in great part by the deliberate violation of the election law of the State, by the votes of men who were in active accord with the rebellion and whose hatred to the government rendered the presence of military force during the war necessary to prevent their active aid to the rebels in arms, and in spite of which they did give large aid in men and money, they have marked their session by a series of acts to which we desire to call your attention."

After mentioning the fact that there were 20,000 Maryland soldiers in the Confederate army, the resolutions continue:—

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[62] Sun and American, Feb. 28, 1867.
[63] House Jour., 1st Sess., 40th Congress, 61.

"These men have nearly all returned, and a large emigration from the South since the war has largely added to that number. By a doubtful construction of a clause in the existing Constitution this General Assembly, thus elected, has enfranchised all white men, no matter what treason they may have committed, and has thus added to the voting population about 30,000 persons who have only lately ceased an armed resistance to the government. Not satisfied with this, they have just passed a militia bill which . . . has made all white rebels . . . part of the militia."

Further, the complaint was made that the legislature had passed a bill for calling a constitutional convention in the illegal manner described above, particular stress being laid on the fact that increased representation had been given to the southern counties of the State, which were stigmatized as "the old, wornout counties, which were [as] rebellious as South Carolina." The resolutions closed with the following appeal:—

"These acts, we submit, are in violation of the State and national law, oppressive, revolutionary and dangerous to the order and peace of the nation. The Union men of Maryland are groaning under the tyranny. They are now oppressed by verdicts of disloyal juries in many counties. Immigration to the State except from the South, is stopped, and some loyal men are deliberating on leaving the State. The most, however, are ready by all proper means, at all personal hazards, to resist this infamous attempt of oppression. The danger of bloodshed is imminent, the time is perilous. We call on Congress not to adjourn before settling this grave matter, which if not settled, may startle them in their recess by something worse than the massacre of New Orleans, although not so unequal and one-sided. We earnestly ask on the part of the majority of the people of Maryland, deprived of legal voice, except through us, a minority of the general assembly, that Congress will guarantee to us a republican form of Government on the only basis of right, truth, and peace,—impartial suffrage without respect to race and color, as it has already guaranteed it to the Southern States."[64]

On the very same day, Senator James M. Nye, of Nevada, presented a long series of resolutions from the Grand Council of the Union League of Maryland, passed by it on March 20, 1867. This memorial, after a bitter arraignment of the "disloyal" acts of the Democratic-Conservative

[64] House Misc., 1st Sess., 40th Cong., Doc. 27.

party, closed by "earnestly pray[ing] the Congress of the United States, as far as practicable, to extend to Maryland the principles of the military reconstruction law, and to secure [to] all loyal citizens in the State the right of suffrage." It was signed by Henry Stockbridge, grand president, and Charles H. Gatch, grand secretary.[65]

On March 27 the Republican state convention of February 27 reassembled in Front Street Theatre at the call of Dr. Ohr, its president. A series of resolutions was passed and submitted to Congress on March 28, which is herewith given *in extenso,* since therein will be found the plan of campaign agreed upon by the Radical leaders and also an explanation of what is shortly to follow.

After thanking the Republican members of the General Assembly for addressing the memorial to Congress and urging that body to grant the request for Federal interference contained therein, it was resolved (1) to "oppose any new convention set up in subversion of the existing constitution under the convention bill, which does not express the will of the majority of the people without regard to color" and "with the aid of the loyal representatives of the nation and by all means in [our] power [to] resist and destroy any such constitution as a revolutionary usurpation;" (2) to take no part in the approaching election for delegates to the convention other than a general vote against the call for a convention; (3) that should the call be sustained by a majority of the voters, the state central committee should issue a call for district meetings throughout the State "for the choice by ballot, on the basis of universal manhood suffrage, of delegates to a State constitutional convention," representation in which should be based upon the provisions of the "present constitution of the State," and finally, (4) that such a convention, if called, should meet in Baltimore on the first Wednesday in June, and "proceed to form a Constitution based upon universal manhood suffrage."[66]

[65] House Misc., 1st Sess., 40th Cong., Doc. 28.
[66] House Misc., 1st Sess., 40th Cong., Doc. 32; Sun and American,

Francis Thomas supported these resolutions in a vigorous speech in the House of Representatives on March 28, in the course of which he said:—

"I utterly deny here . . . that there is a republican government in Maryland. This tyranny and oppression no free people ought to submit to. . . . What are we to do? We are powerless unless Congress interposes. And has Congress that power? The United States have power to guarantee a republican form of government to all the States. How is Congress to exercise that power? By an Enabling Act. . . . Is it unreasonable to expect that the Congress of the United States, which has expended so much blood and treasure to rescue one section of the Union from the political domination held by those plotting the overthrow of the government, will hesitate to exercise the unquestioned power conferred upon it under the Constitution, to rescue Maryland from the hands of persons as thoroughly disloyal and hostile to this government at this moment as are any in the States further South?"[67]

Finally, before we leave the subject of the appeal of the Radicals to Congress for aid, we must mention a memorial from the mayor and city council of Baltimore, presented on March 30. It began by reviewing the course of events in Maryland during the war, and concluded with a peroration, which was in part as follows:—

"And now, . . . we appeal to you as the supreme law-making power of the land, to ask you if there can be found no remedy to correct these monstrous evils? We ask you in the name of those men whose bones are now bleaching on a hundred battlefields, in the name of their widows and destitute and helpless orphans, in the name of the blood and treasure spent to subdue the late rebellion, in the name of the Union men of the State of Maryland, who have been tried in the furnace, yea in the hot hell of treason in this

March 28, 1867. When these resolutions were presented to the United States Senate on Mch. 28, Senator Reverdy Johnson made the following statement, which is of interest as showing his position upon the question of calling the constitutional convention: "I agree in the opinion . . . that the convention which is provided for by the recent legislation of my State should not be called by her people. In the present condition of the country, and the excitement which it is producing, and the state of feeling in Maryland, I should deem such a convention not only unfortunate, but fraught with more or less of peril to the peace and prosperity of my State, and I shall endeavor . . . to impress this view upon my constituents and hope to succeed in it." (Cong. Globe, 1st Sess., 40th Cong., 1867, 398.)

[67] Cong. Globe, 1st Sess., 40th Cong., 1867, 415–419.

State—in the name of liberty, God, right and law, is there no power sufficiently strong to save us from drinking of this damnable cup? Must we stand idle and look on with composure whilst we are being robbed of our dearest rights, and whilst all the sacred forms of law are disregarded by our treasonable enemies?"[68]

It will be seen later on that Congress made no effort to interfere with the local affairs of Maryland but wisely left the State to work out its own political salvation. The violent appeal of the Radicals finally resulted in a complete anticlimax.

In order to leave no stone unturned in the effort to block the course of state reconstruction now being carried out by the Democrats and Conservatives in Maryland, Alexander M. Rogers, Benjamin Deford, John Clark, William Kennedy and Johns Hopkins on Saturday, March 30, 1867, filed before Judge Martin in the Superior Court of Baltimore City an application for an injunction prohibiting the sheriff and police commissioners from advertising or holding the election for a constitutional convention. The application stated that the convention bill was unconstitutional in that it was not in accord with the method prescribed by the constitution of 1864. In support of this statement the applicants charged, first, that the bill called a special election instead of providing for a vote at the regular election in the fall; second, that it provided for a dual election—on the convention and the delegates at the same time; third, that representation would not be according to the constitutional method. Alexander M. Rogers appeared as counsel for the complainants, and S. Teackle Wallis and Orville Horwitz for the respondents.[69]

On April 8 a majority of the court, Justice Bartol dissenting, dismissed the appeal on the ground of want of jurisdiction under the ruling of the court in the case of Steigerwald *vs.* Winans (17 Maryland Reports, 62).

The vote on the convention took place, as provided by the convention bill, on April 10, 1867, and resulted, as had

[68] 1st Sess., 40th Cong., House Misc., Doc. 34.
[69] Sun and American for April 1 and 2, 1867.

been expected, in a sweeping victory for the Conservatives and Democrats.[70] Since the Republicans had nominated no candidates, a solid Democratic-Conservative convention was chosen to make a new constitution for the State. The total number of votes cast in the election was 58,718. Of these, 34,534 were for a convention, 24,136 against, and 48 ballots were blank. This vote gave a majority of 10,350 in favor of a convention. It is said that the election was one of the most quiet and orderly held for some years, and the Baltimore Sun thought[71] that party lines were largely disregarded.

In accordance with the provisions of the convention bill, on April 20 Governor Swann issued a proclamation stating the results of the election and calling the delegates to assemble in Annapolis on the second Wednesday of May. When the day arrived, the Baltimore American announced the advent of the convention with the following pessimistic forecast:—

"Today is the recommencement of an actual conflict in the State of Maryland. . . . In a word, a war for office will be inaugurated. . . . This is the real and sole object to be accomplished. However artfully it may be disguised at first, we predict it will become apparent to the most incredulous as soon as the plans are sufficiently developed and ready for active operations. The great thing to be accomplished is to put out Union men, regardless of merit, qualification and the public interest, and to put in Secessionists. . . . This convention assembles to make war on men who have been honest and faithful public servants. Having accomplished, through the last Legislature, all that could have been fairly and honorably desired by any other party, this was all that was left for selfish and party malice to achieve. The convention was called, and now assembles, to accomplish this."[72]

The Radical organ was only partially right, for while the whole state government, with the exception of Gov-

[70] At the same time a vote was taken in Baltimore City on the question of allowing street-cars to run on Sunday. It resulted in a victory for that measure also, 10,915 votes being cast in favor of it, 9153 in opposition.

[71] Issue for Apr. 11, 1867. See also Frederick Republican Citizen for April 12.

[72] May 8, 1867.

ernor Swann, was legislated out of office by the convention, we shall find that the general character of its work was of a permanent nature.

The Republican state convention assembled for a third time on May 14, 1867, in Broadway Hall, Baltimore, both white and colored delegates, it is said, being present. Baltimore City and all the counties of the State were represented with the exception of Calvert, Dorchester and St. Mary's. Senator John A. J. Creswell presided, and after some discussion the idea of an opposition constitutional convention was abandoned, it being decided instead to await the result of the Annapolis convention then in session, and to unite all efforts to defeat the new constitution at the polls, in case a provision for manhood suffrage should be omitted.[78]

[78] Sun and American, May 15, 1867.

CHAPTER V.

The Constitutional Convention.

The constitutional convention met at noon on Wednesday, May 8, 1867, in the hall of the House of Delegates, in the city of Annapolis. As mentioned before, its entire membership of 118 delegates was of the Democratic-Conservative party, since the Radicals had nominated no candidates in opposition.

Among the members were forty-five lawyers, ten of whom added the interests of "farmers" to their profession. There were thirty-seven who were known simply as farmers, also one member who styled himself a "planter." In addition there were twenty-two men of "business," nine physicians, two mechanics, one editor, and one conveyancer. As can be seen, the convention was largely composed of business and professional men of Maryland, and included the names of some of the most important families. Many of the delegates were at a later day prominent office-holders in the state and nation. George W. Covington and James R. Brewer, of the Worcester County and Baltimore City delegations respectively, have told the writer[1] that the convention was most harmonious, and in particular that there was no rivalry between the city and county members. Economy was a ruling motive, hence the debates were not reported except for the newspapers, and only the proceedings were published by authority of the State.[2] Both gentlemen state that Gov-

[1] Mr. Covington also remarked upon the fact that, the Democratic-Conservative party having just been organized, there was great harmony and unanimity of feeling in the party.

[2] The debates were largely of minor interest, no great questions of policy dividing the delegates (see Sun, May 18, 1867). On August 16 the convention passed an order appropriating $400 to be paid two "reporters," for services rendered by them in reporting the debates for the newspapers of Baltimore and elsewhere (Proc., 674–678).

ernor Swann was personally popular with the convention, and that its members often consulted him.

Several Union soldiers were in the delegations (*i. e.*, Colonel William P. Maulsby, of Frederick, and Colonel James Wallace, of Dorchester), and John F. Lee, of Prince George's County, had been at one time in the Confederate army.[3] John F. Dent of St. Mary's County had been a member of the conventions of 1851 and 1864. Ephraim Bell, of Baltimore County, Benjamin B. Chambers, of Cecil County, William T. Goldsborough, of Dorchester County, and Samuel S. McMaster, of Worcester County, were delegates to the former and Isaac D. Jones, of Somerset County, Fendall Marbury, of Prince George's, and Charles S. Perran, of Calvert County, to the latter.

The convention was in session altogether three months and nine days, and the average attendance was about seventy-eight. There were only three days on which there was no quorum present (*i. e.*, one half of the members elected). The largest attendance was one hundred and nine on May 8 (the opening day of the convention) and on May 24. The smallest was forty-seven on June 10. One session a day was held until July 23, and after that date there were altogether fifteen evening sessions on various days.

The convention was organized by the unanimous choice of Richard B. Carmichael, of Queen Anne's County, to be its president.[4] In accepting the office, Judge Carmichael made a short speech, which contained this significant paragraph:—

"It would not be becoming in me to attempt to foreshadow the result of the proceedings of this Convention by reference in detail to any of its measures. They are unknown to me. It is only for me to say that you have been called here to frame a new Constitution or to adopt *that which has had an existence, de facto, here for a*

[3] Authority of Mr. John M. Carter, of Baltimore.

[4] Mr. Covington states that Messrs. Isaac D. Jones, of Somerset, Thomas J. McKaig, of Allegany, and John F. Dent, of St. Mary's, were each ambitious to be president of the convention. However, Judge Carmichael was particularly favored by the delegates, who sympathized with him in his forcible removal from the Bench by the military in 1862.

brief space, and to express the opinion that you will discharge the duty that has been imposed upon you in such a manner as to promote the peace and order of the State, and to reflect lasting honor on yourselves. I trust, gentlemen, that the proceedings of this Convention will be marked by that harmony which should prevail among men of common opinions and upon an occasion of so great magnitude."[5]

In accordance with the provisions of the convention bill,[6] Judge Daniel R. Magruder of the second judicial district administered to the president of the convention the oath of office and of allegiance. This oath included the following clause:—

"I have not in any manner violated the provisions of the present, or the late Constitution in relation to the bribery of voters, or preventing legal votes, or procuring illegal votes to be given, and I do further swear or affirm, that I will bear true allegiance to the State of Maryland, and support the Constitution and laws thereof, and that I will bear true allegiance to the United States, and support, protect and defend the Constitution, Laws and Government thereof as the supreme law of the land, any law or ordinance of this or any State to the contrary notwithstanding, and I do further swear, or affirm, that I will, to the best of my ability, protect and defend the Union of the United States, and not allow the same to be broken up and dissolved or the Government thereof to be destroyed under any circumstances, if in my power to prevent it, and that I will, at all times, discountenance and oppose all political combinations having for their object such dissolution or destruction."[7]

The president then administered the oath to the members of the convention. This oath was a strong guarantee that they were not "disloyal" in their sentiments as charged by the Radical party.

Judge Carmichael seems to have made a fair, just and impartial presiding officer,[8] and the convention at the close of its session passed a unanimous vote of thanks "for the urbanity and fidelity with which he has discharged the duties of presiding officer."[9]

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[5] Proc., 8.
[6] Acts of 1867, sec. 5, chap. 327.
[7] Proc., 9–12.
[8] Opinion of both Mr. Covington and Mr. Brewer. The writer, however, has a strong suspicion that Judge Carmichael was not particularly well versed in the rules of parliamentary procedure.
[9] Proc., 675, 711.

On June 20 the convention by unanimous vote invited President Andrew Johnson, about to be absent from the city of Washington "for the purpose of visiting one or more of the eastern cities," to "visit the ancient and honored seat of government of Maryland," since

> "it would be a source of much gratification to the members of this convention to have an opportunity, during the session of said convention, to manifest in person their respect for the patriotic Chief Magistrate of the nation."[10]

This invitation being accepted, President Johnson was formally received in the convention hall on the morning of June 29,[11] Hon. William H. Seward, secretary of state, Governor Swann and various others of more or less prominence being present. Governor Swann introduced the President to the convention as the "great advocate of the people's rights," and then proceeded to deliver a grandiloquent panegyric upon him, of which the following will serve as illustration:—

> "Unawed by persecution, stripped of the powers, the essential powers conferred by the Constitution upon his high office, powers which he has conscientiously and honestly exercised for the benefit of the whole people, in the interest of patriotism, and not of party; almost within reach of accomplishing the great object of reconstruction, to which his efforts have been directed, he stands here today not the less honored because he has failed, from untoward interferences, to accomplish the great object of his mission and duty. . . . Standing within these ancient walls, consecrated by so many of the proudest recollections of the past, we may enjoy the privilege here, in the State of Maryland, at least, while not forgetting our duties as Statesmen and Christian men, of doing honor to Andrew Johnson, for in this we renew our pledges to the Constitution which comes down to us from our fathers of the Revolution to which this distinguished man, this uncompromising advocate, and I may say, the friend of popular government throughout the world, has devoted his life."

Not to be outdone, Judge Carmichael also welcomed the President with an oratorical outburst, saying among other things:—

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[10] Proc., 294.
[11] Proc., 326, 360.

"Welcome, Mr. President! Thrice welcome to the Capitol of the State of Maryland! This greeting throbs in every heart of this Convention, and would have utterance from every lip if it were in the order of procedure. . . . You are . . . assured that, in coming here, you are in the midst of your friends—friends of your policy and your person. . . . . This occasion . . . was intended to convey to you and to the country the approbation of this Convention and of this State, for the measures adopted by your administration for the restoration of the Union. These measures, inaugurated for that purpose, and to bind up the wounds of a bleeding country, were received throughout the State of Maryland with universal acceptance. It was the policy of a wise statesmanship. It was the promptings alike of patriotism and philanthropy. . . . It brought men together who had held life-long differences in political opinions. It bound up broken ties of former friendships, and made them firmer and faster. It made us one people, as you here find us of one mind and one heart."

President Johnson replied in a dignified speech which expressed his appreciation of the attention and honor thus conferred upon him, and also defended his policy in regard to the national issue of the reconstruction of the Southern States. Said he:—

"If I know myself, from the beginning of the late unhappy civil strife, I had but a single object in view, and that was to preserve the harmony, peace and union of these States. It would have been at any time the highest object of my ambition to tie up the bleeding arteries which caused so much blood, and the expenditure of so much money. Now, however, there is a new era, and I trust we shall have peace on earth and good will toward men. . . . I have been taught to believe [the Constitution] sacred in principle, and for [its] preservation I have periled my all. . . . When the requirements and securities of the Constitution are set at naught by a tyrannical majority, and their will made law, liberty is gone and despotism takes its place. . . . In politics, as in religion, when my facts give out and reason fails, my conviction is strong that truth is mighty and will ultimately triumph. Though I may go down and perish, my proud consolation at the last moment will be that I have done my duty, and this for me will be a sufficient reward. . . . I do hope and believe an era of good feeling has commenced. . . . Let us try to be one people and go on and fulfil our noble destiny, and I trust through the difficulties which we have just passed, a beneficent Providence will insure for us a more permanent existence."

At the conclusion of these remarks, the President was escorted to the senate chamber, where an informal reception was held.[12]

As soon as it had completed its organization, the convention went promptly to work. The committee on rules made a report on May 17, which was adopted without amendment three days later. This report covered the usual matters of parliamentary procedure, with the following special provisions: (1) the sessions should be open to the public, (2) the use of the "previous question" to close off debate was allowed when demanded by a majority of the members present, (3) yeas and nays were to be taken when required by five members, (4) any fifteen delegates (including the president) were authorized to compel the attendance of members, and (5) it was required that any subject-matter must be finally passed only by the vote of a majority of the whole number of members elected to the convention.[13]

On May 29 it was decided to limit debate upon the amendment of the reports of standing or special committees to fifteen minutes for each speech, the chairman of a committee to be allowed twenty minutes when a report was on its second reading. On June 19 the narrower limit was applied to every member of the convention, and in addition no person could speak more than once on any question. In the final "rush" of work towards the close of the convention it was ordered on August 6 "that on any motion, order, or resolution, except amendments to Reports of Committees, no member of this Convention be permitted to speak oftener than once, or more than five minutes."[14]

And now as to the actual results of the work of the

[12] Proc., 372–378. It will be recalled that the question of impeaching Andrew Johnson was being discussed at this time. The movement looking toward this result had begun as early as Jan. 7, 1867, but it was not till Feb. 24, 1868, that the House of Representatives formally impeached the President (see Rhodes, VI, 98–99).

[13] Proc., 14, 16, 57–67, 74.

[14] Proc., 136, 285, 554.

convention. The declaration of rights as finally adopted omitted Article I of the constitution of 1864, which related to certain inalienable rights of the people, such as that of reform, and Article III was inserted, which declared that the

"powers not delegated to the United States by the Constitution thereof, nor prohibited by it to the States, are reserved to the States respectively or to the people thereof."

Article VII gave the suffrage to every "white male citizen" of age, and Article XV continued the prohibition of a poll-tax.[15]

Article XXIV substituted for the provision of 1864, which abolished slavery, the following:—

"That slavery shall not be re-established in this State, but having been abolished, under the policy and authority of the United States, compensation, in consideration thereof, is due from the United States."

It appears that there was some debate in the convention on May 28 concerning the advisability of inserting in the constitution this clause prohibiting slavery, for some members wished that it be omitted. However, others insisted upon its retention, in view of the effect on the public mind—abolition being an accomplished fact—and it was finally inserted upon this ground.[16]

Article XXVII copied the constitution of 1851,[17] which provided "that no conviction shall work corruption of blood or forfeiture of estate," but omitted the clause inserted in 1864 which contained the words "for any crime, except treason, and then only on conviction." Finally, the following was inserted as Article XLIV:—

"That the provisions of the Constitution of the United States, and of this State, apply, as well in time of war, as in time of peace; and any departure therefrom, or violation thereof, under

[15] There was an ineffectual effort to strike out this article, on the ground that it dealt with a matter more properly subject to the decision of the legislature, and that every one should contribute to the expenses of government (see the Sun, May 28, 1867).
[16] Sun, May 29, 1867.
[17] Article XXIV.

the plea of necessity, or any other plea, is subversive of good Government, and tends to anarchy and despotism."[18]

This was a direct condemnation of the war policy of President Lincoln.

As in previous constitutions, Article I dealt with the "elective franchise." The convention entirely omitted the retrospective test oaths of 1864, providing merely an oath of office binding a person to the support of the Constitution of the United States and the constitution and laws of the State of Maryland, and to the faithful discharge of the duties of an official. Section 5 provided for a uniform registration of the voters of the State, and made it conclusive evidence of the right to vote.[19]

One of the greatest improvements made in the fundamental law of the State by this convention was in giving the veto power to the governor.[20] It was also provided that in order to override the opposition of the executive, bills must be passed by a three-fifths vote of each house of the General Assembly. The office of lieutenant-governor was abolished probably on account of personal hostility to Dr. Cox and to save the State a small item of expense. Provisions were introduced for the election of a governor by the General Assembly in case of a vacancy in that office.[21]

A new state election was to be held in 1867 and every fourth year thereafter for the choice of a governor and other officers, but the term of Governor Swann (who had been elected in the fall of 1864) was to be completed before his successor took charge of state affairs. All the other state officials were legislated out of office by the convention.[22] The words "qualified voter" were inserted

[18] Proc., 15, 20, 26, 27, 52–57, 88–90, 97–100, 112–114, 120–121, 123–124, 133–134, 139–142, 143–145, 157–164, 498–501.

[19] Proc., 27, 37, 48, 151–153, 258–259, 270–272, 276–278, 289, 549–550.

[20] Art. II, Sec. 17; Proc., 71, 189–190, 507–508; Sun, June 7, 1867.

[21] Art. II, Secs. 6 and 7. When the General Assembly adjourned on March 23, 1867, Lieut.-Gov. Cox made a speech evidently anticipating the abolition of his office if a convention were called.

[22] See Sun, Aug. 19, 1867. There was much talk in the con-

in the fifth section of the article which prescribed the qualifications of the executive, the fear being expressed that otherwise a negro would be eligible.[23] The salary of the governor was raised from $4000 to $4500, and that of the secretary of state from $1000 to $2000—a very short step taken in the right direction.[24]

In fixing the representation of the counties and of the city of Baltimore in the General Assembly, the constitution of 1864 made the white population the basis. The convention changed this by making the whole population the basis, thus materially increasing the power of the southern counties, the large negro population of which was thus "represented" although not given a vote. A sliding scale of apportionment of delegates was adopted, based somewhat upon population, but by an arbitrary rule limiting the representation of the city of Baltimore and of the larger counties in the interest of the Democratic stronghold, *i. e.*, the counties in southern Maryland.[25]

Section 11 of Article III inserted the old provision of the constitution of 1851 (Art. III, Sec. 11) which had been omitted in 1864. It made any minister or preacher of the Gospel, or of any religious creed or form of belief, ineligible to membership in the legislature.[26] Section 34 of the same article especially permitted the General Assembly to appropriate not more than $500,000 "in aid of the construction of works of internal improvement, in the counties of St. Mary's, Charles and Calvert, which have

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vention of also turning Gov. Swann out of office, many of the "old-line" Democrats evidently remembering his activity in the "Know-Nothing" and "Unconditional Union" parties in past years. However, a feeling of gratitude for his aid, particularly in the appointment of the registers, finally caused the matter to be decided in his favor.

[23] Sun, June 5, 1867.

[24] Proc., 27, 128–132, 169–175, 179–181, 187–190, 197–204, 220, 506–509.

[25] Art. III, Secs. 3–5. Proc., 20, 28, 78, 95, 285–286, 398–404, 601–610. It should be noted that Sec. 4 is rather vague as to whether the representation of the largest county should be the maximum or the minimum limit for each district of Baltimore City.

[26] Proc., 326–328.

had no direct advantage from such works as have been heretofore aided by the State."

Section 37 retained the provision placed in the constitution in 1864 which prohibited the legislature from granting any payment for emancipated slaves, but a clause was added that it should "adopt such measures as [it] may deem expedient, to obtain from the United States compensation for such slaves, and to receive, and distribute the same, equitably, to the persons entitled."[27] Section 53 settled a long controversy by making no person "incompetent, as a witness, on account of race or color, unless hereafter so declared by Act of the General Assembly,"[28] while Section 55 was also an aftermath of Civil War conditions, since it provided that the "General Assembly shall pass no Law suspending the privilege of the writ of *Habeas Corpus.*"

J. Hall Pleasants, of Baltimore City, made an attempt to do away with the provision of the constitution of 1864 (Art. III, Sec. 50) which placed the legal rate of interest at six per cent. per annum, with instructions to the General Assembly to provide the necessary forfeitures and penalties against usury. A memorial from the Baltimore board of trade to the same effect was also presented by him on May 28. This movement was vigorously opposed by the county delegations, led by John F. Dent, of St. Mary's, and John T. Stoddert, of Charles, and as a final compromise, Section 57 provided for a six per cent. legal rate "unless otherwise provided by the General Assembly."[29]

Perhaps greater changes were made in clauses relating to the judiciary than in any other part of the constitution. The convention legislated all the judges out of office and did away with the independent Court of Appeals, which the

[27] Proc., 29, 353–355, 364–367, 604–605.

[28] There was a great deal of opposition in the convention to the idea of negroes witnessing in court. Judge Wm. M. Merrick, of Howard Co., most ably supported the measure and it finally prevailed. See Sun, July 24, 1867; Proc., 148–150, 153–154, 157–161, 288, 387–388, 439, 442.

[29] Proc., 30, 34, 126–127, 220, 236–237, 241–242, 258, 296–304, 602–604; Sun, June 15, 1867.

delegates attacked as "too technical."[30] It provided for eight judicial circuits instead of thirteen, with three judges in place of one judge for each, and constituted the eight chief justices of the circuits the Court of Appeals, and these judges were to be elected by the people of each circuit respectively, instead of by the people of the whole State. The convention also required that all cases in the Court of Appeals should stand for hearing at the first term instead of certain special cases only, and that the clerk of this court should no longer be appointed but be elected by the people. Further, the Court of Appeals was directed to frame rules in equity. The salaries of all the judges in the State except those of the Orphans' Courts were slightly increased.

The arrangement of the courts in Baltimore City was new and rather peculiar. Six courts were provided for, since the five judges of the several courts were united into an additional court called the Supreme Bench. This last was given some supervisory powers without, however, restricting the right of appeal to the Court of Appeals as heretofore, and the several judges were from time to time to be assigned by the Supreme Bench to the respective courts. Concurrent jurisdiction in all common-law cases was given to each of the three common-law courts. Finally, the terms of office of the judges of the Orphans' Court were changed from four to six years, and all terms expired together, instead of one every two years as before.[31]

The extensive provisions for the advancement of education contained in the constitution of 1864 (Article VIII)

[30] Authority of Mr. John M. Carter, of Baltimore. Mr. Covington, who was a member of the judiciary committee of the convention, states that the object of the new provisions was to introduce the custom of superior court judges going on circuit, and also to do away with the expense of special judges, which had been of considerable amount up to this time.

[31] Condensed from the summary of Mr. Edward Otis Hinkley in his edition of the constitution of 1867, published by John Murphy and Company, Baltimore. See also Proc., 20, 27, 42, 73, 80, 333–343, 360–364, 393–396, 406–407, 409–413, 417, 551–594, 648–656. It has been pointed out that there was a large number of future judicial candidates in the convention, for example, Messrs. Gill, Brown, Ritchie, Gary and Dobbin of the Baltimore City delegations later on attained that dignity.

were done away with, and in their place the convention required that the General Assembly should at its first session " by Law establish throughout the State a thorough and efficient System of Free Public Schools." The system in force at the time was to expire, but the school fund of the State was to be kept inviolate and appropriated only to the purposes of education.[32]

In accordance with the arrangement made by the Democratic and Conservative forces during the sessions of the preceding legislature,[33] Article XI provided for an entirely new government for the city of Baltimore, and the new mayor and city council were to be elected on the fourth Wednesday of October, 1867. No debt could be created, nor could the credit of the city be loaned, unless authorized by the General Assembly and approved by the vote of the people. This last provision was immutable, but any other provision of the article could be changed by the legislature.[34]

Article XII empowered the board of public works, with the authorization or ratification of the General Assembly, to sell the State's interest in the various works of internal improvement, with the exception of the interest in the Washington Branch of the Baltimore and Ohio Railroad.[35]

[32] Article VIII. The system in force since 1864 was objected to as too expensive. Sun, June 12, 1867; Proc., 20, 27–28, 33, 139, 220–221, 291–292, 304–305, 307–314, 625–627. With this exception no serious attack was made upon the white school system so successfully started in accordance with the provisions of the constitution of 1864 by Libertus van Bokkelen, state superintendent of education. The Radical leaders of the period were most earnest in their advocacy of education, and under their auspices was also opened on January 3, 1865, in Baltimore, the first public school for negroes, and another at Easton, Md., during the same month. To Evans Rodgers, Wm. J. Albert, John A. Needles, Joseph M. Cushing, H. Lennox Bond and Archibald Stirling, Jr., is due a large part of the credit for furthering this enlightened policy.

[33] See page 100.

[34] Several members of the Baltimore City delegation made speeches in the convention earnestly urging the necessity of a new government for the city, with the result that the report of the committee was concurred in unanimously. See Sun, July 13, 1867; Proc., 641–642.

[35] Proc., 390–393, 595, 633–635, 642–645, 661–662, 666–667, 669–673, 683–703, 706–708. It is interesting to note that on May 23 Mr. Wm.

Article XIII provided for the erection of a new county to be named Wicomico, with the town of Salisbury as the county-seat, out of land taken from the counties of Somerset and Worcester. The people within the limits of the proposed new division were to vote upon the question of its creation at the election to be held upon the adoption of the constitution. This matter had been mooted for some years and various petitions for and against were presented to the legislature. It appears that Salisbury lay partly in Somerset and partly in Worcester County, a street of the town forming the dividing line. It was the home of much comparative wealth at that time, and its people, urged on by pride of territory and a desire to increase the value of their property, were ambitious to make it the county-town of a new district to be known as Wicomico County. With this object in view, they united upon J. Hopkins Tarr, who was sent to the convention as a member of the Worcester County delegation, for the particular purpose of working for the plan. He was successful, as the convention was evidently willing to provide in this manner for an increase in the representation and influence of southern Maryland in the legislature. The same article of the constitution also provided for the future creation or rearrangement of counties by the General Assembly, with the consent of the voters interested.[36]

Article XIV provided for amending the constitution in

S. McPherson, of Frederick County, suggested the expediency of legislation to regulate railroad freight and passenger rates in the State of Maryland. Proc., 96. By amendment ratified 1891 the sale of the Washington Branch was authorized and accomplished in 1906.

[36] Proc., 35, 127–128, 157, 196–197, 232, 253–254, 287–288, 293–294, 330–333, 356, 389, 418–419, 437–438, 474, 497, 511–515, 525–532, 597–598, 627–629, 654–655; House Jour., 1865, 269, 290, 307, 332, 345, 384, 507, 544, 577; House Jour., 1866, 165, 190, 202, 260, 295. Under the article Garrett County was erected out of Allegany shortly after the adoption of the constitution, but it seems physically impossible to form any more new counties without infringing the provision of the article that each county of the State must contain at least four hundred square miles. It should be noted that the provision in the constitution of 1864 (Art. X, Sec. 2) for the organization of townships in the place of election districts in the counties was omitted by the convention (see my Maryland Constitution of 1864, 87).

two ways. First, the legislature might submit to the people any amendments, if passed by a three-fifths vote of each house; second, there must be submitted to the people in the year 1887 and every twentieth year thereafter the question of the call of a convention for altering the constitution. It will be noticed that nothing was said in regard to the power of the legislature to call a convention or submit the matter to the vote of the people at any other time.[37]

Finally, the constitution as a whole was adopted by the convention on August 17, by the vote of 100 to 4, the negative votes being cast by James L. Horsey, of Somerset County, J. Montgomery Peters and Lindsay H. Rennolds, of Baltimore City, and John T. Stoddert, of Charles County.[38] The convention then adjourned, after listening to a species of farewell rhapsody on the part of Judge Carmichael.[39]

A reading of the debates as reported in the daily newspapers of the time will show a good disposition on the part of the members of the convention to leave matters (particularly of detail) to the legislature as much as possible. Taken as a whole, and giving due consideration to the chaotic times in which the work was done, the constitution was a strong and fairly conservative document, and up to the average excellence of the contemporary instruments of government in force in the other States of the Union. It has lasted, and has worked fairly well, up to the present time.

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[37] Proc., 349–350, 488–489, 639–641. The people of the State were strongly adverse to a convention, both in 1887 and in 1907. The vote on Nov. 8, 1887, was, "for" a convention, 72,464, "against," 105,735, blank ballots, 8908 (Baltimore City voted, "for," 31,373, "against," 31,622). St. Mary's was the only county in southern Maryland which was strongly opposed. At the same election the vote for governor was, Elihu E. Jackson of Wicomico Co. (Democrat), 99,038; Walter B. Brooks of Baltimore City (Republican), 86,622. On Nov. 5, 1907, the vote of the State on the question was even more decided, "for" a convention, 32,778, "against," 87,035 (Baltimore City, "for," 18,894, "against," 41,944). It has been remarked that the state judiciary has generally been good, and that this is one of the strongest reasons why the present constitution has lasted.

[38] Proc., 710–711.

[39] Proc., 711–712.

CHAPTER VI.

Self-Reconstruction Completed—Congress Declines to Interfere.

The new constitution was at once published, and September 18, 1867, was proclaimed by Governor Swann as the date for its submission to the voters of the State. The American of August 20 voiced the feeling of the Radicals when it attacked the constitution on the ground that it was not a republican form of government, saying further that it did not give all citizens the right to vote, or make them equals before the law. This of course referred to the negroes, and did not call forth much enthusiasm among the Republicans, who, while they had accepted the principle of negro suffrage, were not anxious to accentuate the matter any more than was necessary.

On September 10 there was a large Democratic-Conservative parade, followed by a mass-meeting in Monument Square, which was presided over by Hon. Thomas G. Pratt. Resolutions were passed endorsing President Johnson, Governor Swann and the new constitution. Addresses were made by the governor, by Daniel Clarke, of Prince George's County, and by Frederick J. Nelson, of Frederick County.[1] On the other hand the opposition of the Republicans could hardly be dignified by the name of a political campaign. A "Border State Convention" which met in Front Street Theatre, Baltimore, on September 12, and was presided over by Horace Maynard of Tennessee, passed resolutions which urged Francis Thomas to push forward in Congress his policy of national investigation of border-state government and politics.[2]

The election held on September 18 was a very tame

[1] Sun, Sept. 11, 1867.
[2] American and Sun, Sept. 13, 1867.

affair.[3] The Conservative forces swept the State and the constitution was adopted by an overwhelming majority. Out of a total vote of 70,215, the number "for" the constitution was 47,152; "against," 23,036; blank ballots, 27.[4]

The American of September 19 said of the election:—

"To the apathy of the Republicans in the city and State is due the large majority of their opponents, who have considerably increased their vote since September last. . . . Our despatches from the counties indicate that the same course pursued by the Republicans here was practiced there, and the election was almost allowed to go by default on their part, while the opposition brought out all their strength.[5] We have appealed time and again to the Republicans throughout the State to properly organize their party. A want of organization, energy and united course of action has injured the party in the past, as in the contest of yesterday."

The Democrats were of course jubilant, rightly believing that their cause was now won beyond any chance of future danger, and that the self-reconstruction of Maryland was complete. Said the Sun of September 24, 1867:—

"A grand moral triumph has thus been achieved, which even the most reckless political iniquity will scarcely venture to confront. It should silence and crush the machinations against the popular will and the welfare and honor of the State, which have so long sought to prostrate the vast majority of the Maryland people, and all its great interests, beneath the heel of a faction so inconsiderable that, with free access to the polls, and none of those restrictions imposed upon it which it is always seeking to impose upon others, it could not carry a single precinct in Baltimore, nor a single county in the State."

The new constitution went into effect on October 5, 1867, as the convention directed, and on the twenty-third of the month the first election for the choice of a new city govern-

[3] Sun, Sept. 19, 1867.

[4] The vote of Baltimore City was, "for," 16,120; "against," 5627; total, 21,747. Those districts of Somerset and Worcester counties which were to form Wicomico County voted, "for," 1281; "against," 906, giving a favorable majority of 375. A vigorous opposition to it had developed.

[5] The Frederick Examiner of Sept. 25, 1867, states that there was no organized effort against the new constitution on the part of the "Union men."

ment for Baltimore was held. The Democrats were again successful, R. T. Banks being elected mayor by the overwhelming vote of 18,420 in his favor to 4896 for his Republican opponent, A. W. Denison. At the state election on November 5 following, the Democratic candidate[6] for governor, Oden Bowie, received 63,694 votes, and Judge H. Lennox Bond, the Republican candidate, 22,050.[7]

The extreme radicalism of a certain element of the Republicans, combined with the policy of advocating negro enfranchisement, thus threw the entire government of the State into the hands of the Democratic party. The fifteenth amendment to the Constitution of the United States caused the enfranchisement of the negroes in Maryland after 1870, and thus added to the total Republican vote, but nevertheless the hold of their opponents remained still unshaken. Long-continued power usually begets political indifference on the part of the average citizen, and opens boundless opportunity for "ring" politics and "graft." The Democratic party in Maryland was no exception to this rule—it soon fell hopelessly into the hands of a corrupt political organization, the history of which, however, is not included in this study.

It will be remembered that we turned our attention from Congress and its attitude toward Maryland at the point when it had received, in March, 1867, numerous petitions from the defeated Republicans of that State who, under the leadership of Francis Thomas, were praying for "a republican form of government," and were attempting to arouse at Washington a violent political agitation against the Conservatives in Maryland.[8] This movement was at once opposed by the small Democratic minority in Congress as "dangerous constitutional doctrine."[9] In addition it was strongly resisted by loyal Union men such as, for example,

[6] The "Conservative" Unionists had by this time lost their identity as an organized political party, and had finally merged with the Democrats.

[7] The vote of Baltimore City was, Bowie, 19,912; Bond, 4846.

[8] See page 110.

[9] Cong. Globe, 1st Sess., 40th Cong., 1867, 415–419.

Charles E. Phelps, of the third Maryland district, who had been a gallant officer in the Federal army during the war. Consequently the Republican majority failed to act, and the movement died down during the course of the year in spite of several determined efforts to revive it.

Thus, on July 15, 1867, William H. Kelsey, of New York, obtained the passage of a resolution in the House of Representatives, instructing the judiciary committee to inquire and report by bill or otherwise as to whether the States of Kentucky, Maryland and Delaware were living under governments republican in form.[10] In November of the same year, James G. Blaine, of Maine, submitted a resolution that the general commanding the army of the United States should communicate to the House, among various papers, "all correspondence in regard to the difficulties in Baltimore touching the police commissioners and other matters prior to the election of 1866."[11]

Again, on December 17, Francis Thomas offered a resolution that the committee on the judiciary "be authorized to continue inquiries . . . concerning public affairs in Maryland." This was carried in spite of the vigorous opposition of General Phelps, who stated that this move for congressional reconstruction of Maryland was "in the interest of a defeated and disappointed political faction" and that "an investigation [had] been going on before a committee of this House for the last twelve months involving the integrity and independence of a State in full relation with the Government of the United States."[12]

Thomas continued to present during the next two years various petitions from "citizens of Maryland praying for a republican form of government,"[13] but, although he was himself a member, the judiciary committee steadily refused

[10] House Jour., 1st Sess., 40th Cong., 211–212, 244; Cong. Globe, 1st Sess., 40th Cong., 1867, 656–657.

[11] House Jour., 1st Sess., 40th Cong., 269.

[12] Cong. Globe, 2nd Sess., 40th Cong., 1867, 230–231. This investigation generally took place behind closed doors.

[13] House Jour., 3rd Sess., 40th Cong. (1868–9), 18, 111, 128, 149, 156, 202, 242, 263, 312, 412.

to take any action, and nothing further was done by Congress. Maryland, therefore, was permitted to carry out a policy of self-reconstruction, with no outside interference.[14] The Radicals in the State, realizing the uselessness of further agitation, accepted the situation as inevitable and turned their attention to more promising fields of endeavor. Their violent and unreasonable agitation had ended in a complete fiasco.

It is perhaps easy, in the retrospect of more than forty years, for us to criticize and condemn this or that man, or this or that party. However, it is well for us also to remember with pride that although feeling was aroused, during the reconstruction period following the war, to a height which we of this day can hardly imagine, a large majority of the people of Maryland showed the characteristic restraint of the strong American stock from which they had sprung. They never forgot that the corner-stone of a democratic government is after all the rule of law as made by the will of the majority. They were willing to submit when beaten, and turned their attention to repairing the losses caused by the Civil War, and to advancing the prosperity and future well-being of the State of Maryland.

[14] House Jour., 2nd Sess., 40th Cong., 109; 3rd Sess., 40th Cong., 431. General Charles E. Phelps, in a recent interview granted the writer, gave his authority for the statement that Francis Thomas had for years bitterly opposed the undue representation in the General Assembly of the Democratic counties of southern Maryland, and this move for the reconstruction of the State by Congress chimed in with these views, hence it was a strong reason for his active advocacy of the plan. General Phelps further states that the whole movement was soon stripped bare as merely partizan, and that the Republican leaders were unwilling to assume the responsibility for revolutionizing a State in the interest of a political party.

THE DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY

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THE DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY

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CONTENTS.

PREFACE.

The following pages contain the results of a study of the English law relating to criminal conspiracy, begun in the spring of 1906, and continued with little interruption until May, 1908. The author's purpose has been to present an exhaustive discussion of the subject based upon an examination of all the available material extant. Accordingly, he has considered every relevant statute and case, from the earliest to the latest, which a careful search through ancient and modern law writings has enabled him to bring to light.

There is scarcely a more complex topic in the entire domain of British national jurisprudence than that of illegal combinations. The law relating to them has been more than ordinarily the creature of accident and special conditions. The resultant contradiction and confusion introduced into the cases renders extremely difficult the task of extracting the underlying principles, tracing their rise and growth, and giving an intelligible account of the causes which have determined their subsequent history.

The author desires to acknowledge his indebtedness to Professor W. W. Willoughby for the inspiration which made the work possible, as well as for his helpful suggestions and unfailing friendly interest.

THE DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY.

CHAPTER I.

Origin and Early History of the English Law of Conspiracy to the End of the Reign of Edward I.

Our first definite and reliable information regarding the conception of conspiracy in English law is found in several ordinances and statutes passed during the reign of Edward I. This fact has accordingly led some authorities, notably Mr. Justice Wright, to believe that the crime of conspiracy was created by these enactments. Others are equally emphatic in claiming for the offense a common-law origin antedating the statutes, and a scope extending far beyond the limits marked out by them. It will be our duty, therefore, to examine the grounds of this conflict of opinion and to endeavor to find out the real truth of the matter. This we shall do by setting out what is known of the law of conspiracy before the passage of the Edwardian statutes, and then discussing the effects which these acts appear to have really produced.

The statutes bear internal evidence that they are intended to deal with an offense not entirely unknown to the law. Not until the third statute is the attempt made to define conspiracy. The first Ordinance of Conspirators, anno 21 Edward I, provides a remedy against "conspirators, inventors and maintainers of false quarrels and their abettors and supporters and having part therein, and brokers of debates." The Articuli super Chartas, 28 Edward I, Stat. 3, C. 10, is no more explicit in its mention of "conspirators, false informers, and evil procurers of dozens, assizes, in-

quests and juries." It is obvious that the execution of these acts with justice and uniformity would have been impossible in the absence of an already existing body of custom supplying a more or less accurate description of the offense denounced. An even clearer reference to extra-statutory legal principles relating to conspiracy seems to be embodied in a clause in the famous Definition of Conspirators, 33 Edward I (1304), directing "that justices assigned to the hearing and determination of felonies and trespasses should have the transcript hereof." Since, as we shall see, the two former statutes had provided only civil remedies against conspirators, the criminal liability evidenced by the Definition's being supplied to the criminal justices could have arisen only from the common law.[1]

The inference that the law had begun at a very early period to take cognizance of the special dangers to be apprehended from concerted evil-doing is supported by positive testimony. Thus, we find that plotting against the life of the king or of a lord was punished by the Anglo-Saxon laws.[2] Passing to a later period, we are shown in the record of the Shropshire Eyre for the year 1221 a case strikingly similar to a modern boycott.[3] The word "conspirator" is first met in the Mirror of Justices,[4] written between the years 1285 and 1290. In the chapter entitled "The View of Frankpledge," hundredors are directed to

[1] This conclusion is strengthened by the fact that the "villanous judgment," subsequently rendered against conspirators convicted at the suit of the king, is given by no statute, and was believed by Lord Coke and Serjeant Hawkins to have been derived from the common law. Coke, 3 Inst., Cap. 66, p. 143; Cap. 101, p. 222; Hawkins, Pleas of the Crown (Ed. 1762), Bk. 1, Ch. 72, f. 193.

[2] Laws of King Alfred, Ch. 4; Laws of King Aethelstan, Ch. 4.

[3] The Abbot of Lilleshall complained to the justices of gaol delivery "that the bailiffs of Shrewsbury do him many injuries against his liberty and that they have caused proclamation to be made in the town that none be so bold as to sell any merchandise to the Abbott or his men upon pain of forfeiting ten shillings, so that Richard Peche, the bedell of the said town made this proclamation by their orders." The defendants all denied the charge; but the "bedell" was ordered to defend himself by the oaths of eleven compurgators. The abbot, however, "remitted the law." Select Pleas of the Crown (Selden Soc.).

[4] Mirror of Justices (Selden Soc. Pub.), Ch. 17.

assemble once a year all the men of their hundreds in order to inquire of the various "sins against the holy peace;" among them, "of conspirators, and all other articles which may avail for the destruction of sin." Britton[5] includes in his discussion of pleas of the crown a chapter upon certain conspiracies or "alliances" to the hindrance of justice; and Bracton[6] makes mention of the offense of "conspiracy" by name.

These passages, all of which antedate the passage of the first Ordinance of Conspirators in 1294, clearly evidence a conception of conspiracy which had attained to some growth in the virgin soil of the common law quite independently of the Edwardian statutes.[7]

While claiming for conspiracy an origin in extra-statutory law, however, we must be careful to avoid the common error[8] of holding that the ancient law had developed a conception of the offense in any degree as advanced as that which we have today. The modern law upon the subject is the result of a painful course of evolution lasting many centuries. It has been gradually worked out by the interaction of statutory enactment with judicial elaboration, guided by the circumstances of its history. In order to tell the story of its evolution, therefore, we must examine the condition of the law relating to unlawful combinations as it stood just before the passage of the statutes.

At this period the law had already assumed the aspect which it was to exhibit for some time afterward. Conspiracy was limited to combinations whose object was to hinder or pervert the administration of justice. Explicit in-

[5] Britton (Nichols Ed.), p. 79.

[6] De Legibus et Consuetudinibus Angliæ (Twiss Ed.), Vol. 2, pp. 335–7.

[7] Noteworthy also is the absence of any but a single statement (see argument of counsel in Y. B. 3 Edw. II, f. 81) in the ancient writings that conspiracy originated in these statutes. On the other hand, references by counsel, court and commentator to the common-law origin of the offense, in the later Year Books and in the later authorities, are found in abundance.

[8] Strikingly exemplified in State vs. Buchanan, 5 H. & J. 317, the leading American case upon conspiracy.

formation upon this subject is derived from Britton.[9] In the passage previously referred to, he says: "Let it be also inquired concerning confederacies between the jurors or any of our officers, or between one neighbor and another, to the hindrance of justice; and what persons of the county procure themselves to be put upon inquests and juries and who are ready to perjure themselves for hire or through fear of any one; and let such persons be ransomed at our pleasure and their oath never after be admissible." It is an offense of the same narrow scope which is pictured in the statutes of Edward and in the great majority of the early cases in the Year Books.[10]

It is not probable that the courts of the period under examination ever took cognizance of conspiracies to commit the more serious crimes, such as murder, robbery, arson, and other felonies. During the reigns between the Norman Conquest and the accession of Edward I crime was exceedingly rife. Civil war was common. The country swarmed with outlaws, who rendered life and property insecure and

[9] Op. cit., Bk. 1, Ch. 22.

[10] We can readily conjecture why the fact should be so. From the very earliest times the law of England had always been particularly severe in denouncing false accusations in a court of justice, and the newly founded supremacy of the royal over the communal courts, which had become nearly complete during the reigns of Henry III and Edward I, doubtless heightened the enormity of these offenses. The improved methods of procedure in the king's courts, the increase in litigation caused by the restoration of order and the establishment of a regular judicature, and especially the vigor and effect with which the judgments of the courts were enforced, would naturally render false accusations, vexatious suits, and fraudulent perversions of justice not only more frequent but also far more serious than they had formerly been. The criminal law was harsh in its treatment of suspected felons, and was not so solicitous as it is now that the accused should be given every chance to prove his innocence. Hence a perversion of the new process of indictment would furnish a ready means of paying off an old grudge. The multiplication of cases of this kind would soon attract the attention of the judges and would make them desirous of finding some method whereby this employment of the machinery of the law as an engine of oppression might be stopped. Now such enterprises almost always require the coöperation of a plurality of performers. Hence, the judges would soon observe that the false prosecution might be in some degree hindered by an interference with the original combination. In this way the conspiracy would in time come to be considered as at least an element in the offense, and punished as such.

travelling hazardous. The civil authorities, consequently, had to put forth their utmost exertions to punish the actual perpetration of such outrages. Under these conditions the idea of punishing mere agreements to commit crimes would scarcely arise. Such a thing would not be attempted until the supremacy of the law had become so firmly established that the punishment of actual wrong-doing was regular and certain and opportunity was left for positive attempts at prevention. Not until the crime had been committed would the law be invoked; and then the malefactor would be subjected to the penalty prescribed for his misdeed, with little attention to any conspiracy or other thing preceding, except possibly in so far as it might constitute matter of aggravation. As for combinations to defraud, we must recollect that at the time of Henry III there was no legal remedy for cheating and deception.[11] In the early stages of the law it is not to be supposed that the confederacy to perform an act not itself judicially cognizable would be considered a crime. Hence we have every reason to believe that a conspiracy in pre-Edwardian times included no more than what is mentioned by Britton and exemplified in the Year Books—combinations to defeat justice.

There is no reference in the books which antedate the first Ordinance of Conspirators to any but the criminal aspect of conspiracy. Whether the law provided a civil remedy for the offense cannot be known with certainty. It seems clear that the royal courts had developed no such remedy before the statutes. Neither Glanville, Bracton, Britton, nor Fleta refers to it, though they all treat exclusively and exhaustively of the law administered in those tribunals. Moreover, the writ which is provided by the Ordinance concludes with the phrase "contra formam statuti." It is quite possible, however, that civil actions were entertained in the county, hundred, and feudal courts for the redress of wrongs originating in unlawful combinations; if not generally, yet under certain conditions or in certain localities. But no positive proof upon this point

[11] Pollock & Maitland, "History of English Law," Vol. 2, p. 538.

can be adduced. Since none of these local tribunals were "courts of record," we have very little information in regard to the various customs recognized and enforced by them. Indeed, the older law so confused civil and criminal procedure that in speaking of a "civil" action of conspiracy at the period under discussion we may be guilty of an anachronism.

Modern law treats as a crime the mere combination to do certain acts. The offense is complete as soon as the agreement is formed, and is wholly distinct from any act performed in pursuance of it. The ancient law was otherwise. The conspiracy was an element to be taken into account, but was not in itself a complete crime. For this statement we have the authority of Bracton.[12] Writing of principal and accessory in criminal prosecutions, he states that the accessory may not be put to answer until the principal has been tried; "because," he adds, "where there is a principal party, there may sometimes be an accessory, but never an accessory where there is no principal party, because where a principal act has no existence, things consequent on it can have no place, as may be said of precept, conspiracy, and such like, because these things may occur even without any act, and are sometimes punished if an act is subsequent, but without any act not so, like the saying: 'For what harm did the attempt cause, since the injury took no effect?' Nor ought precept, conspiracy, precept and counsel to do harm, unless some act follows." Traces of this principle linger long after the reign of Edward I. In 1368 (42 Edw. III)[13] we find a case arising upon a writ of conspiracy in which the argument is made by counsel and assented to by the court that a mere "parlaunce" of conspiracy without an act in execution of it is not an indictable offense. The preamble to the statute 3 Henry VII, C. 14 (1486), declaring conspiracies to destroy the king or his great officers to be felonies recites that such conspiracies are frequent, and that "by the law of this land if actual deeds

[12] Op. cit., Vol. 2, pp. 335–7.
[13] Year Book, 42 Edw. III, fol. 14.

be not had, there is no remedy for such false compassings, imaginations, and confederacies against any Lord, etc. . . . and so great inconveniences might ensue if such ungodly demeanings should not be straitly punished before that actual deed be done." At the time of this statute, and even of the case cited, the tendency to hold the combination punishable apart from the act performed by it was becoming noticeable. The citations given, however, sufficiently evidence the older rule that the bare conspiracy was not subject to the animadversion of the courts.[14]

The above pages present a complete inventory of such information regarding the ancient common-law conception of conspiracy as can be gleaned from the scanty evidence that has come down to us. We must now take up and explain the contents and effect of the Edwardian statutes of conspiracy.

The first of these, passed in 1293 (21 Edw. I),[15] is usually spoken of as the Ordinance of Conspirators. Its provisions are as follows: "As to those who may desire to complain of conspirators, procurers of pleas maliciously to be moved in the country, as well as of brokers who maliciously maintain and sustain such pleas and contumelies that they may thence have part of the land or any other benefit, let them come before the justices assigned to the pleas of our Lord the King and there let them find security for prosecuting

[14] That even the criminal law punished conspiracy only after the performance of an overt act is rendered probable by the fact that until about the time of Charles II the large majority of the conspiracy cases in the books are civil actions for damages. In the nature of things, for the purposes of a civil suit the importance of the act done must be greater than the mere combination to do it. The influence of this principle is seen in the rule that a writ of conspiracy would not lie unless the plaintiff had been actually accused of a felony before a competent tribunal and legally acquitted by the verdict of a jury. As the criminal law of conspiracy closely followed the principles worked out in the civil courts touching other aspects of the offense, the influence of this great principle also must have affected the attitude of the criminal courts toward the same matter. It is profoundly significant that when the criminal law governing unlawful combinations began to widen, new cases were brought in under the name of "confederacy." For many years "conspiracy" had the technical meaning assigned to it by the civil courts in connection with cases arising upon writs of conspiracy.

[15] 1 Rot. Parl., p. 96.

their plaint. And let the Sheriff be commanded by the writ of the Chief Justice and under his seal that they [i. e., the defendants] be before the King at a certain day; and there let swift justice be done. And let those who shall be convicted of this be severely punished according to the discretion of the justices aforesaid, by imprisonment and ransom; or let such plaintiffs, if they so desire, await the iter of the justices in their neighborhood, and there let them pursue their remedy."

This ordinance appears among the statutes of uncertain date in a slightly altered form:[16] "Our Lord the King at the information of Gilbert de Roubery, clerk of his council, hath commanded that whoever will complain of conspirators, inventors, and maintainers of false quarrels, and their abettors and supporters and having part therein, and brokers of debates, that persons so grieved and complaining shall come to the chief justices of our Lord the King, and shall have a writ of them, under their seals, to attach such offenders to answer to the parties grieved so complaining before the aforesaid justices; and such shall be the writ made for them: [Here follows the writ; see p. 26, n. 3.] And if any be thereof convicted at the suit of such complain-

[16] Bigelow, in his "Cases on the Law of Tort" (p. 211), speaks of this act as having been passed "about the same time" as the Articuli super Chartas. Italicizing the phrase in the writ given by the former act, "secundum ordinationem nostram nuper inde provisam," he continues: "From this it appears that this statute (which is classed among those of uncertain date) was subsequent to that of the 21 Edw. I, and that the first act above mentioned was designed to afford an ample private remedy to the person aggrieved, as well as a public prosecution."

The better opinion seems to be, however, that this ordinance is not a new enactment, but an inexact transcript or reproduction of the 21 Edw. I, with the addition of a specific writ subsequently devised. None of the other authorities mention any ordinance passed between 21 and 28 Edw. I. The instrument under discussion states only that the king "hath commanded," etc.; it does not direct anything to be done, beyond saying that "such shall be the writ made for them." The contents of the instrument are practically identical with those of 21 Edw. I, except for the writ. So one is forced to conclude that this instrument is nothing but a recital of the Act of 21 Edw. I, accompanied by a definite writ to be used in the premises.

On the dates of these ordinances, see notes in 1 Statutes at Large (Tomlins), pp. 256, 292, 399.

ants, he shall be imprisoned till he hath made satisfaction to the party grieved, and he shall also pay a grievous fine to the King." An incorrect and incomplete version of the same ordinance is also appended to the Statute of Champerty,[17] and wrongly attributed to the thirty-third year of Edward I.

Whether the last two of these instruments are but inexact transcripts of the first, or whether they reënacted it with the addition of a specific writ, the purpose of the group was to provide a civil action in the royal courts for damages caused by the acts of unlawful combinations of malefactors. No especial significance is to be attached to the provisions for fine and imprisonment to be inflicted upon those found guilty of conspiracy in these proceedings. Such penalties were commonly inflicted upon unsuccessful parties to a civil action, and they only bear testimony to the indistinctness of the line drawn between civil and criminal procedure in early English law.

The next statute that deals with conspiracy is the Articuli Super Chartas, 1300 (28 Edw. I, Stat. 3, C. 10).[18] It provides as follows: "In regard to conspirators, false informers, and evil procurers of dozens, assizes, inquests, and juries, the King hath ordained remedy for the plaintiffs by a writ out of the chancery. And notwithstanding, he willeth that his justices of the one bench and of the other, and justices assigned to take assizes, when they come into the country to do their office, shall upon every plaint made unto them, award inquests thereupon without writ, and shall do right unto the plaintiffs without delay." This act is evidently intended to improve the remedy previously established by permitting actions of conspiracy to be begun without writs. What its effect was cannot be known with certainty. One or two allusions in the earlier Year Books would indicate some doubt in the minds of the judges whether the action by writ of conspiracy was intended to be entirely superseded by the new remedy. This doubt,

[17] 33 Edw. III, C. 3 (1305); 1 Statutes at Large, p. 150.
[18] 1 Statutes at Large (Tomlins), p. 283.

however, seems to have been resolved in favor of the older action. All the cases in the Year Books (except a few criminal prosecutions) were begun by writs; and there is nothing to show that the new procedure was ever followed at all.[19]

We come now to the statute which for the first time tells us something regarding the exact nature of the offense of conspiracy. This is the famous Definition of Conspirators, made in 1304 (33 Edw. I, Stat. 2),[20] which served as the very basis of the law for a long time after its passage. It states "who be conspirators" in these words: "Conspirators be they that do confeder or bind themselves by oath, covenant or other alliance that every of them shall aid and support the enterprise of each other falsely and maliciously

[19] Of this statute Fitzherbert says: "There is also another writ of conspiracy which is given upon the statute called Articuli super Chartas, 28 Edw. I, cap. 10, which writ shall be directed unto the justices of assize to enquire of the conspiracy; and the writ shall be such:

"The king to his beloved and faithful W. of S. and his companions, etc., assigned, greeting: Whereas among other articles which Lord Edward, formerly king of England, our grandfather, granted for the amendment of the estate of his people, it is ordained, that of conspirators, false informers [etc., following the substance of the statute], as in the articles aforesaid is more fully contained: We, willing that the said articles in all things to be inviolably observed, command you that having looked into the ordinance aforesaid, you further willingly do, at the prosecution of all and singular persons complaining before you, that, which according to the form of the ordinance aforesaid shall be fit to be done. Witness, etc.

"And upon that he shall have an alias and pluries, and attachment against the mayor or sheriff, etc., if they do not according to the writ sent unto them, or return the cause why they cannot do the same; and it seemeth reasonable that the party in prison should have an action upon that statute against the recognizor, if he find him not bread and water in prison, etc., according to the statute." De Natura Brevium (9th edition, 1762), f. 116.

No case is cited referring to the statute, and there is nothing in the books to show the manner in which it operated in practice. Its importance, if it ever had any, was doubtless destroyed by the decadence of the civil action of conspiracy. After this had been displaced by the action on the case, suits for damages caused by false accusations, etc., were brought in the more flexible proceeding, while prosecutions for conspiracy were begun by indictment or information. Thus the older procedure, which partook of the nature both of a civil and of a criminal remedy, was left no sphere in which it could operate.

[20] 1 St. at L., p. 292 (Tomlins Ed.); 1 St. at L. (Ruffhead Ed.), pp. 149–50.

to indite, or cause to be indited, or falsely to acquit people, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees for to maintain their malicious enterprises and to suppress the truth; and this extendeth as well to the takers as to the givers. And stewards and bailiffs of great lords, which by their seignory, office or power undertake to bear or maintain quarrels, pleas or debates for other matters than such as touch the estate of their lords or themselves. This ordinance and final definition of conspirators was made and accorded by the king and his council in his Parliament the thirty-third year of his reign. And it was further ordained, that justices assigned to the hearing and determination of felonies and trespasses should have the transcript hereof."

There are a few other early statutes relating to conspiracy. These, however, are of but little importance for our present purpose.[21]

[21] On November 27, 1330 (Stat. 4 Edw. III, C. 11; 1 St. at L., Ruffhead, p. 204), a statute was passed which extended the criminal remedy for conspiracy. This act will be discussed presently. Fourteen years later (1344, 18 Edw. III, Stat. 1), it was declared that exigents should be awarded against "conspirators, confederators and maintainers of false quarrels." In the seventh year of Henry V (St. 7 Hen. V; 1 St. at L., 510) the civil remedy was improved by an act directing that, on account of the frequency of prosecutions by conspirators for felonies alleged to have been committed "in a place where there is none such," justices shall notice ex officio whether there is any such place as that named in the appeal or indictment; and if not, the process shall be void, the accused shall have writs of conspiracy against their "indictors, procurers and conspirators," and these shall be also punished by imprisonment, fine and ransom for the benefit of the king. This act was continued by 9 Hen. V, St. 1, C. 1 (1421), and made perpetual by St. 18 Hen. VI, C. 12 (1439).

By St. 6 Hen. VI, C. 1 (1427), reciting that many people are falsely indicted by conspirators, the time within which a capias is returnable and an exigent awarded is extended, and the capias is issued to the sheriff of the county in which the crime was alleged to be committed, as well as to the sheriff of the county in which the accused resides.

Finally, by Stat. 8 Hen. VI, C. 10 (1429), which recites that many persons are falsely accused of felony in a county or franchise other than that in which they reside, and are outlawed, further safeguards in the way of notice and delay before exigents shall issue are pro-

The real purpose and effect of the Edwardian statutes may be briefly summarized as follows: Although the civil action of conspiracy in the royal courts provided by the Ordinance of 21 Edward I and the Articuli super Chartas was probably an innovation, the Definition of Conspirators was in the nature of a codification of existing law. The conception of conspiracy which appears in the Definition, and in the later statutes which slightly extend and improve it, is but little in advance of that attained by Bracton and Britton. So we may be permitted to believe that these ordinances were intended to set out the entire law of conspiracy as it was then understood.[22] In other words, the

vided, and persons acquitted upon such prosecutions are given an action upon the case against the procurers of such indictments and are allowed to recover treble damages.

[22] The contrary view is taken by Buchanan, J., in the great American case upon conspiracy, State vs. Buchanan et al., 5 H. & J. (Md.) 317, decided in 1821. Speaking of the Definition of Conspirators, 33 Edw. I, he says (p. 335): "It is equally clear, that the statute does not embrace all the ground covered by the common law. Who doubts, or was it ever questioned, that a conspiracy to commit any felony is an indictable offense; as to rob or murder, to commit a rape, burglary or arson, etc., or a misdemeanor, as to cheat by false public tokens, etc.? . . . Yet such cases of conspiracy are not made punishable by any statute, and are only indictable at common law; which could not be if the statute 33 Edw. I either furnished a definition of all the conspiracies indictable at common law, or restricted and abridged the latter, by rendering dispunishable, all such as it does not define. . . . The statute, therefore, must be considered either as declaratory of the common law only, so far as it goes, for the purpose of removing doubts and difficulties which may have existed in relation to the conspiracies it enumerates, by giving them a particular and definite description: or as superadding them to other classes of conspiracy already known to the common law, leaving the common law in possession of all the ground it occupied beyond the provisions of the statute. And so it has been uniformly understood in England, from the earliest down to the latest decision that is to be found on the subject; otherwise the Judges could not have sustained a great proportion of the prosecutions for conspiracy, with which the books are crowded; in some of which the objection, that the matter charged was not within the statute 33 Edw. I, was made and overruled, as will be hereafter shown."

It will be noted that the phrase "common law" may be understood in two senses. It may refer to the customary law existing before the Definition of Conspirators, or it may mean the entire body of principles developed and applied by the courts at any one period. Now Judge Buchanan is right in saying that conspiracy is largely of common-law origin, understanding the term in the second of these senses. But this does not commit us to

essential purpose of the Edwardian statutes was to render clear and certain the already existing principles of the common law relating to unlawful combinations, and to create and improve the judicial machinery through which that law was to be administered.[23]

It is difficult to say just what was the ultimate effect of

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the position that the Definition of 33 Edw. I covered only a part of what was known to be law in regard to conspiracy at that time. The unsoundness of this opinion appears almost beyond question when we examine what evidence has been preserved to us. As the cases increased, and other conspiracies than those to enter false accusations were brought before the courts, the judges extended the law to embrace them. But this was clearly a process of judicial legislation, as appears from the manner in which this extension took place. (See Ch. III.) Thus there was developed a supplementary body of unwritten law which soon outstripped the statutes and furnished ample authority to support Judge Buchanan's decision in the case under discussion. It did not make any real difference, therefore, in this case whether the Edwardian statutes did or did not embody all the then law relating to conspiracy. Indeed, all that Judge Buchanan needed to hold, in any event, was that the Definition did not render "dispunishable" all combinations except those which it mentions.

[23] Wright, in his monograph entitled "The Law of Criminal Conspiracies and Agreements," says (p. 5): "There appears to be no evidence that, during the first of these periods [1200–1600], any other crime of conspiracy or combination was known to the common law than that which was authoritatively and 'finally' defined in A. D. 1305 by the Ordinance of Conspirators, 33 Ed. I, as consisting in confederacy or alliance for the false and malicious promotion of indictments and pleas, or for embracery or maintenance of various kinds." This statement is substantially true, though a tendency to broaden the offense appears during this period.

Mr. Justice Wright, however, is in error in his opinion that "even the civil writ of conspiracy appears not to have been extended until the seventeenth century to any matters beyond the purview of the 33 Edw. I" (ibid., p. 12). On the contrary, as is shown in Chapter II of the present study, as early as the reign of Edward III the civil action was entertained for several matters not within the statute; whereas by the seventeenth century it had been practically displaced by the new action on the case in the nature of a conspiracy.

He also gives several reasons which he considers to be "nearly conclusive that the crime of conspiracy was created by statute, and that no such crime was known to the common law." Without taking these up in detail, we may state that they do not, in our opinion, sustain his contention. A careful examination of all the evidence at our disposal seems amply to justify the conclusion stated in the text: that the Edwardian statutes merely gave definite and authoritative expression to a conception which had already arisen in the common law, and which retained its essential features for many years after the passage of these enactments.

these statutes upon the development of the conception of conspiracy. They were doubtless both a help and a hindrance. At the time of their passage the law of conspiracy was in a formative stage. The conception of the offense had not as yet been logically and completely worked out by the legal thought of the age. Hence, statutory expression may have been prematurely given to it, and so have clothed it with a finality and a rigidity which prevented its gradual improvement by the slow and silent processes of the common law.[24] This consideration may account for the slow progress made by the law of conspiracy during the next two hundred years, until new impetus was given to it by the decisions of the Court of Star Chamber. Still, it is probable that the total effect of the statutes upon the law was, upon the whole, favorable to its growth. They assigned it a definite place in the national jurisprudence, provided suitable procedure for the trial and punishment of conspirators, and prescribed adequate penalties for the enforcement of the law. Many cases were consequently drawn into the royal courts, whose decisions soon revealed the defects in the old conception of conspiracy and called attention to the possibilities of its future development. In this way the statutes so greatly advanced the progress of the law toward its modern form that they may be justly said to be the most important factor in the early history of conspiracy, though not the original source from which it arose.

[24] This statement is not inconsistent with the undeniable truth that the principles governing both the civil and the criminal remedies for conspiracy were largely a product of judicial legislation. The statutes undoubtedly confined the law within too narrow limits, judged according to our present notions; but it required elaboration and extension even within those limits. This is the task to which the courts devoted themselves for some years after the passage of the statutes; whereas, had these not been enacted, the judges might have been widening the general conception of conspiracy, leaving for a future time the settlement of its details.

CHAPTER II.

The Growth and Decay of the Civil Action of Conspiracy.

The statutes of Edward authorizing the royal courts to entertain civil actions for the redress of certain injuries inflicted by combinations of persons served as a foundation upon which the courts reared a complex structure of unwritten law relating to conspiracy. Limitations as to space forbid an enumeration of the steps whereby the old "strict" or "formed" action of conspiracy was evolved. The process was about completed by the time of Henry VII (1485). It will be necessary, however, to examine the matured form of the strict action as it appeared at this period, in order that its inherent limitations and defects may be pointed out, and the way opened for an intelligible account of the progress and causes of its decline and practical disappearance.[1]

The action by writ of conspiracy could be brought by a person who had been acquitted upon a false indictment preferred by two or more persons acting in concert. It also lay for a false appeal in which the plaintiff had been non-suit. Nothing else than a technical acquittal by verdict would support the action. If the plaintiff had gone free by reason of a defective indictment, a charter of pardon, or benefit of clergy, he had no standing in court. Even if an appeal had been sued while the indictment was pending, and upon this appeal the accused had been acquitted, wherefore the indictment also failed, he was not entitled to his writ of conspiracy, because he had not been technically

[1] The following description of the old strict action of conspiracy is based upon a personal examination of sixty-odd conspiracy cases in the Year Books of the period between the reign of Edward II and that of Henry VIII. I have thought it best, however, not to encumber the text with specific references, except in a few instances, to the individual cases. These can be found in F. N. B., f. 116.

acquitted upon the indictment. In like manner, if a person had been falsely indicted as an accessory to a crime, the acquittal of his principal gave him (the accessory) a right of action against the accusers; not so if the principal had died before the rendition of a verdict or had escaped in any of the ways mentioned above. The writ of conspiracy could not be brought jointly by husband and wife, or by two or more persons acquitted upon a joint indictment, because the grievance was said to be several in all cases.

The writ of conspiracy lay only against two or more defendants. Hence, if all the defendants but one were found guiltless, he was necessarily discharged also. If, however, one of two defendants had been discharged by "matter of law" (i. e., in any other way than by acquittal by verdict), or had died during the pendency of the action, the plaintiff might still proceed to a judgment against the other. Husband and wife, also, were held to constitute but one person in the eye of the law, and they were therefore incapable of conspiring with one another.

Certain classes of persons were immune from actions of conspiracy. The most important of these were the members of the presenting jury, or "indictors," who had found the indictment upon which the accused had been prosecuted. Their protection was absolute, even if they had procured themselves to be placed upon the inquest for the sole purpose of indicting the plaintiff. In one case this protection was allowed, by analogy, to the extendors in an elegit who had conspired to deprive a person of his land by means of a false extension. A qualified immunity could be claimed by witnesses and other informers connected with the unsuccessful prosecution. As long as these had acted under compulsion of the law and in good faith, they were protected from suit; not so if they could be shown to have been guilty of any collateral corruption, malice or covin. Commissioned judges, justices of the peace, bailiffs and other court officers who had assisted in the prosecution of the accused occupied a very similar position. If they had acted in pursuance of their duties and within the scope of

their offices, they were exempt from suit; but if they had gone outside of their duties, they might be held liable. In the same way it appears that a "man of the law" could not be charged with conspiracy by reason of advice rendered a client which led to an indictment or an appeal, provided he had acted in good faith and in the course of his professional duty.

An action of conspiracy lay upon an acquittal by verdict of a charge of felony or of treason. This is the principle finally settled upon by the authorities. We find in the Year Books during the reign of Edward III, however, several cases in which writs of conspiracy were grounded upon injuries not covered by the above principle or even by the Definition of Conspirators.[2] These exceptional cases may

[2] The Definition of Conspirators, as we have seen, was confined in its terms almost exclusively to combinations to pervert justice.

In the Year Book for the fortieth year of Edward III (1366) we find a case wherein an action of conspiracy was allowed for a combination to disturb the plaintiffs in the exercise of their right of advowson. The defendants had made a false letter, purporting to be signed by the plaintiffs, requesting the bishop to receive a certain clerk. This clerk was accordingly presented and inducted, and the plaintiffs were thus prevented from appointing their own clerk until they had brought a quare impedit and recovered their presentation. The court said that "for such false understandings, deceits, or conspiracies the action of conspiracy lies" (P. 40 Edw. III, f. 19).

Two years later a similar action was entertained for a conspiracy to procure a disseisin and feoffment resulting in a loss of warranty. In the same year an action was brought for a conspiracy to entér an action of novel disseisin in the name of the now plaintiff, wherein the defendant had pleaded that the plaintiff was a villein and the court had decided accordingly—in other words, for a conspiracy to deprive the plaintiff of his liberty and reduce him to villenage. The court held that the writ of conspiracy would lie, for if such falsity were not punished, any freeman might be made a villein in the same violent manner (H. 42 Edw. III, f. 1; P. 42 Edw. III, f. 14).

There is some ground for believing that a writ of conspiracy would lie for combinations to forge false deeds and offer them in evidence, whereby the plaintiff lost his case; also for a conspiracy to cause a false office to be found of the plaintiff's land (T. 39 Edw. III, 13; 46 Edw. III, f. 20; 27 Lib. Ass. 73).

Not only the civil courts, but the criminal courts as well, took cognizance of various combinations of like nature (26 Lib. Ass. 131; 27 Lib. Ass. 74, 73).

None of the above wrongs fell within the field of the matured form of the action of conspiracy, and most of them were beyond the operation of the Definition of Conspirators.

be attributed to the vague form of the writ of conspiracy prescribed in the Ordinance of Conspirators,[3] which afforded opportunities for much judicial discretion as to entertaining the action in new cases. In course of time the writ became more explicit in describing the conspiracy complained of. Several definite formulas, applicable to the various circumstances under which false accusations of treason and felony might be prosecuted in vain, came into existence. Finally, these forms became the only legal forms, and unless the complainant's case could be brought within the words of these standard writs, he was obliged to seek another remedy or, failing in this, go without legal redress altogether.

Such were the principles governing the strict action of conspiracy. One can easily foresee the defects soon revealed in practice. This ancient remedy fell short of the necessities of the conditions under which it originated.

[3] The following is the form of writ prescribed by the Ordinance of 21 Edw. I: "The King to the Sheriff, Greeting. We command you that if A. de G. shall give you security for prosecuting his plaint, then place under gage and safe pledges G. de C. that he be before us in octabis sancti Joh' Baptistae, wheresoever in England we shall be, to answer the said A. for his plea of conspiracy and transgression, according to our ordinance lately thereupon provided, according as the said A. may reasonably show that he ought to answer to him for it, and have there the names of the pledges and this writ. Teste, etc."

The above language in no way describes the wrong to be redressed, beyond calling it a conspiracy. The plaintiff might accordingly sue out his writ of conspiracy, and then "count" upon almost any kind of injury done him by a combination of persons. The court thus was left an unbounded discretion to determine whether the wrong complained of was a conspiracy under the statutes or according to the general principles of the common law. This consideration probably accounts for the extensions which the action of conspiracy received during the period under discussion.

It may have been this very disposition of the courts freely to extend the remedy whenever reason and justice seemed to demand it that contributed to cause the writ of conspiracy to become more definite in its description of the tort to be redressed. All we can say with assurance, however, is that exceptional cases like the above are no longer met with after the reign of Edward III, and that by the time of the compilation of the Register Brevium, and of the De Natura Brevium (Fitzherbert), the writ of conspiracy had become differentiated into a number of distinct forms, each applicable to a single group of circumstances under which the action of conspiracy would lie.

There were many injuries of the same general character as those just enumerated which the action of conspiracy was incapable of reaching. False indictments might be preferred by a single individual. The offense charged might be a crime other than treason or felony. Other perversions of justice besides false accusations might be wrought, by single persons or by combinations of persons. False accusations might fail in other ways than by the acquittal of the accused. All of these wrongful acts were beyond the purview of the writ of conspiracy, but that they should go unpunished was intolerable. On the other hand, false indictments might be preferred by a combination of persons acting in good faith. If such persons were to be liable in damages whenever the accused happened to escape conviction, manifest injustice would be done. So extended a liability to actions of conspiracy would also deter people from laying charges against evildoers, and would thus operate as a serious hindrance to the administration of criminal justice.[4]

These defects were eliminated by a process of judicial legislation, operating under the cover of a supplementary form of action which grew up beside the action of conspiracy and enabled the courts to take cognizance of wrongs of the same general nature as those redressed by the older remedy, but excluded from its field by some technical barrier.[5] The result was the complete displacement of the old

[4] This was a particularly serious objection in the England of that period, because the prosecution of criminals depended almost entirely upon the zeal of private individuals. Any undue deterrent upon private initiative in this direction would almost certainly result in a large increase of lawlessness.

[5] We ought not to be surprised at seeing the defects of the action of conspiracy rendered harmless in this roundabout fashion. It would have been utterly repugnant to the traditions of the early law for the courts openly to have changed the principles governing the older remedy. The characteristic method of legal development, in England as elsewhere, has always been to mask a change in the essentials of the law under a nominal adherence to its letter. Hence, in quietly broadening the legal remedy for false and malicious prosecutions through the agency of a supplementary form of action, which apparently left the older remedy untouched while really undermining its very foundation, the English courts were merely giving a special illustration of the manner in which legal fictions, equitable remedies, and the like, come into being.

remedy by the new, which, being based upon an ultimately sound conception, has survived to the present day under the name of "malicious prosecution." The story of this phase of the law of conspiracy is interesting in the extreme, and vividly pictures the mode in which the English common law has grown to be what it is today. We shall accordingly describe the changes in the civil law of conspiracy effected by the new remedy, and then explain the causes which brought them about and finally led to the extinction of the old strict action of conspiracy.

The new remedy was an action upon the case "in the nature of a conspiracy."[6] It was first[7] brought into the

[6] The "action upon the case" had its origin in Chapter 24 of the Statute of Westminster 2, passed in the thirteenth year of the reign of Edward I (1285). Before this statute, when a person wished to bring an action for damages for some legal injury done him, he was obliged to show that the facts of his case could be comprehended within one or more of the formal, authoritative "original" writs contained in the Register. If this were impossible, he must appeal to the chancellor or go without remedy altogether, for only Parliament could change or create an original writ. In the growing volume of litigation, however, more and more cases appeared which were not covered by already existing original writs, but which obviously called for redress. Accordingly the above statute provided as follows: "And whenever from henceforth it shall fortune in the Chancery, that in one case a writ is found, and in like case (in consimili casu) falling under like law, and requiring like remedy, is found none, the clerks of the Chancery shall agree in making the writ." Such writs were held to no strict form, but were framed to fit the circumstances of specific cases. Actions begun by means of these special, individual writs were known as "actions upon the case," and were soon extended to numerous wrongs hitherto not legally remediable. The operation and value of this new remedy are strikingly illustrated in the history of the action upon the case "in the nature of a conspiracy."

[7] Lord Holt seems to claim for the action upon the case in the nature of a conspiracy a much earlier beginning than this. Speaking of several earlier cases, among them two or three decided during the reign of Edward III, he says, "These actions of conspiracy in the old books were really but actions upon the case: but conspiracy properly so-called does not lie unless the party were indicted of a capital crime" (Savile vs. Roberts, 12 Mod. 209). This remark holds true of some of the cases that he cites; but it is not applicable to the abnormal cases of conspiracy reported in the reign of Edward III, of which mention has been made. It is improper to speak of these as actions upon the case. The statement implies an anachronism. At that period the strict action of conspiracy was in a formative state. The limits of that remedy

field heretofore occupied solely by the action of conspiracy by the Statute 8 Henry VI, Chapter 10 (1429). This act provided that any person falsely indicted or appealed in a jurisdiction in which he does not reside shall, after acquittal by verdict, "have a writ and action upon his case against every procurer of such indictments or appeals," and shall recover treble damages. This statute was held (Y. B., 11 Hen. VII, f. 25) to have provided a remedy broader than the strict action of conspiracy: whereas the latter lay only after a false indictment for felony, and only against two or more defendants, the former lay for a false indictment for a mere trespass, and against a single defendant. The obvious advantages of the action begun by a writ "framed as the matter required," and "tied down to no strict form," soon caused it to encroach deeply upon the province of the strict action of conspiracy, where indeed it almost immediately displaced the older remedy altogether. There are no cases begun by a strict writ of conspiracy later than the reign of James I (1603–1624). The discussions regarding the nature of the strict action of conspiracy, so often met with from the time of James I until the reign of Anne, were designed to mark out the limits of the ancient remedy, and to show that the new principles being introduced in connection with actions upon the case in the nature of a conspiracy were not inconsistent with the old, because applicable to an entirely different sphere.[8]

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were so indistinct and shifting (owing, as we have seen, to the vague and general phraseology of the writ of conspiracy) that redress could readily be extended to exceptional cases without violence to any of the principles relating to the action of conspiracy. Not until these had hardened into the set forms of a later period was it necessary that an action upon the case be employed to redress "consimiles casus." At the time of Edward III, the conditions which gave rise to the action upon the case in the nature of a conspiracy had not yet come into existence.

[8] Thus, in Smith vs. Cranshaw, 1 Jones 93 (1 Car. I, 1625), the court says: "There are two writs of conspiracy: the one the writ of conspiracy in the Register and the other is an action on the case, and if a man brings writ of conspiracy mentioned in the Register, he should be indicted and acquitted, and if he is not acquitted no action lies. There must be a conspiracy, hence writ of conspiracy does not lie against one, for one cannot conspire

The improvements effected in the law by means of the new action upon the case were gradually wrought out in a line of judicial decisions extending from the reign of Henry VII to that of George I (1485–1726). The practical completion of the process was shown in the great cases of Savile vs. Roberts (10 Wm. III, 1698) and Jones vs. Gwynn (12 Anne, 1713), to be discussed presently. Its results may be briefly stated in the form of the new principles established by it.

1. A single person who preferred a false and malicious indictment was subjected to a liability to the party injured similar to that previously enforced in an action of conspiracy against a combination of persons who had been guilty of the same act. In the words of Lord Holt,[9] "Wherever an action of conspiracy is maintainable against two, there if it be a malicious prosecution by one, case will lie."[10]

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alone, for the writ of conspiracy having a precise form cannot be extended beyond the form." But the action upon the case, the court continues, is framed as the matter requires, and is not confined to any strict form. Hence it lies against one person, and upon a mere ignoramus. The purpose of this contrast is clearly to enable the court to establish the broader principles applicable to the action upon the case without contravening the current doctrines regarding the action of conspiracy. There are similar comparisons between the two forms of action, and for a like purpose, in Savile vs. Roberts (12 Mod. 209), and Jones vs. Gwynn (10 Mod. 148, 214).

[9] Savile vs. Roberts, 12 Mod. 208.

[10] The availability of the action upon the case against a single defendant was the feature which first attracted notice. At first there was a tendency for the courts to hold that actions upon the case would lie against one defendant only when the crime charged had been a trespass. For malicious indictments for felony, it was thought, the action of conspiracy would furnish the only redress. Thus, in Shotboldt's Case, Godb. 76 (28–29 Eliz., 1586–7), Clench, J., said that "such a conspiracy which is grounded upon an indictment of felony must be against two at the least, for the same is an action grounded upon the common law." This distinction, however, soon disappeared. The case of Knight vs. German, Cro. El. 70, 134, decided during the same reign (29 and 31 Eliz., 1587 and 1589), was grounded upon a false indictment for felony, and a single defendant was made to plead probable cause. Lord Coke said, "The words here, and in a conspiracy, are all one; and as a writ of conspiracy lieth against two, so here [case lieth] against one." This is the doctrine of the later cases. The books record an increasing number of actions upon the case against single

2. Actions upon the case were entertained in favor of persons injured by false and malicious accusations of offenses amounting only to trespasses.[11] Recovery was in like manner allowed for the damages inflicted by false and malicious proceedings in the civil[12] and in the ecclesiastical[13]

defendants wherein the wrongs complained of would have supported actions of conspiracy had they been perpetrated by a combination of persons. The true principle was broadly stated in Savile vs. Roberts, and it held its place until the decay of the action of conspiracy took away from it all practical importance.

[11] Here again the courts at first showed a disposition to narrow the operation of the new principle. It was intimated in Law vs. Beardmore, T. Raym. 135 (17 Car. II, 1665), that an indictment for a bare trespass is not actionable; "but where the matter of the indictment is scandal, or cause of corporal punishment, there [an action] lyeth." Three cases decided in the twenty-first year of Charles II (1669)—Skinner vs. Gunton, 2 Keb. 473, wherein the plaintiff had been arrested and imprisoned in a false civil action of debt; Price vs. Crofts et al., T. Raym. 189, arising out of a false indictment for barratry; and Henly vs. Burstall, 1 Vent. 23, 25 (21 Car. II, 1669), in which the cause of action was an indictment against a justice of the peace for rescuing a vagabond out of the hands of the constable who had brought the latter before him—all these were within the limitation of Law vs. Beardmore. This limitation, however, was soon exceeded. In Norris vs. Palmer, 2 Mod. 51 (confirmed in Anon., 2 Mod. 306, 20 Car. II, 1668), the plaintiff was allowed to recover in an action for a malicious indictment for a common trespass involving no scandal—the asportation of 100 bricks.

The point was fully discussed in Savile vs. Roberts, 12 Mod. 208. The plaintiff had been maliciously and falsely indicted for a riot. Lord Holt expressly overruled the doctrine that an action would not lie for a false indictment for a trespass unless the charge involved scandal, and gave judgment for the plaintiff. This decision was fully examined and confirmed in Jones vs. Gwynn, 10 Mod. 214 (12 Anne, 1713), wherein an action had been brought upon a false and malicious prosecution for exercising without a license the trade of a "corn-badger." Premising that the ground of the action was the expense to which the plaintiff had been put to defend himself from the false charge, the court said that the damage was as great whether the charge was scandalous or not, and the malice also as great or greater. "If scandal be mentioned, it is only mentioned in the nature of damages." This is the modern doctrine.

[12] The early practice of permitting the defendant in an action of debt to be arrested at the beginning of the suit and held in prison unless he was able to give bail to appear in court and satisfy any judgment that might be rendered against him opened manifest opportunities for false and malicious proceedings for which the allowance of costs was not an adequate redress. Accordingly, during the reign of Charles II, actions upon the case for the damages caused by such malicious civil suits came to be allowed. The first of them reported is Skinner vs. Gunton,

courts. It became finally settled, also, that an action upon the case would lie for false and malicious accusations of treason,[14] in regard to which the courts for a time had exhibited some uncertainty.

T. Raym. 176, 2 Keb. 473 (21 Car. II, 1669). A typical case is Daw vs. Swaine, 1 Sid. 424, decided the same year. Swaine had falsely and maliciously affirmed to the sheriff of Middlesex that Daw owed him £1000, and caused bail to be fixed accordingly, whereas the debt really amounted to only £40. Daw had been unable to secure such large bail, and had consequently been kept in gaol for several days. He was allowed to recover a judgment against Swaine in an action upon the case; "because," the court said, "he had special damages from such false parlaunce." See also Hocking vs. Mathew et al., 1 Sid. 463 (22 Car. II, 1670), Webster vs. Haigh, 3 Lev. 210 (36–37 Car. II, 1684), and Bird vs. Line, Comyn 190 (8 Anne, 1709). During the reigns of William III and Anne it was thought that such an action would lie only in case the plaintiff could show that he had been held to excessive or "special" bail. See Neal vs. Spencer, 12 Mod. 257 (10 W. III, 1698); Robins vs. Robins, 12 Mod. 273 (11 W. III, 1699); Parker vs. Langley, 10 Mod. 145, 210 (11–12 Anne, 1712–13). In Goslin vs. Wilcock, 2 Wils. 302 (6 Geo. III, 1765), however, the plaintiff was allowed to recover in an action for a false arrest in a malicious civil suit, without any allegation that he had been held to excessive bail. This decision was perfectly proper. Excessive bail is only an evidence of malice or of damages; and if these can be proved by other facts, the necessities of the action are satisfied.

[13] This doctrine dates from the case of Carlion vs. Mill, Cro. Car. 291 (8 Car. I, 1632), where it was held that an action upon the case would lie against the apparitor of a bishop for maliciously causing a man to be cited to the consistory court upon a groundless suspicion of incontinence. The reasons for allowing such actions were the same as those given in support of actions for false and malicious civil suits: the malice of the defendant, and the costs which the plaintiff had incurred in repelling the charge. See Hocking vs. Mathew et al., 1 Sid. 463 (22 Car. II, 1670); Grey vs. Degge, T. Jones 132 (31–32 Car. II, 1679–80).

An action would lie for a false charge of an ecclesiastical offense only in case the court before which it had been preferred had had jurisdiction over the offense. Thus, in Bomber vs. Painter, 2 Bulst. 343 (8 Car. I, 1632), an action for an attempt to charge the plaintiff at quarter sessions with being the father of a bastard child was disallowed, because scandals of this kind were properly cognizable in the spiritual, not in the secular, courts.

[14] In Lovet vs. Falconer, 2 Bulst. 220 (11 Jac. I, 1613), an action upon the case had been brought for a false and malicious accusation of treason. The court inclined against entertaining it. "Every one," they said, "by his oath of allegiance is bound to discover treason, and to have one punished for this by an action upon the case in the nature of a writ of conspiracy to be brought against him should be very hard." The case, however, went off upon the point that the false accusation had been preferred before a court without jurisdiction to try it. The question was settled in the great case of Smith vs. Cranshaw, 2 Bulst. 270, 1 Jones 93, and other

3. The former technical principle requiring the plaintiff in an action of conspiracy to prove a legal acquittal by verdict of the false charge was greatly relaxed. It became gradually settled that an action upon the case would lie where the grand jury had refused to find an indictment, but had returned an ignoramus upon the bill preferred.[15]

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reports (20 Jac. I—1 Car. I, 1622–1625), wherein the court held, after listening to several rearguments, that an action would lie for a false and malicious charge of speaking treasonable words, and that as to this there was no diversity between a conspiracy to indict for treason and a conspiracy to indict for a felony.

[15] The first suggestion of this principle is to be found in the case of Sydenham vs. Keilway, decided anno 16 Eliz. (1574), and cited in a case reported anno 1 Jac. I (1603), Cro. Jac. 7. The court said that although an action of conspiracy would not lie upon an ignoramus found, an indictment for the conspiracy would lie at the common law. This distinction was adhered to when actions upon the case came into general use. Thus, in Barnes vs. Constantine, Yelv. 46 (2 Jac. I, 1604), there is an obiter dictum that "this action is but for damages for a slander, which well lies . . . if a bill is offered and an ignoramus found." This statement was confirmed in the Poulterers' Case, 9 Co. 56 b, six years later. The court said, "And it is true that a writ of conspiracy lies not unless the party is indicted and legitimodo acquietatus, for so are the words of the writ." But they upheld an action upon the case for a false accusation of robbery whereon the grand jury had found ignoramus. Some doubt was thrown upon this doctrine in Lovet vs. Falconer, 2 Bulst. 270 (11 Jac. I, 1613), and was exhibited by the court during the first argument of Smith vs. Cranshaw, Palm. 315 (1 Car. I, 1625). The final decision of the latter case, however, so firmly established the doctrine that it was never afterwards shaken. See Payn vs. Porter, Cro. Jac. 490 (16 Jac. I, 1618); Pollard vs. Evans, 2 Show. 50 (31 Car. II, 1679). In Goddard vs. Smith, 6 Mod. 261 (3 Anne, 1704), the court seemed clearly opposed to extending it to a case wherein the plaintiff could show only a nolle prosequi; but no decision was rendered.

In Savile vs. Roberts, 12 Mod. 208, 211 (10 W. III, 1698), Lord Holt was inclined to think that an action could not be maintained upon an ignoramus unless the charge involved scandal. This qualification, however, was not adhered to in Jones vs. Gwynn, 10 Mod. 214 (12 Anne, 1713), which contains a final statement of the law upon this point. The principle under discussion was unequivocally laid down as authoritative, upon the reason suggested in the Poulterers' Case and more fully explained in Smith vs. Cranshaw. "Conspiracy," concludes Parker, C. J., "lies not without acquittal, and the reason of this, and the only one, is because this is a formed action, and the form of the writ in the Register is so. . . . There is certainly no argument from an action which is a formed one, for which there is a formed writ in the Register, to an action upon the case, that is tied down to no form at all. If an action upon the case be brought upon an indictment, where the jury find ignoramus, there is no possibility that there can be an acquittal."

By a parity of reasoning, actions came to be entertained where the plaintiff had escaped prosecution by reason of a technical defect in the indictment found.[16] Later, also, suits were allowed even for damages inflicted by false and malicious proceedings, civil and criminal, before a tribunal which was without jurisdiction in the premises.[17]

[16] The first statement that an action would lie for a malicious prosecution upon a defective indictment is found in an obiter dictum in Barnes vs. Constantine, Yelv. 46 (2 Jac. I, 1604). It was repeated as part of the ratio decidendi in Smithson vs. Symson et al., 3 Keb. 141 (25 Car. II, 1673), and confirmed in a note to Pedro vs. Barrett, 1 Ld. Raym. 81 (8 W. III, 1696). Lord Holt, in Savile vs. Roberts, remarked obiter that such an action grounded upon an erroneous indictment would lie for the slander and injury to the plaintiff's good name; sed aliter when the indictment "contains crime without slander," as in forcible entry. The doubt suggested in Goddard vs. Smith, 6 Mod. 261 (3 Anne, 1704), seems applicable to the formed action of conspiracy.

The law upon this matter was finally settled, however, in Jones vs. Gwynn, 10 Mod. 214 (12 Anne, 1713). The plaintiff had been indicted for exercising without a license the trade of a "corn-badger." The prosecution failed because this was not an indictable offense. The court held that an action of conspiracy could not be sustained upon these facts, but that an action upon the case might, since the gist of such an action is malice and damages. "It is to be considered," says Parker, C. J. (p. 217), "that the grounds of this action are, on the plaintiff's side, innocence, and on the defendant's side malice. . . . And as the plaintiff is equally damnified by an insufficient as sufficient indictment, so the malice of the defendant is not at all less because the matter was not indictable; nay it is rather an aggravation." Nor is there any reason, he continues, for making a difference when the matter of the indictment is scandalous and when not. Judgment was accordingly given for the plaintiff. This decision has been followed in the later cases. As was said in Chambers vs. Robinson, 1 Stra. 691 (12 Geo. I, 1726), "a bad indictment [serves] all the purposes of malice, by putting the party to expense, and exposing him, but it serves to no purpose of justice in bringing the party to punishment if he be guilty." See also Wicks vs. Fenton et al., 4 T. R. 247 (21 Geo. III, 1780).

[17] An action of conspiracy would not lie unless the alleged false and malicious prosecution had been before a court of competent jurisdiction. This principle was at first held applicable to actions upon the case, and the declaration was required to disclose upon its face the competence of the tribunal in which the charge had been tried. See Throgmorton's Case, Cro. El. 563 (39 Eliz., 1597); Arundell vs. Tregono, Yelv. 116 (5 Jac. I, 1607); Lovet vs. Falconer, 2 Bulst 270 (11 Jac. I, 1613); Anon., Styles 374 (1653). In time, however, the strictness of the rule began to relax. In Taylor and Towlin's Case, Godb. 444, decided anno 4 Car. I (1628), a bill of conspiracy for a false indictment for rape was entertained by the Court of Star Chamber, although the jurisdiction of the

4. Although the framers of the statutes of conspiracy had sought to provide remedies for false and malicious accusations only, the courts of the time of Edward III, in their zeal to break up conspiracies, were inclined to punish

court in which the charge had been prosecuted was not distinctly alleged. The court at first was inclined to think this a good exception. "But afterwards," we are told, "upon view of the Bill, because the conspiracy was the principal thing tryable and examinable in this court, and that was well laid in the bill, the bill was retayned, and the court proceeded to sentence."

Actions for malicious prosecutions coram non judice were not long in finding their way into the common-law courts. In 1653 the case of Atwood vs. Monger, Styles 378, arose out of a false presentment before the conservators of the River Thames for suffering eight loads of dirt to fall into the river. After verdict for the plaintiff, the defendant moved in arrest of judgment upon the ground that the record did not disclose the authority of the conservators to receive presentments. The court said, however, that an action lies "for bringing an appeal against one in the common pleas, though it be coram non judice, by reason of the vexation of the party and so it is all one whether here were any jurisdiction or no, for the plaintiff is prejudiced by the vexation, and the conservators took upon them authority to take the presentment."

The principle that an action might lie for a false and malicious civil suit before a court without jurisdiction was stated obiter in Temple vs. Killingworth, 12 Mod. 4 (3 W. and M., 1691), and in Jones vs. Gwynn, 10 Mod. 214, 219, 220 (12 Anne, 1713). It becomes part of the ratio decidendi in Goslin vs. Wilcock, 2 Wils. 302 (6 Geo. III, 1765). Wilcock had caused the arrest of Goslin upon a false and malicious civil action in the court for the Borough of Bridgewater. It was shown that the court at Taunton had jurisdiction of the case, but that Wilcock had caused Goslin to be arrested at Bridgewater because he (Goslin) had a stall in the fair at that place. After verdict for Goslin in an action upon the case grounded upon the above facts, Wilcock moved for a new trial; but the court said: "If you hold a man to bail in an inferior court when you know it hath not jurisdiction, and with malice, an action will lie; that though it was somewhat doubtful but that the declaration should have alleged that the defendant knew he had no cause of action in the jurisdiction of Bridgewater . . . yet justice and equity being on the side of the plaintiff, a new trial would be refused."

It has always been necessary, however, for the plaintiff in an action for a malicious prosecution to show that the prosecution is at an end; "otherwise, he might recover in the action, and yet be afterwards convicted on the original prosecution." Fisher vs. Bristow, 1 Dougl. 215 (19 Geo. III, 1778). See also Glaseour vs. Hurlestone, Gouldsb. 51 (29 Eliz., 1587); Shotboldt's Case, Godb. 76 (28–9 Eliz., 1587); Throgmorton's Case, Cro. Eliz., 563 (39 Eliz., 1597); Arundell vs. Tregono, Yelv. 116 (5 Jac. I, 1607); Skinner vs. Gunton, 2 Keb. 473 (21 Car. II, 1669); Parker vs. Langley, 10 Mod. 145, 210 (11–12 Anne, 1713); Lewis vs. Farrell, 1 Stra. 114 (5 Geo. I, 1719); Morgan vs. Hughes, 2 T. R. 225 (28 Geo. III, 1788).

all false accusations whatsoever.[18] The evil effects of this policy have been already shown. They were corrected by the later doctrine of "probable cause," which has survived in full force until the present day. According to this doctrine, the defendant in an action upon the case for malicious prosecution will escape liability for the false arrest and prosecution if he can prove that the circumstances under which he ordered the plaintiff's arrest had been such as to justify a man of ordinary prudence and judgment in believing that the plaintiff was guilty of the crime charged.[19]

[18] 2 Pollock and Maitland, "History of English Law," p. 538.

[19] The evolution of the doctrine of probable cause is interesting. In Archeboll vs. Borrell, 3 Leon. 139, 142 (28 Eliz., 1586), Walmesley, Serjeant, states that no action lies for any "vexation by suit, if no corruption or covin be in the party who prosecutes the suit." In Knight vs. German, Cro. Eliz. 70 (29, 31 Eliz., 1587, 1589), the court held that no suit can be brought upon a false indictment of felony in cases where "the indictment is preferred by the party grieved, and he pursueth it according to law." But the defendant should plead that he "did it upon good presumption," else "everyone shall be in danger of his life by such malicious practices."

During the reigns of Elizabeth and James I it was several times decided that a good "ground of suspicion" constituted a sufficient justification for having preferred a false indictment. See Pain vs. Rochester, Cro. Eliz. 871; Chambers vs. Taylor, ibid., 900; Weele vs. Wells, 3 Bulst. 284. Thus the finding by the plaintiff, in the hands of the defendant, of goods stolen from him was held a good defense (Anon., Moore 600), likewise the plea of a father sued for a false charge of rape that he had believed and acted upon the statement of his young daughter (Cox vs. Wirrall, Cro. Jac. 193).

In Ashley's Case, 12 Co. 90 (9 Jac. I, 1611), the Court of Star Chamber enumerated the elements which must concur in order that the defendant in malicious prosecution might justify upon the ground of a "good cause of suspicion." (1) A felony must have been committed. (2) The arrestor must plead suspicion upon good cause, which is traversible. (3) The party who pleads suspicion must actually have arrested the plaintiff. He cannot command another to do so, since suspicion is purely personal. Common voice and rumor were said to be sufficient grounds of suspicion.

In Payn vs. Porter, Cro. Jac. 400 (16 Jac. I, 1618), the Court of Exchequer recognized that "the exhibiting the bill upon true and just presumptions is excusable." See also Carlion vs. Mill, Cro. Car. 291 (8 Car. I, 1632)—"groundless suspicion;" Hockin vs. Matthew et al., 1 Sid. 463 (22 Car. II, 1670)—"without any cause."

The term "probable cause" seems to be employed for the first time in Atwood vs. Monger, Styles 378 (1653). There the court

Thus was the law extended to cases which the strict action of conspiracy had been unable to reach. We must now endeavor to explain the causes of the process of growth just described, and to show why the action upon the case displaced the old action by strict writ of conspiracy.

None of the defects in the older remedy were such as would necessarily prove fatal to it. Their presence alone does not suffice to explain the displacement of the old remedy by the new. These defects might well have been corrected within the limits of the action of conspiracy, or the two forms might have continued to exist side by side and remained mutually exclusive. But the old form of action embodied a fundamental error. This error lay in the idea that the element of combination among several persons to inflict harm upon another might in itself furnish a universally valid foundation for a civil action for the recovery of damages.[20]

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said, "And I hold that an action on the case will lye, for maliciously bringing an action against him where he had no probable cause," etc. The term recurs in the argument of Pemberton, Serjeant, in Norris vs. Palmer, 2 Mod. 51 (27 Car. II, 1675). It was adopted generally by the courts, and the conception denoted by it refined in the later decisions.

Until the case of Savile vs. Roberts had been decided, the practice was for defendants to plead probable cause as their justification. After that decision, however, it became incumbent upon the plaintiff to allege and prove affirmatively the absence of probable cause in the defendant, else the declaration would be held bad upon demurrer. This is the modern practice.

[20] This idea is at the foundation of the early statutes and cases. The gist of the civil action of conspiracy was the combination. No judgment could be pronounced against the defendants unless at least two were found guilty. The action had to be brought in the county in which the combination had been formed, not where the false indictment had been preferred and discharged, the reason being that the conspiracy was the "root of the fact," and acts in execution of it were "only consequences following upon this," or "matters of aggravation." During the reign of Richard II it was even said that one "might have a writ of conspiracy although they [the defendants] did nothing but the confederacy together, and may recover damages" (Bellewe's Cases, Temp. Rich. II). In Cockshall vs. Mayor of Boalton, 1 Leon., f. 189, pl. 269 (31 Eliz., 1589), the plaintiff brought suit against the mayor, town-clerks, and gaoler of Boalton for a conspiracy to delay him in recovering in an action of debt by allowing the debtor to go free without bail. It was objected by the defendants that the taking of bail is a judicial act, and can therefore give rise to no action, but

The fallacy involved in making a conspiracy the gist of a civil action is manifest. The immediate purpose of such action is to reimburse the plaintiff for some material loss resulting from the infliction upon him of a legal injury. The amount recoverable is the estimated pecuniary measure of the loss, and in some cases an additional sum by way of "punitive damages." In every instance, however, the plaintiff must have suffered actual damage from the very acts constituting the legal wrong. Now obviously a bare agreement among two or more persons to harm a third person inflicts no material hurt upon him. However malevolent the combination may be, the person against whom it is directed suffers no loss until the acts planned are actually performed. Hence the acts done and not the conspiracy to do them should be regarded as the gist of the proceeding to make good the damage. Attention should be paid primarily to the damnum; injuria, though essential to recovery, occupies a position of secondary importance as regards the procedure by which such recovery is to be had.

The form of action upon the case enabled the courts to accomplish this shift of emphasis from the conspiracy to the acts done. Its convenience and consequent popularity also led to the substitution of malice for conspiracy as the element of injuria in torts founded upon false prosecutions. The relation existing between conspiracy and malice in this connection is curious and instructive. The vitality of the strict action of conspiracy lay in the fact that it was devised to remedy a class of malicious injuries. The malice of the conspirators was what attracted the attention of the early lawyers[21] and supplied the moral support of the action.

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the court entertained the suit, "for the not taking bail is not the cause of the action but the conspiracy." And when the attempt was made later on to find a reliable means of distinguishing the action of conspiracy from the action upon the case in the nature of a conspiracy, one of the methods employed was to determine whether the conspiracy was the ground of action, or whether the emphasis was placed upon the acts done and the conspiracy was mentioned by way of aggravation.

[21] Thus, Chapter 12 of the Statute of Westminster 2 (13 Edw. I, 1285), provides a remedy for malicious appeals. The Ordinance of

But noting that false and malicious indictments and appeals were always preferred by several persons acting in concert, these jurists were led to found the tortious character of such enterprises upon what is little more than a single evidence of malice, instead of malice itself. The remedy constructed under these circumstances worked very well as long as malicious prosecutions retained their original incidents. But as litigation increased, malice exhibited itself in new activities. To meet them the action upon the case was employed. The variety of malicious injuries so brought before the courts soon recalled into prominence the idea of malice as the secondary element of such wrongs. After this idea had become firmly established it was not long before its more general validity and increased scope caused the recognition of its superiority over the element of conspiracy as a constituent of tort. In a word, the strict action of conspiracy was rendered obsolete by the reappearance in the conscious thought of the times of the general conception of malice as a secondary element of tort.[22] This process will now be explained in detail.

Conspirators is directed against those who "procure pleas maliciously to be moved," and those who "maliciously maintain and sustain" such pleas. Stat. 33 Edw. I defines conspirators as "they that do confeder or bind themselves . . . falsely and maliciously to indict or cause to be indicted . . . and such as retain men for to maintain their malicious enterprises," etc. There are also other statutes and cases at this period which aim to punish various injuries inflicted with malice.

[22] Even in their treatment of actions upon the case wherein the right of the plaintiff to recover was explicitly based upon malice and damages, the courts at first exhibited a tendency to repeat the process of erecting into fundamental conditions for redress circumstances which were really but particular evidences of malice or measures of damages—the same process whereby the action of conspiracy had become invested with its stiff and contracted character. Manifestations of this tendency are seen in the earlier holdings that an action upon the case for a false and malicious accusation of a trespass, or for a malicious prosecution upon a defective indictment or before a court without jurisdiction to conduct the prosecution, or for a malicious accusation whereupon the grand jury had found an ignoramus, would not lie except in cases in which the charge involved slander or the plaintiff had suffered corporal injury or imprisonment. Of the same nature was the principle at first announced that an action for a false and malicious proceeding in the civil courts would lie only in cases in which the plaintiff had been held to excessive bail. Fortunately, the number and

So completely had the current conception of malice as the secondary element of the torts under discussion found expression in the principles governing the remedy by writ of conspiracy, and so efficient, we may be permitted to believe, was this remedy in reaching the most prominent class of malicious injuries then judicially noticed, that express reference to malice in conspiracy cases of the period from the reign of Edward II to that of Henry VII (1307–1509) practically ceased.[23] But even at this time a tacit idea of the significance of malice lingered in legal thought. Its presence may be detected in the qualified immunity from suit granted to witnesses, justices, and attorneys concerned in an unsuccessful prosecution for crime. Such persons could not be held liable for what they might do in the regular and impartial discharge of their official duties, but if they went further and took any extra-official part in the prosecution, their protection ceased. We can readily conjecture that this principle flowed from the conception of malice. Such persons, we should say today, must be presumed to act without malice so long as they confine themselves to their official duties. But this presumption does not relieve them from the consequences of improper conduct, prearranged plans, and the like, because these clearly evidence malicious intent. That this conception was the real foundation of the above immunities and marked out their limits appears in the saying of the court in the case of Gerlington vs. Pitfield, 21 Keb. 527 (21 Car. II, 1669):

variety of the cases compelled the courts to abandon these principles before they had become firmly established, and finally led them to adopt that general view of the nature of malice which has survived.

[23] The term "malice" occurs but twice in the Year Books for this period, and in neither instance is any especial significance attached to it (P. 17 Edw. II, f. 544; 13 Edw. II, Fitz. f. 222, pl. 25). In the "Articles Inquired of by Inquest of Office," 27 Edw. III (27 Lib. Ass. C. 44), conspirators are said to be those who combine and agree "that each will aid and sustain the enterprise of the other, be it false or true; and who falsely have people indicted and acquitted, or falsely move or maintain pleas." Here, so completely has the conception of malice received expression in the current principles relating to the action of conspiracy that even the term is lost.

" Strict proof of malice in this case of a justice is requisite, and procuring witnesses is no prosecution."

The official positions occupied by the defendants who claimed an exemption from liability in such cases, and the reasons upon which their exemption was ostensibly based,[24] prevented an explicit statement that malice was the real ground of action in conspiracy cases. Express recognition of the importance of malice first recurred during the reign of Henry VII, in a case wherein a false accusation had been preferred in good faith by a private individual.[25] Here the court said: " To each sessions all men may come for the common profit, and if they come with that intent, and for the zeal that they have for justice, and not from malice, they act sufficiently for the common profit . . . and if it was from malice, the matter would be otherwise." The idea thus suggested was taken up and developed by the courts during the reigns of James I, Charles I and Charles II. The judges employed the term " malice " more frequently. They gradually came to perceive and to state more clearly that the essential elements of the torts redressed by actions upon the case in the nature of conspiracy were the dam-

[24] Indictors, or members of the grand jury which found the indictment against the plaintiff, enjoyed an absolute protection from action or prosecution for conspiracy (13 Edw. II, 401; 21 Edw. III, 17 a; 47 Edw. III, 16, 17; 30 Lib. Ass. 21; 7 Hen. IV, 31). It was said that " they cannot . . . be adjudged conspirators, because they affirmed by their oaths " (27 Lib. Ass. 12; 9 Hen. IV, 9); and again, " the law understands, when a man is sworn, that he will do according to his conscience " (27 Hen. VIII, 2). In the twenty-seventh year of Edward III a witness sought to claim an immunity upon the same ground (27 Lib. Ass. 12). He pleaded that he was sworn to inform the jury, but his plea was disallowed. The qualified protection enjoyed by witnesses taking part in the false prosecution was founded, not upon their oath, but upon the fact that they were compelled by law to testify (27 Hen. VIII, 2). In this respect they occupied the same position with primer trovers and participators in the hue and cry (20 Hen. VII, 11; 35 Hen. VI, 14). Justices and other court officials could not be sued for what they might have done in open court and in the execution of their official duties (47 Edw. III, 16, 17; 12 Edw. IV, 18; 27 Lib. Ass. 12; 9 Hen. IV, 9; 21 Edw. IV, 67), because " the law will not admit proof against this vehement and violent presumption of law that a justice sworn to do justice will do injustice " (Floyd vs. Barker, 12 Co. 23).

[25] Y. B., M. 20 Hen. VII, f. 11; Keilway, ff. 81 b. & 83 b.

ages suffered by the plaintiff and the malicious intent prompting the defendant's acts.[26] "Malice" was still used in its popular sense. It signified malevolence, "as for unjust revenge."[27]

Contemporaneously with the gradual increase in the judicial consciousness of the importance of malice, the action upon the case was being extended to afford a remedy for false prosecutions for trespasses and for ecclesiastical offenses, for arrests in civil cases, and for prosecutions upon defective indictments and before courts without jurisdiction. This extension advanced the growth of the conception of malice, although in most of the cases of this class no express reference to malice was made. Such cases provided the courts with varied specimens of malicious acts causing damages. As the specimens became sufficiently numerous to be made the basis of generalization, it became evident that the common elements of malice and damages were the bonds connecting even the most heterogeneous of them. In the

[26] The growing emphasis put upon malice as an essential element in malicious prosecutions can be traced in the following cases: Knight vs. German, Cro. Eliz. 70 (31 Eliz., 1589); Miller vs. Reignolds & Bassett, Godb. 205 (Jac. I), wherein the court said that a conspiracy should be malicious as well as false, "else it is no conspiracy," wherefore malice should be proved; Cox vs. Wirrall, Cro. Jac. 193 (4 Jac. I, 1606); Poulterers' Case, 9 Co. 56 b. (8 Jac. I, 1610), nota by Lord Coke; Payn vs. Porter, Cro. Jac. 490 (16 Jac. I, 1618); Smith vs. Cranshaw, 1 Jones 93 (1 Car. I, 1625); Taylor & Towlin's Case, Godb. 444 (4 Car. I, 1628); Carlion vs. Mill, Cro. Car. 291 (8 Car. I, 1632); Atwood vs. Monger, Styles 378 (1653); Norris vs. Palmer, 2 Mod. 51 (27 Car. II, 1675); Daw vs. Swaine, 1 Sid. 424, 1 Lev. 275 (21 Car. II, 1669); Hockin vs. Mathew et al., 1 Sid. 463 (22 Car. II, 1670); Gray vs. Degge, T. Jones 132 (31–2 Car. II, 1680); Webster vs. Haigh, 3 Lev. 40 (37 Car. II, 1684). An interesting extension of the idea as to the significance of malice in these actions is seen in Anon., 2 Mod. 306 (30 Car. II, 1678), a case arising out of an indictment for a common trespass. The court said that after acquittal of the trespass the indictment should be held malicious, since the defendant might have brought a civil action for his own recompense and hence had no reason to indict the plaintiff other than to put him to charges and make him pay fees to the clerk of the assizes.

The above list comprises all the cases decided prior to Savile vs. Roberts in which malice had been expressly recognized as essential to recovery in actions for false prosecutions.

[27] Note by Lord Coke in Poulterers' Case, 9 Co. 56 b.

same manner the development of the doctrine of probable cause, which was rapidly progressing during the same period, and reached its practical completion during the reign of Charles II, threw much light upon the true significance of malice as an element of the torts under discussion. This doctrine supplied the courts with a much needed principle to guide them as they extended the action upon the case to new circumstances. It eventually became a fundamental condition for recovery in such actions that the plaintiff should prove that the defendant had ordered his arrest without a reasonable cause to believe him guilty. Maturer thought was not long in recognizing that the absence of probable cause is nothing but a more or less accurate test or measure of malice, thus bringing into clearer view the real part played by malice as an element of tort.

During all the period in which the true conception of the significance of malice was being slowly and painfully worked out, and for some time after it had become practically complete, the old strict action of conspiracy remained theoretically intact, although it was never resorted to. The principles relating to it were frequently stated and affirmed by the courts, even in cases in which they were basing the plaintiff's right to recovery upon the malice of the defendant. At first sight the long coexistence (in theory) of the two forms of action is surprising, in view of the superiority of the conception upon which the action upon the case was built. Two causes, however, may be assigned to account for the length of time which elapsed before the incompatibility between an action founded upon malice and the strict action of conspiracy was perceived, and the latter driven into obsolescence. The first was the fact that the courts had lost sight of the true significance of conspiracy, and had ceased to regard it as a mere evidence of malice. The term had come to connote the act commonly performed by the conspirators as well as to denote the plurality of the performers. "Conspiracy" always carried with it the suggestion of a false prosecution. For many years after the introduction of the action upon the case for malicious

prosecutions, this remedy was called "an action upon the case in the nature of a conspiracy." The writ by which it was begun always contained an averment that the false prosecution had been instituted as the result of a conspiracy —"conspiratione inde praehabita"—even in cases in which only a single defendant was named. Also, in the digests of the period between the reign of Henry VIII and that of Charles II, cases of malicious prosecution, whether against a single defendant or against several, are all listed under the caption "conspiracy." As the word had thus become a vocabulum artis, with a special formal meaning quite different from its primary signification, the validity of the conception expressed by it as the ground of a civil remedy was not readily perceived to be undermined by the growth in the conscious thought of the times of the conception of malice as the true secondary element of actionable false prosecutions.

The second reason was the fact that this conception of the importance of malice was worked out through the medium of the action upon the case, which began to be employed as a remedy for false accusations almost simultaneously with the reappearance of that conception. For a long time the courts busied themselves in extending redress through this new form of action to the many cases in which the strict action of conspiracy was powerless to afford relief, in developing the doctrine of probable cause, and in coming clearly to base the rights of the plaintiff upon the damage suffered by him and the malice of the defendant. Not until they had arrived at a comparatively matured conception of the significance of malice in such cases did the courts begin to compare the new remedy with the old, and to inquire into the relations existing between them. These considerations explain why the strict action of conspiracy was preserved from the disintegrating effects of the new conception of malice until the latter had become sufficiently developed to destroy the old action at a blow.

Comparisons between the two forms of action, leading to the analyses of their basic conceptions which proved fatal

to the older form, were first instituted, it is curious to note, as a direct result of the conservatism of the courts in retaining the name and as many as possible of the attributes of the older action while developing the new. It was often important to determine whether the action brought was an action of conspiracy or an action upon the case.[28] The similarity of the two proceedings made necessary a close examination of their fundamental characteristics in order to distinguish them. The discussions thus inaugurated, though at first productive of a great deal of confusion and contradiction, revealed the vital differences between the two remedies. The result was the establishment of the broad principle that the action of conspiracy should be confined to cases wherein there had been a combination such as would subject its members to the villanous judgment; that is, a combination falsely and maliciously to indict of a capital crime. In such cases, if the action were based upon the conspiracy as the principal element of the wrong, the other facts being alleged by way of aggravation, it was an action of conspiracy. In all cases in which the false accusation had been preferred by a single defendant, or even in which a conspiracy was alleged but the emphasis was placed upon the acts causing the damage, the mention of the conspiracy being by way of aggravation, the proceeding was said to

[28] Thus, the localities in which the two actions should be brought differed. An action of conspiracy was cognizable by the court having jurisdiction over the place in which the combination was formed; an action upon the case, in the jurisdiction in which the malicious prosecution took place. So, too, the jury which tried an action of conspiracy had to be drawn from the several vicinages in which the conspiracy had been entered into and put into execution, whereas the jury in an action upon the case need come only from the vicinage in which the case was tried. It may be said generally that in actions of this character, for prosecutions alleged to have been instituted by a combination of persons, it would frequently happen that all the defendants but one would be acquitted, or the plaintiff would be unable to show that he had been acquitted upon the alleged false charge, or the like. The defendant would then move in arrest of judgment that the proceeding was an action of conspiracy and that he could not be held alone, etc. In such an event the fate of the action depended upon which form of action the court held it to be; hence the importance of distinguishing between them with certainty.

be an action upon the case.[29] In this manner the two forms of action were drawn into sharp contrast with each other.

[29] This method was first suggested in Smith vs. Cranshaw, Palm. 315 (1 Car. I, 1625), an action upon the case for a false and malicious accusation of having uttered treasonable words. The question had been raised whether the jury should be drawn from the county in which the conspiracy had been formed, or partly from that county and partly from the county in which the concerted design had been executed. Dodd, J., believed "that the action will be brought and tried where the conspiracy, which is the root of the fact, is laid; for the others are only consequences following upon this." He held further that the damages "will be equal and entire; because the conspiracy is the cause, and all are found guilty together." Ley, C. J., agreed that "if the conspiracy only had been the offense, there the visne will be where the conspiracy is committed."

Skinner vs. Gunton, T. Raym. 176 (21 Car. II, 1669), is a leading case in this connection. An action upon the case had been brought against three defendants for a conspiracy to have the now plaintiff arrested in a grand action of debt. Only one defendant being found guilty, his attorney argued in arrest of judgment that the proceeding was an action of conspiracy, wherein a single defendant cannot be held. A majority of the court held that it was an action upon the case, the reason being that "the substance of the action was the undue arresting of the plaintiff, and not the conspiracy" (1 Saund. 227). The same idea is expressed in another report of the same case (1 Vent. 12): "Here 'tis rather in the nature of an action upon the case, and the conspiracy alleged by way of aggravation." In still a third report (2 Keb. 497) we are told: "The court said, the writs being the same, it's one or the other, as the plaintiff titles it, albeit the word conspiracy be used; and according to the offense, if felony conspiracy; if but trespass, action upon the case." Here the action was entitled "In placito transgressionis super casum" (1 Vent. 18). Three years later the case reappears, and it is laid down (3 Keb. 118), "In placito transg. quod conspiraverunt or indictari procuraverunt, if trespass be the principal and this but for aggravation of damages, finding one guilty is sufficient, but in a bare conspiracy not, though no villanous judgment be given."

The above principles were discussed and reaffirmed in Rex vs. Thode, 3 Keb. 111 (24 Car. II, 1672), in the following words: "In an action on the case for disceit, conspiratione inde habita, one may be convicted alone, but when it is an action upon the case quod conspiraverunt, one alone cannot be convicted." In another report (1 Vent. 234) of this case we find that "Wild said: The difference was, where the suit was upon conspiracy wherein the villanous judgment was to be given, and where the conspiracy is laid only by way of aggravation; as in this case. Hale said it would be the same in an action against two upon the case for conspiracy; but not in such actions where there be a charge of conspiracy, yet the gist of the action is upon another matter."

The inconsistency and inaccuracy of the language employed in the above decisions bear striking testimony to the confusion of thought which lingered in the minds of the judges. Still, the main ideas intended to be conveyed are clear enough in their broad outlines.

So stood the law when the great case of Savile vs. Roberts, 9 and 10 William III (1698), arose. In this decision, which supplies the foundation of modern doctrines relating to malicious prosecution and is still quoted as a leading case, the various principles which we have been discussing separately were woven into a single, harmonious fabric. The transition to the conception of malice and damages as the true essentials for recovery in actions upon the case for malicious prosecution was completed. Confusion of thought resulting from the numerous attempts of former times to inject principles valid within the field of the action of conspiracy into the field of the action upon the case was cleared away. The inadequacy of the mere conspiracy as the foundation of a civil action was pointed out, and the triumph of the new proceeding over the old was openly recognized.

Roberts brought an action upon the case in the Court of Common Pleas against Savile,[30] alleging that the latter "maliciously and wickedly intending to oppress the plaintiff, caused him to be maliciously indicted of a riot," and recovered a judgment for £11 damages. The defendant then sued a writ of error into the Court of King's Bench, where, after several arguments, the judgment of the lower court was affirmed. Lord Holt, in his opinion, emphasized the principle that the damage suffered by the plaintiff was the true ground of the action. If a person suffer loss by reason of a false and malicious prosecution, "it is reason and justice that he should have an action to repair him the injury; though of late it has been questioned, yet it has always been allowed formerly. . . . But it may be objected against the authority of the old books that these actions were grounded upon a conspiracy, which is of an odious nature; and that without conspiracy they are not maintainable; but to this it is answered that the conspiracy was nothing in these cases; that was not the ground of these

[30] 12 Mod. 208.

actions, but the damage sustained by the party;[31] for if there be never so great a conspiracy to indict a man, yet if nothing be done in pursuance of that conspiracy, the party can have no action. . . . Now if a man be prosecuted maliciously for trespass, either with or without a conspiracy, it is the same thing; the trouble and expense is the same; and I take it that wheresoever an action of conspiracy is maintainable against two, there if it be a malicious prosecution by one, case will lie. These actions of conspiracy in the old books were really but actions upon the case: but conspiracy properly so-called does not lie unless the party were indicted of a capital crime."[32]

Lord Holt says further that malicious acts causing damage always give the injured party a right of action, even in some cases where the malicious prosecution is a proceeding in the civil courts. Still, he cautions,[33] "though this action does lie, yet it is an action not to be favored, and ought not to be maintained without rank and express malice and iniquity. Therefore, if there be no scandal or imprisonment, and ignoramus found, no action lies, though the matter be false; yet if the indictment be fairly prosecuted, no action lies; so if the court has a jurisdiction, though the matter be scandalous, yet if there be no malice, no action lies. But

[31] It must be borne in mind that Lord Holt is speaking of actions upon the case, not of actions of conspiracy. Though the foundation of the latter, as well as of the former, was really the damage done to the plaintiff by the false accusation, the conspiracy was nevertheless considered an integral part of the wrong to be redressed. See note 20, p. 37.

[32] The remainder of this passage, in which Lord Holt further contrasts the two actions, is as follows: ". . . unless the parties were indicted of a capital crime (F. N. B. 116), in which action of conspiracy properly so-called, if it be brought against two, and the one found guilty, and the other acquitted, no judgment can be given against him who is found guilty. . . . And no villanous judgment shall be given, but where a conspiracy was to take away a man's life; and conspiracy, though nothing be done thereupon, is a crime and punishable at the suit of the King. But where the conspiracy is only to indict a man for a misdemeanor, though the action be against two, and only one is found guilty, yet judgment shall be against him, as in the case of trespass; for really it is an action on the case, and no action of conspiracy" (5 Mod. 394, 408).

[33] 12 Mod. 211.

in the case before us the verdict has found express malice; and therefore judgment ought to be affirmed."

The same points arose again in the case of Jones vs. Gwynn,[34] decided a few years later, wherein an action upon the case had been brought upon a false and malicious indictment for following the trade of "corn-badger" without a license. The above doctrines were reaffirmed and applied, with extensions and improvements.

These two cases mark the culmination of the long process whereby the courts had been gradually unfolding the basic principles relating to the action upon the case for malicious prosecution as it exists today. The courts clearly and authoritatively announce that not conspiracy, but damages flowing from the malice of the defendant, are essential requisites for recovery. The old action of conspiracy was not in terms declared obsolete. But the action upon the case was so broadened in its scope that it became available to redress not only wrongs beyond the operation of the older remedy, but also torts which the old action might still reach; and in competition with the new form of action the action of conspiracy immediately succumbed. Henceforth the activities of the courts are confined to clearer statements and to logical extensions of the principles laid down in the above cases. The terms employed receive further elucidation. A more objective conception of malice, making the latter nearly coextensive with absence of legal excuse, is evolved, and the significance of probable cause and other evidences of malice is discussed.[35] These matters,

[34] 10 Mod. 148, 214; Gilb. Cases, Law & Eq., 185.

[35] Clearer and more general statements that the elements of the tort of malicious prosecution are malice, innocence, and damages: Jones vs. Gwynn, 10 Mod. 214 (1713); Chapman vs. Pickersgill, 2 Wils. 145 (1762); Goslin vs. Wilcock, 2 Wils. 302 (1765); Purcell vs. McNamara, 9 East 361 (1808). Malice as absence of legal justification: Jones vs. Gwynn (supra); Sutton vs. Johnstone, 1 T. R. 493 (1786). Analysis of the conception of "probable cause," etc.: Muriel vs. Tracy, 6 Mod. 169 (1704); Jones vs. Gwynn (supra); Farmer vs. Darling, 4 Burr. 1971 (1766); Purcell vs. McNamara (supra). Anything may be employed as an instrument of malice: Chapman vs. Pickersgill (supra); Chambers vs. Robinson, 1 Stra. 691 (1726).

however, fall outside of our province. Our interest in the doctrines worked out by the civil courts ceases with the disappearance of the conception that conspiracy is in itself a constituent element of tort. From this time on our attention will be centered upon the criminal aspect of conspiracy, until at the end of the nineteenth century the results flowing from the decision of Allen vs. Flood,[36] coupled with certain modern industrial conditions, again force the conception of conspiracy to occupy a position of prominence in civil cases.

[36] 77 L. T. Rep., N. S., 717 (1898).

CHAPTER III.

The Criminal Law of Conspiracy, from the Reign of Edward I to the Beginning of the Nineteenth Century.

Although the Ordinance of Conspirators (21 Edw. I) and the Articuli super Chartas (28 Edw. I) were intended to deal with the civil remedy for conspiracy, they both contain elements of a criminal nature.[1] There is also a clause in the Definition of Conspirators which evidences a criminal liability for the offense.[2] Not until the fourth year of the reign of Edward III (1330), however, was a statute passed devoted exclusively to the criminal aspect of conspiracy. This statute is as follows: "Item, Where in times past divers people of the realm, as well great men as other, have made alliances, confederacies, and conspiracies, to maintain parties, pleas, and quarrels, whereby divers have been wrongfully disinherited, and some ransomed and destroyed, and some for fear to be maimed and beaten, durst not sue for their right, nor complain, nor the juries of inquests give their verdicts, to the great hurt of the people, and slander of the law and common right; it is accorded, That the justices of the one bench and of the other, the justices of assizes, whensoever they come to hold their sessions, or to take inquests upon nisi prius shall inquire, hear, and determine, as well at the King's suit, as at the suit of the party, of such maintainers, bearers and conspirators, and also of

[1] The infliction of penalties of fine and imprisonment upon persons found guilty of conspiracy in a civil proceeding, in addition to the damages awarded to the plaintiff, does not fall in with our modern ideas respecting the separation which should be made between civil and criminal procedure.

[2] The significance of the direction contained in the Definition that "Justices assigned to the hearing and determination of felonies and trespasses should have the transcript hereof" has already been alluded to. See supra, p. 10.

them that commit champerty, and of all other things contained in the aforesaid article, as well as justices in eyre should do if they were in the same county. And that which cannot be determined before the justices of the one bench or the other upon the nisi prius, for the shortness of time, shall be adjourned into the place whereof they be justices, and there be determined as right and reason shall require."[3]

Fourteen years later (18 Edw. III, 1344) it was enacted by Parliament that exigents should be awarded against "conspirators, confederators, and maintainers of false quarrels."

The above statutes do nothing more than improve the criminal procedure relating to the prosecution of conspirators. The common law, as has been shown, had already raised a criminal liability against conspiracy. The content of that offense was described in the Definition of Conspirators. It was left for the courts gradually to expand and improve the law applicable to illegal combinations and to adapt it to changing conditions until they brought it to the position which it now occupies.

During the period between the reign of Edward I and that of Charles II the criminal aspect of conspiracy was far less important than the civil. With the exception of several cases reported during the reign of Edward III, the books record practically no criminal prosecutions for conspiracy.[4]

[3] Of this statute Wright ("The Law of Criminal Conspiracies," p. 14, n. 7) says, "The 4th Edw. 3 C. 11, made conspiracy effectively criminal, by directing the justices of either bench or of assize in sessions to hear and determine conspiracies and maintenances." But it does not in reality create an entirely new criminal liability for conspiracy. The very terms of the act evidence a pre-existing liability. It will be noted that justices at nisi prius are simply invested with the jurisdiction already exercised by justices in eyre. If, therefore, this statute rendered conspiracy for the first time "effectively criminal," it must have done so by improving the machinery for prosecution.

[4] The criminal prosecutions for conspiracy reported in the Year Books are: 22 Lib. Ass., C. 77; 24 Edw. III, 75; 26 Lib. Ass. f. 131 (pl. 62); 27 Lib. Ass. 12, 73, 74, 59, 138 (ch. 44); 28 Lib. Ass. 12; 30 Lib. Ass. 21; 9 Hen. IV, f. 9.

The narrow scope of the offense of conspiracy during this period is shown in 24 Edw. III, f. 75 (1351). Here was a presentment for conspiracy to imprison a man until he should pay a fine.

In the few such cases which we do find, the conceptions worked out by the courts in connection with civil actions of conspiracy were closely followed. The offense included only combinations to pervert justice. The combination was not punishable apart from the act performed. The same immunities were enjoyed by indictors, justices, and witnesses. The party injured must have been acquitted by verdict. In general, the principles governing the civil and the criminal proceedings were substantially the same.

The expansion of the criminal law of conspiracy began during the reign of Edward III, was accelerated in the time of Elizabeth and James I, and had made its most important progress by the end of the reign of George III. In comparing this course of evolution with that undergone by the civil law of conspiracy we are struck with two main differences. First, the principle that several persons should be punished criminally for engaging in a mere combination to do evil is sound. Second, although the growth of the criminal law was influenced and hampered by the narrow conceptions at the basis of the civil law of conspiracy, it encountered no difficulties flowing from a technical form of procedure which had to be respected.

Our treatment of the development of the criminal law of conspiracy will be divided into two parts: First, we shall

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Upon a petition in the Court of King's Bench to reverse the judgment, the court said: "And because neither year, nor day, nor place is averred, . . . and moreover because the principal matter of the conspiracy alleged is not conspiracy, but rather damage and oppression of the people. Wherefore we reverse and annul the judgment."

In 40 Edw. III, f. 19, Thorpe, J., admitted that where the conspiracy had been entered into in one county and executed in another the king could not maintain an indictment in the first county, although a private plaintiff could pursue his remedy by writ of conspiracy in that county. The reason, he says, is "that the suit of the party in such a case is broader than the suit of the King."

The only other criminal proceedings against conspirators of which we have any account until the time of Charles II are a few cases in the Court of Star Chamber during the reigns of Elizabeth, James I, and Charles I. See note 7, p. 55.

The first of the modern prosecutions for conspiracy seems to be Rex vs. Timberley & Childe, 1 Sid. 68, 1 Lev. 62 (13–14 Car. II, 1662).

trace the rise of the principle that the bare unexecuted conspiracy is a complete offense; second, we shall show how the classes of combinations punishable as conspiracies increased.

The language of the Definition of Conspirators is broad enough to include combinations which have performed no act. It appears, however, that an unexecuted agreement to do evil was first declared punishable during the reign of Edward III,[5] and by an unsupported judicial determination.

[5] In the Book of Assizes, 27 Edw. III, ch. 44, f. 138, we find the following (Art. 5): "Item of those who retain people with their liveries or fees to suppress the truth, and to maintain their evil enterprizes, etc. . . . And nota, that two were indicted of confederacy, each of them to maintain the other, whether their matter were true or false, and notwithstanding that nothing was supposed as put in action, the parties were put to answer, because this thing is forbidden in the law." This article, as its language indicates, was founded upon the Definition of Conspirators. The offense described in the nota represents a natural, though unmistakable, extension of the terms of the Definition.

The subsequent history of this new offense of confederacy, as distinguished from conspiracy, is an interesting illustration of the methods of legal development. A difference between the two offenses was recognized in a number of later cases: 27 Lib. Ass., ch. 44, Item 6 (apparently based upon item 5, supra); 28 Lib. Ass., f. 12; 29 Lib. Ass., f. 166, pl. 45. See also the language of the Commission of Oyer et Terminer ("de omnibus coadunationibus, confoederationibus et falsis alligantiis").

In the Poulterers' Case the court once or twice uses conspiracy and confederacy synonymously. But a careful reading of the whole opinion reveals that the court is sensible of a difference between conspiracy and the offense then before them, and inclines to call the latter "confederacy." This is the term employed by Lord Coke in his nota.

Windham, J., in Rex vs. Sterling, 1 Keb. 675 (1664), carefully distinguishes the offenses, and says that Sterling and his companions were guilty of confederacy "as in the Poulterers' Case." Twisden, J., however, says, "The false alliance or binding by oath is but a further degree of conspiracy, which is all one and synonymous with confederacy, and of which the assembly and consultation is a sufficient fact." But in Reg. vs. Best, 6 Mod. 185 (1704), Lord Holt recognizes the distinction in these words: "This indeed is not an indictment for a formed conspiracy, strictly speaking, which requires an infamous judgment, and loss of liberam legem, as upon conviction on an attaint, and for which an indictment will not lie until acquittal or an ignoramus found. But this seems to be a conspiracy late loquendo, or a confederacy to charge one falsely, which sure without more is a crime," etc.

The above facts possess a deep significance. They indicate that "conspiracy" had a special meaning of its own. Hence, when other combinations than agreements falsely and maliciously to in-

Moreover, this declaration took place in connection with the offense of "confederacy," which, though apparently within the terms of the Definition of Conspirators, had become differentiated from "conspiracy" strictly so called, and embraced combinations to commit maintenances of various kinds.

There is an obiter dictum upon the subject of unexecuted conspiracies in a case anno 19 Richard II (1395)[6] arising out of a civil action upon writ of conspiracy. Waddell, J., said: "A man will have writ of conspiracy although they did nothing but the confederacy together, and they will recover damages, and may be indicted of this also, and sic nota."

The great impetus toward the principle that an unexecuted conspiracy is criminal came from several cases decided in the Court of Star Chamber at the beginning of the seventeenth century.[7] The act creating this extraordinary

dict of felony were brought to the attention of the courts, they were punished under the name of "confederacy." Thus it appears that this new offense bore practically the same relation to the criminal law of conspiracy that the action upon the case bore to the civil law. Under cover of "confederacy" the courts were able to develop new principles relating to unlawful combinations, the most notable being that the mere act of combination is criminal, which is at the very foundation of the modern law upon the subject.

As long as the dominance of the civil action of conspiracy served to keep alive the technical meaning of conspiracy, the latter offense remained distinct from confederacy. With the decadence of the old civil proceeding before the newer "action upon the case," however, the term "conspiracy" gradually lost its former narrow signification. The dividing line between it and confederacy became confused, and the two terms were often used synonymously (as in the Poulterers' Case and Sterling's Case). By means of this interchangeability of the words, "conspiracy" was enabled to appropriate the conceptions proper to "confederacy." Finally the latter, having vastly enriched the law of illegal combination by the infusion of the principles worked out under the protection of its name, lost its separate existence; and the crime of conspiracy was made to include all criminal agreements whatsoever.

[6] Bellewe's Cases, Temp. Rich. II, p. 80, pl. 108.

[7] The first of these Star Chamber decisions was Glaseour vs. Hurlestone, Gouldsb. 51 (pl. 14), 1587, in which "it was overruled by the lords, that if a jury at the common law. . . . give their verdict, although they make a false oath, yet they shall not be impeached by a bill in the Star Chamber: But if any collateral

tribunal[8] was held to have invested it with plenary jurisdiction over all wrongs perpetrated by combinations of persons. Influenced no doubt by the precedents supplied by confederacy cases and by the theoretical importance assigned to the element of combination in civil actions of conspiracy, as well as by the conditions of the times, the judges of the Star Chamber soon came to look upon the conspiracy itself as the "principal matter" to be noticed. The extreme flexibility of proceedings in this court and the broad scope of its authority permitted a free development of the tendency just mentioned. The result of the interaction of these conditions can be seen in a line of decisions

corruption be alleged in them, as that they took money or bribes, a bill shall lye thereof well enough."

In Amerideth's Case, Moore 562 (1600), certain tenants had combined and made joint obligations to contribute to maintain suits against their lord compelling him to grant copyhold estates to the heirs of the holders. "They were fined for the combination, and the maintenances, and the taking of the obligations one from the other." In Lord Grey's Case, Moore 788, pl. 1088 (1607), certain tenants had joined in a petition to the king to obtain the benefit of a similar custom of the manor in respect to copyhold estates, and had agreed to share the expense ratably among them, and had signed a blank paper, giving authority to one Perkins to fill in what petition he pleased. The Star Chamber held this agreement illegal. "And Popham said that an illegal combination is not justifiable although the complaint is . . . For the blank they seem all to be censurable, because it is an illegal combination, although the complaint is not censurable, because made to the King who has power to redress it; and the complaint is not made with terror, nor for a thing apparently illegal." In these two cases we seem to find the germ of the later doctrine that a conspiracy renders unlawful that which it is perfectly legal for one person to do.

Scroggs vs. Peck and Grey, Moore 562, pl. 765 (1600), was grounded upon agreement to file a false bill in chancery against a third person. The scheme was abandoned, but notwithstanding this the parties were fined for the matter of agreement in prejudice of a third person without his privity.

Miller vs. Reignolds & Basset, Godb. 205, and Floyd vs. Barker, 12 Co. 23 (1608), are not important for our present purpose. The next case in point of time is the Poulterers' Case. It was followed by Ashley's Case, 12 Co. 90, in the following year. The last Star Chamber decision upon conspiracy was Tailor & Towlin's Case, Godb. 444 (1628), in which the court entertained a bill of conspiracy for a false indictment before a tribunal whose jurisdiction was not distinctly alleged, "because the conspiracy was the principal thing tryable and examinable in this court, and that was well laid in the bill."

[8] St. 3 Hen. VII, C. 1.

culminating in the famous Poulterers' Case,[9] anno 8 James I (1610), wherein, after a full discussion of the law, it was said that a bare conspiracy is punishable independently of any act done in execution of it.

The plaintiff in the Poulterers' Case had instituted proceedings in the Star Chamber against the defendants for a conspiracy falsely to charge him with robbery, upon which charge the grand jury had returned an ignoramus. The defendants relied upon the settled principle of the common law that no action or indictment for conspiracy could be entertained unless the plaintiff had been legally acquitted by verdict. The court, however, refused to dismiss the bill. After stating that at common law an innocent person was protected by the bill de odio et atia in the interval between the laying of a charge and the finding of an indictment, the judges say: "And it is true that a writ of conspiracy lies not, unless the party is indicted and legitimodo acquietatus, for so are the words of the writ; but that a false conspiracy betwixt divers persons shall be punished, although nothing be put in execution, is full and manifest in our books." The authority cited in support of this proposition consists in (1) the confederacy case above referred to, which appears in Item 5 of the Articles Inquired of by Inquest of Office, anno 27 Edward III (1354), and the language of Items 6 and 19 of the same articles; (2) the anonymous case anno 19 Richard II (1395), also mentioned above; (3) the clause in the usual Commissions of Oyer and Terminer giving the commissioners the power to inquire "de omnibus coadunationibus, confoederationibus et falsis alligantiis." The court continues: "In these cases before the unlawful act executed the law punishes the coadunation, confederacy, or false alliance, to the end to prevent the unlawful act . . . and in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it." After a hearing, therefore, the defendants were punished by fine and imprisonment, and

[9] Co. 56 b.

one of them was branded in the face with the letters "F. A.," for "false accuser."

Although the judges profess to base their decision in this case upon the common law, the Poulterers' Case represents a long step in advance of existing principles. The precedents cited do not sustain the decision. The language employed in the Articles Inquired of by Inquest of Office (27 Lib. Ass., Ch. 44), the case there noticed, and the terms of the Commission of Oyer and Terminer, all apply to confederacy—a combination for an evil purpose, to be sure, but one quite different in its nature from conspiracy strictly so called.[10] The dictum cited from the case anno 19 Richard II was undoubtedly erroneous in so far as it applied to the civil action of conspiracy, and we have every reason to believe that it was an equally inaccurate statement of the doctrine relating to the criminal aspect of the offense. On the other hand, the holding in the Poulterers' Case was utterly opposed to the notion common at that time to both the civil and the criminal law of conspiracy that the offense was not complete until the person injured had been indicted, tried, and acquitted by the verdict of twelve men.

It is to be noted, however, that the importance of this decision lies not so much in what is contained in the ratio decidendi as in the manner in which the doctrines laid down in it were understood and applied. The general statement that conspiracy in itself is punishable is obiter dictum. The case really decides nothing more than that persons guilty of concerted efforts to secure the conviction of an innocent person upon a capital charge may be punished for conspiracy, although the false prosecution end otherwise than in an acquittal by verdict.[11] This principle is consonant with those of the common law as explained by Bracton and

[10] See note 5, p. 54.

[11] To his report of the Poulterers' Case Lord Coke appends the following comment: "Nota, reader, these confederacies, punishable by law before they are executed, ought to have four incidents: It ought to be declared by some manner of prosecution, as in this case it was, either by making of bonds or promises one to the other; 2 . . . malicious, as for unjust revenge, etc.; 3 . . . false against an innocent; 4 . . . out of court, voluntarily."

declared in the Edwardian statutes of conspiracy.[12] The extension given to the criminal law by the Poulterers' Case, so interpreted, was practically identical with the contemporaneous advances being made by the civil law relating to the same class of offenses under cover of the remedy by action upon the case. In the later cases, however, the principle broadly laid down that the bare conspiracy is punishable was looked upon as having been settled by this decision. A doctrine probably valid as to a limited class of evil combinations thus came to be extended over the entire field of such enterprises. The Poulterers' Case, therefore, in view of the effects actually produced by it, must always be regarded as one of the historic landmarks upon the highway of English legal history.

The Poulterers' Case was cited and confirmed in Ashley's Case[13] (9 Jac. I, 1611) and in Tailor and Towlin's Case[14] (4 Car. I, 1628), both Star Chamber cases, in which the facts were identical in principle with those of the earlier case. The statement that an unexecuted conspiracy is an offense punishable is met with for the first time in the Court of King's Bench in an obiter dictum in Bagg's Case[15] (13 Jac. I, 1615). It was repeated, again obiter, upon the authority of the Poulterers' Case, in Smith vs. Cranshaw;[16] also in Rex vs. Timberly[17] (13–14 Car. II, 1662), wherein, as in the Poulterers' Case, acts had been performed in execution of the conspiracy, but the enterprise had not been such as would constitute a formed conspiracy in the strict sense. In Rex vs. Starling (or Sterling), however, another case of surpassing importance, decided anno 15 and 16 Charles II (1664), it was authoritatively laid down, upon

[12] In Sydenham vs. Keilway, Cro. Jac. 7 (1574). It was said obiter that where two conspire to indict a person falsely, and the grand jury returns an ignoramus, no writ of conspiracy lies "because he never was indicted nor acquitted; yet he may be indicted upon conspiracy at common law for this false conspiracy and misdemeanor, which is punishable at common law."

[13] 12 Co. 90.

[14] Godb. 444.

[15] 11 Co. 93 b.

[16] Palm. 315.

[17] 1 Sid. 68.

an appropriate set of facts, that a conspiracy is a crime quite apart from anything done to carry out its purpose.

An information had been laid against Sterling and others, brewers of London, charging that in pursuance of an illicit conspiracy to impoverish the king's excisemen they had given orders that no more little "servois," called "gallon-beer," a commodity largely consumed by the poor, should be brewed; and that ale should be sold only at a certain price. By these means, it was alleged, the defendants designed to excite the common people to violence against the excisemen, in order that the latter might be impoverished and so disabled to pay their rent to the king. Upon a plea of not guilty the defendants were found guilty of assembling and consulting to impoverish the excisemen, but not guilty of the other facts charged. The prisoners' counsel accordingly made a motion in arrest of judgment, arguing that the only fact found was the conspiracy, and that the only conspiracies punishable without overt act "must be such as concern the public, which does not appear here in this general charge, but an injury to the fermors by particular name."[18]

Counsel for the king replied that since the effect of impoverishing the fermors of the excise would be a diminution of the king's revenue, this conspiracy was a great offense "of public concernment." Moreover, a conspiracy to injure any third party is punishable. Again, although the mere conspiracy is an act ad intra, the communication of it is an overt act, punishable "though nothing ensue thereon." The conspiracy is the crime, and the other acts are but "particular instances of it," of value only as evidence.

The court unanimously overruled the motion. Keeling, J.,[19] was of the opinion "that this bare conspiracy is a great crime, where it is to do that which is evil, although to a private person; so is the Poulterers' Case." But the conspiracy in question, he continued, was of a public nature, as it touched the king's revenue. Windham, J., "conceived

[18] 1 Keb. 655.
[19] 1 Keb. 675.

it a point of weight and difficulty. . . . They are acquitted of conspiracy, which properly is where it's to indict men for their lives, and this is that whereon the writ lieth; but the false alliance and union by mutual swearing to maintain quarrels, is rather a confederacy. Also . . . if it were a conspiracy, there ought to have been some overt act expressed; as if H. be indicted for forestalling, or being a common thief, or barrator, or conspirator, and as to this there is no difference betwixt indictment and an action or information; I do conceive the defendants found guilty of confederacy, as in the Poulterers' Case." After stating that the offense contemplated by the present conspiracy was of a public nature, he continued: "I agree that general confederacy, without designment to public or private end, is punishable by action upon the case . . . or by indictment, in 19 Rich. II in Poulterers' Case is according [sic]; and therefore I do conceive here is enough found to give judgment against them for a confederacy, by their assembling together, their consultation and conspiracy, which is as much a false alliance as if they had bound themselves by oath."

Twisden, J., held that the defendants were guilty "of an unlawful assembly, and of a conspiracy. . . . Also, intent, while private, is fluctuating, and so cannot be punished, but when it's declared by act, it's punishable; also, voluntas non reputabitur pro facto . . . that is, it shall not be punished so fully, but it is still punishable: The false alliance or binding by oath is but a farther degree of conspiracy, which is all one and synonymous with confederacy, and of which the assembly and consultation is a sufficient fact." Sterling was accordingly fined £1000, the others £300 each.

The language of the court is confused in parts, but several points stand out clearly: (1) The declaration that the mere combination to do evil is a crime is part of the ratio decidendi. (2) This principle is based upon obiter dicta in the Poulterers' Case and in Bagg's Case, and is not supported by what was actually decided in these cases. (3) Although Windham, J., correctly distinguishes between confederacy and conspiracy, the tendency to widen the prin-

ciples applicable to the former until they should include all unlawful combinations, and to embrace the latter within the term "conspiracy," is plainly apparent. (4) The real advance shown by this case over the Poulterers' Case lies in the nature of the overt act decided to be necessary to evidence the conspiracy: whereas the overt act in the Poulterers' Case was an unsuccessful prosecution, the overt act in Sterling's Case was the mere consultation and agreement. (5) The modern view as to the nature of the offense and the connection between the conspiracy and the acts done appears for the first time.

In several cases decided soon afterward, however, the court seemed to hesitate to apply the doctrine of Sterling's Case. In Rex vs. Tayler and Gard[20] the punishment of the defendants was lightened because the conspiracy had been unsuccessful. In Rex vs. Armstrong et al.,[21] counsel for the defense argued that a bare conspiracy without overt act is not indictable, and cited the Poulterers' Case. The court answered that there had been "as much overt act as the nature and design of this conspiracy did admit," instead of making the obvious rejoinder that the conspiracy itself was the crime. And in Rex vs. Parkehurst et al.[22] the court even declared obiter that an information for conspiracy would not lie unless an overt act be proved.

The law was settled finally by Lord Holt. Even this great judge, however, experienced some vacillation of mind before arriving at a final conclusion. In Savile vs. Roberts[23] he declared obiter that "conspiracy, though nothing be done thereupon, is a crime, and punishable at the suit of the King." But in Reg. vs. Daniell[24] he agreed with counsel for the defense that a conspiracy to prosecute an innocent man upon a false criminal charge is not indictable unless executed, although he seemed to think that a conspiracy to rob or kill a man, or to charge him with the

[20] 3 Keb. 399 (20 Car. II, 1668).
[21] 1 Vent. 305 (28–9 Car. II, 1677).
[22] 3 Keb. 799 (29 Car. II, 1677).
[23] 12 Mod. 208, 209.
[24] 6 Mod. 100 (2 Anne, 1703).

paternity of a bastard child, might be punishable without more.[25]

Lord Holt's ultimate opinion is to be found in the great case of Reg. vs. Best et al. (1704–5). The defendants had been indicted for a conspiracy to extort money from one Pickering by falsely charging him in public places with being the father of a bastard child. A motion to quash the indictment being overruled, a demurrer was entered, upon two grounds:[26] (1) "That it does not appear that anything was done in pursuance of the conspiracy, and that ought to appear according to the Poulterers' Case." (2) The indictment contained no averment of Pickering's innocence of the charge, which averment, it was insisted, was necessary, upon the analogy of an accusation of perjury, wherein the falsity of the statement sworn to must be proved.

Lord Holt said: "Your case of perjury is not like this; for there the crime consists in the fact sworn, and the matter is indifferent until the averment of ubi revera comes: but here is a confederacy to charge a man falso, nequiter, malitiose, etc. . . . This indeed is not an indictment for a formed conspiracy, strictly speaking, which requires an infamous judgment, and loss of liberam legem, as upon conviction on an attaint, and for which an indictment will not lie until acquittal or an ignoramus found. But this seems to be a conspiracy late loquendo, or a confederacy to charge one falsely, which sure, without more, is a crime; and it is a crime for several people to join and agree together to prosecute a man right or wrong. If in an indictment for such confederacy you proceed further, and shew a legal prosecution of the confederacy, there you must shew the event thereof, as ignoramus returned on the indictment, or an acquittal, or else the indictment fails; but where you rest upon the confederacy, it will be well without more."

The whole court held "that the very agreeing together to

[25] This conflict really disappears if we hold to the distinction between conspiracy and confederacy. It comes from using the terms synonymously.

[26] 6 Mod. 185.

charge a man with a crime falsely is a consummate offense, and indictable." They believed, also, that the lack of an averment of Pickering's innocence was not fatal to the indictment, and hence gave judgment for the queen. The doctrine laid down is thus summarized in another report of the case:[27] "The conspiracy is the gist of the indictment, and that, though nothing be done in prosecution of it, it is a compleat and consummate offense of itself; and whether the conspiracy be to charge a temporal or ecclesiastical offense on an innocent person, it is the same thing."

The case was reargued during the Easter term of the following year. The point that seemed to "stick much with the court"[28] was the absence of any statement that Pickering was innocent. The question of the criminality of the bare conspiracy, however, was raised again, and Weld, Serjeant, argued that such a combination "stands singly upon the intention,"[29] and is not criminal unless something come of it, "for it is the damage the party receives by the conspiracy that makes it criminal." The court finally held to its former decision. They cited precedents wherein "a conspiracy without any further act done had been held to be indictable."[30] Lord Holt said further:[31] "If two or three persons meet together and discourse and conspire how to accuse another falsely of an offense, it is an overt act, and is an offense indictable. So if two or three meet together to conspire the death of the queen, yet though there was nothing but words passed, the very assembling together was an overt act."

The case of Reg. vs. Best contains a fuller discussion of the law relating to this phase of our subject than is to be found in any preceding case. Lord Holt shows deference to the ancient distinction between conspiracy and confederacy, but this distinction soon lost all importance. Confederacy so widened its scope that it came to include all un-

[27] 1 Salk. 174.
[28] 2 Ld. Raym. 1167.
[29] 11 Mod. 55.
[30] 2 Ld. Raym. 1167.
[31] 11 Mod. 55.

lawful combinations except those comprised within the narrow class of conspiracies strictly so called. And when the decadence of the civil action of conspiracy had robbed the term "conspiracy" of its special significance, it was appropriated to all unlawful combinations and subjected to the principles worked out under the cover of the offense of "confederacy."

From the time of this decision the principle that a bare conspiracy is punishable as a crime was accepted with little question. Counsel argued for the last time against this proposition in Rex vs. Kinnersley and Moore[32] (5 Geo. I, 1719). The objection was vigorously combatted by counsel for the king, and was brushed aside by the court with little ceremony. From this time on attention is centered largely upon the nature of the offense of conspiracy and the relation between the various elements composing it.

We turn now to a discussion of the unlawful purpose which transforms a combination into a criminal conspiracy. During the period of the dominance of the civil action of conspiracy practically no combinations were included within the offense technically so called except combinations to enter false accusations of capital crimes. In this respect the criminal courts followed the practice of the civil courts. The exceptional civil actions of conspiracy entertained during the reign of Edward III are paralleled by several exceptional criminal prosecutions during the same period. In all these criminal cases, however, the prisoners escaped punishment in one way or another. After this reign the rigidity and the narrow scope of the civil law relating to conspiracy appear to have been reflected in the conception of conspiracy in its criminal aspect.

The germinal origin of the modern law of conspiracy, looked at from the viewpoint of the illegal purpose as well as from that of the element of combination, seems to be the clause of the Definition of Conspirators relating to the retention of men in the country "with liveries or fees for

[32] 1 Stra. 193.

to maintain their malicious enterprises and to suppress the truth." From this portion of the Definition sprang the offense of "confederacy," through the medium of which many important principles relating to concerted wrongdoing were developed. By the twenty-seventh year of the reign of Edward III (1364) confederacy had been made to include a combination between two persons whereby each had agreed to "maintain the other whether their matter were true or false."[83] As time went on, the scope of the offense was gradually broadened to reach other kinds of evil combinations, which later formed the basis of generalizations. But the main progress even in this direction was made possible by the above described shift of emphasis from the act to the combination as the gist of the offense. When the courts arrive at the conception that the criminality of conspiracy lies in the intent as manifested by overt acts, they can readily bring within the definition of the crime combinations for an indefinite number of objects.

The tendency to enlarge the class of unlawful combinations first operated in the direction of agreements to perform acts directly harmful to the public.[84] The first sug-

[83] 27 Lib. Ass., ch. 44, f. 138.

[84] Bagg had been removed from his office of chief burgess of the Borough of Plymouth. He complained that he had been unjustly treated. The Court of King's Bench said, "So if he intends, or endeavors of himself, or conspires with others, to do a thing against the duty or trust of his freedom, and to the prejudice of the public good of the city or borough, but he doth not execute it, it is a good cause to punish him, as is aforesaid, but not to disfranchise him" (11 Co. 93 b, 98). This passage strikingly shows the assimilation by the court of conspiracy to intent and attempt.

That the criminality of treason lies in the intent of the parties was first stated in Blunt's Case, 1 How. St. Tr. 1410 (43 Eliz., 1600). The solicitor-general argued that "the compassing the Queen's destruction, which by judgment of law was concluded and implied in that consultation, was treason in the very thought and cogitation, so as that thought be proved by an overt act; that same consultation was an overt act." The lord chief justice said that the act of one treasonable conspirator, "though different in the manner, is the act of all of them who conspire, by reason of the general malice of the intent."

These cases contain the elements out of which can be readily extracted the general doctrine that a bare conspiracy to do acts prejudicial to the public welfare is criminal.

gestion that combinations of this character are punishable is to be found in Bagg's Case[35] (13 Jac. I, 1615), wherein the principle is announced obiter, and without the citation of any authority. It may probably be traced ultimately to the judicial practice already adopted in reference to conspiracies to commit treason, wherein the combination, as evidencing the treasonable intent, was punished because of its direct influence upon the public weal. Such a principle fully accorded with contemporaneous opinion, which favored the protection of the rights and privileges of the king whatever might be the effect upon the conflicting interests of individual citizens. It was applied in Sterling's Case to a combination to reduce the king's revenue by impoverishing the fermors of the excise, and was extended in the later cases. To this principle can be attributed the illegality of the combination spoken of in Vertue vs. Ld. Clive,[36] wherein the military officers of the East India Company had sought to force concessions by simultaneously

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Other combinations the criminality of which can be accounted for by this principle are: To raise the price of merchandise, Anon., 12 Mod. 248 (10 W. III, 1698), Rex. vs. Norris, 2 Ld. Ken. 300 (1758). To raise wages, Journeymen Tailors' Case, 8 Mod. 11 (1721), etc.; see Chapter V. To procure a marriage between paupers for the purpose of charging another parish with their support, Rex vs. Watson et al., 1 Wils. 41 (1743), Rex vs. Herbert et al., 2 Ld. Ken. 466 (1759), Rex vs. Fowler et al., East P. C. 461 (1788), Rex vs. Tanner et al., 1 Esp. 304 (1795). To prevent the burial of a corpse, Young's Case (cited in Rex vs. Lynn), 2 T. R. 733 (1788). To solicit a witness to disobey a summons, Rex vs. Steventon et al., 2 East 362 (1802). To defraud the king by false vouchers, Rex vs. Brissac & Scott, 4 East 166 (1803). To induce a female ward in chancery to marry a man in low circumstances (such acts constituting an interference with the jurisdiction of the Court of Chancery), Rex vs. Locker et al., 5 Esp. 107 (1804), Ball vs. Coutts, 1 Ves. & B. 292, 296 (1812), Wade vs. Broughton, 3 Ves. & B. 172 (1814)—said to be "a species of robbery." To stifle a prosecution, Claridge vs. Hoare, 14 Ves. 59 (1807). To obtain money as compensation for the corrupt procurement of an appointment as coast waiter, Rex vs. Pollman et al., 2 Camp. 229 (1809). To issue a false certificate to be used as evidence in a criminal proceeding, Rex vs. Mawbey et al., 6 T. R. 619 (1796). To raise the price of government securities by circulating false rumors, Rex vs. De Berenger et al., 3 M. & S. 68 (1814)—said to be "a fraud levelled against all the public."

[35] 11 Co. 93 b.

[36] 4 Burr. 2472 (10 Geo. III, 1769).

resigning their commissions. The same is true of the various conspiracies to hinder or pervert the administration of justice, to defraud the government, and generally to do acts directly harmful to the public welfare, which are so frequently met with during the eighteenth and early nineteenth centuries. This principle lends itself to the accomplishment of great extensions in the definition of conspiracy, and some of the most important innovations in the law were made in connection with cases of this character.

A second avenue of progress in the same direction was found in a line of cases, contemporaneous with the above, in which, starting from the offense of conspiracy strictly so called, the courts were gradually and naturally led to treat as criminal various combinations to defame and to extort money by blackmail. This phase of the development of the criminal law of conspiracy is closely analogous to the contemporaneous process of growth in the civil law whereby the action upon the case was made to reach new classes of wrongs. From punishing combinations to enter false charges of capital crimes it was an easy step to punish conspiracies to charge an innocent person, either in court or merely in public places, with acts amounting only to trespasses or to spiritual offenses.[37] At first the courts fol-

[37] This principle was first laid down in Rex vs. Timberly & Childe, 1 Sid. 68 (13–14 Car. II, 1662), wherein there had been an indictment for conspiracy to charge a person with being the father of a bastard child, with intent to extort money. The court upheld the indictment, saying that "this court has conusance of every illegal thing for which damages may come to the party as here they may, for he will be for this liable for the maintenance of the child."

The facts in Green vs. Turnor et ux., 3 Keb. 399 (26 Car. II, 1674), were similar. Twisden, J., thought that the court (B. R.) had no "conusance" of the offense charged upon the prosecutor, since it was merely spiritual. "Contra by Wild and Rainsford, the information being for the conspiracy to draw sums of money from the plaintiff, not for getting the Bastard." Judgment, however, was stayed after conviction. But in Rex vs. Armstrong et al., 1 Vent. 305 (1677), a similar conspiracy was held indictable. The court said that it was "a contrivance to defame the person and cheat him of his money, which was a crime of a very heinous nature."

In Reg. vs. Daniell, 6 Mod. 100 (2 Anne, 1703), and Reg. vs. Best, 6 Mod. 137, 185 (3–4 Anne, 1704–5), Lord Holt laid it down

lowed closely the analogy between cases of this nature and those in which there had been an actual prosecution in court upon the false accusation. But since practically all of these conspiracies to defame were at bottom schemes of blackmail, the attention of the court became fastened upon the intent falsely and unjustly to extort money from the injured person. Thus they came to hold generally that a combination to extort money by a false defamatory charge is a criminal conspiracy. From this principle it is an easy transition to the still broader one that a conspiracy to injure another person by any illegal means is criminal. In this direction the conception of conspiracy has been extended very far. Still, the direct connection between combinations of the character under discussion and the primitive offense of conspiracy technically so called is manifest and interesting.

Combinations to cheat or defraud are among the most numerous and important criminal conspiracies brought before the courts of the present time. The doctrine that they are criminal offenses, however, had a special origin, and was not such an obvious and natural deduction from older settled principles as were those which we have just been treating. The earlier courts exhibited a tendency to punish cheating, whether engaged in by one or by several per-

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generally that a conspiracy to charge a person with a merely spiritual offense is indictable in the temporal courts. He did not look beyond the charge to the purpose for which it was preferred, although the indictment alleged that it was a scheme to extort money.

In Rex vs. Kinnersley and Moore, 1 Stra. 193 (5 Geo. I, 1719), the defendants were convicted of a conspiracy to charge Lord Sunderland with an attempt to commit sodomy, in order to extort money.

Atty. Gen. vs. Blood et al., T. Raym. 417 (32 Car. II, 1680), arose out of a conspiracy to indict the Duke of Buckingham for buggery. Conviction. Rex vs. Veal et al., 2 Keb. 59 (18 Car. II, 1666), was a case of conspiracy to charge with carnal knowledge. In neither of these was the purpose to extort money mentioned.

In Rex vs. Rispal et al., 1 W. Bl. 368 (1760), however, Lord Mansfield described the offense as "the getting money out of a man, by conspiring to charge him with a false fact." Or, as reported in 3 Burr. 1320, "The gist of the offense is the unlawful conspiring to injure the man by this false charge" (p. 1321).

sons. The element of conspiracy, if noticed at all, was considered merely as matter of aggravation. In Rex vs. Wheatley[38] (1 Geo. III, 1760), however, Lord Mansfield held that "all indictable cheats are where the public in general may be injured; as by using false weights, measures, or tokens; . . . or where there is a conspiracy." This decision was attacked by counsel in Rex vs. Lara[39] (36 Geo. III, 1796), but Lord Kenyon recognized its authority. "There must either be a false token or a conspiracy," he said; otherwise a cheat is not indictable.[40]

These cases established the principle that a cheat accompanied by a conspiracy is a crime. It was clearly the product of judicial legislation, and probably resulted from the increased importance attributed to the element of combination in other cases and the similarity between concerted

[38] 1 W. Bl. 273.
[39] 6 T. R. 565.
[40] In Anon., 1 Lev. 53 (13–14 Car. II, 1662), the court advised the plaintiff in a suit to reverse a judgment on account of fraud to prefer "an information against the cheat, and also against the vinter in which the house was, in this court." Here the element of combination does not enter.

Rex vs. Thode, 3 Keb. 111, 1 Vent. 234 (1672), was a conspiracy to cheat by the use of false dice. The court (Wild, J.) said, however, that "the conspiracy is laid only by way of aggravation."

In Rex vs. Armstrong et al., 1 Vent. 305 (1677), it was said that here was "a contrivance to defame the person and cheat him of his money, which was a crime of a very heinous nature."

In Reg. vs. Orbell, 8 Mod. 42 (1703), the indictment charged that the defendant fraudulently and per conspirationem, to cheat J. S. of his money, got him to lay a certain sum of money upon a foot-race and prevailed with the party to run booty. The court refused to quash it upon motion, "for they said that being a cheat, though it was private in the particular, yet it was public in its consequences."

In Reg. vs. Macarty et al., 8 Mod. 302 (1704), and Reg. vs. Parry et al., 2 Ld. Raym. 865 (1704), the cheats were looked upon as the gist of the offenses. In both cases several persons were charged, but they were in terms convicted of the cheats. No mention at all was made in the opinion of the court of the element of combination. The indictment in the Macarty Case charged a "combination to cheat," but in the Parry Case there was no reference at all to the plurality of defendants. After Rex vs. Wheatley, however, the element of combination became essential. See Rex vs. Hevey et al., 1 Leach Cr. L. 232 (1782); Rex vs. Pywell et al., 1 Starkie 402 (1816). The holding in Rex vs. Wheatley was in effect, though not avowedly, anticipated in Rex vs. Martham Bryan, 2 Stra. 866 (1729).

cheats and conspiracies to injure the public. By a further piece of judicial legislation, it was decided in the leading case of Rex vs. Gill and Henry[41] that a bare conspiracy to cheat is a crime.

Of still later origin was the doctrine that a conspiracy to commit a crime is indictable. The statute of Henry VII (1486, C. 14), enacting that conspiracies to destroy the king and his great lords shall be punished as felonies without overt act, recites that up to that time such combinations were not punishable. In Rex vs. Parkehurst and Eling[42] an information had been laid against the defendants for a conspiracy and an attempt to rob Sir Robert Gaire, and lying in wait, etc. The court said that the information would not lie in the absence of proof of an "overt act or lying in wait;" and the verdict went finally for the defendants, "there being no certain appointment of time, place or person." In a later case[43] Lord Holt said obiter that "if a meeting be to rob or kill, it may be indictable;" and two years afterward he also remarked,[44] again obiter, "So if two or three meet together to conspire the death of the queen, yet though nothing but words passed, the very assembling together was an overt act." These are the only instances in the old books wherein a conspiracy to commit a crime was noticed as such. Combinations of this character were not in terms declared to be punishable until the complete separation between the criminality of the combination and that of the act done had led to the general doctrine that a combination to commit any unlawful act is a criminal conspiracy.[45]

The doctrine that a combination to inflict an injury upon a third person is an indictable offense cannot be traced to

[41] 2 B. & A. 204 (59 Geo. III, 1818).
[42] 3 Keb. 799.
[43] Reg. vs. Daniell, 6 Mod. 100 (2 Anne, 1703).
[44] Reg. vs. Best, 11 Mod. 55 (1705).
[45] The first general statement that a combination for a criminal object is itself punishable seems to have occurred in Reg. vs. Rowlands et al., 2 Den. C. C. R. 364, 388 (1851). Erle, J., overruling the case of Rex vs. Turnor, 13 East 226 (1810), said, "An agreement to commit an indictable offense undoubtedly amounts to a conspiracy." See Chapter IV.

any one source. It was quietly accepted and applied by the courts in suitable cases without the citation of authority, and seems to have been a reflection from the other types of conspiracy, especially conspiracy to cheat, to which it bears a close affinity. The doctrine was first announced in Rex vs. Sterling.[46] Counsel for the king had argued that the "very conspiracy to do a lawful act to the prejudice of a third person is inquirable and punishable in B. R." Keeling, J., agreed, obiter,[47] "that this bare conspiracy is a great crime, where it is to do that which is evil, although to a private person; so is Poulterers' Case." Windham, J., said: "I agree that general confederacy, without designment to public or private end, is punishable by action upon the case or indictment. . . . But this is cause to mitigate the fine, that it is only private." The first case directly in point is Rex vs. Cope[48] (5 Geo. I, 1719), wherein there had been a conspiracy to ruin the trade of the king's card maker by bribing his apprentice to put grease into the card paste. This was followed by Elizabeth Robinson's Case[49] (1746), in which the defendants were punished for a conspiracy to marry under a false name in order to obtain the estate of the man personated. The mooted question here was whether there was sufficient evidence of a concerted intent "to do an injury to the person or estate of another." In Rex vs. Eccles[50] several were convicted of a conspiracy to impoverish a tailor and prevent him "by indirect means" from carrying on his trade. It appears also from Clifford vs. Brandon[51] that Lord Mansfield considered unlawful a conspiracy to hiss an actor. Thus the principle that combinations illegally to oppress or injure a third person are punishable had become fairly settled by the beginning of the nineteenth century.[52]

[46] 1 Keb. 650.
[47] Ibid., 675.
[48] 1 Stra. 144.
[49] 1 Leach Cr. L. 38.
[50] 1 Leach Cr. L. 274 (1783).
[51] 2 Campb. 358 (1809).
[52] In addition to the cases cited in the text, the following may be noted: Rex vs. Thorp et al., 5 Mod. 221 (8 W. III, 1696), a

Conspiracies to accomplish a merely immoral purpose were scarcely noticed as such until the nineteenth century. The only eighteenth century case touching upon this subject is Rex vs. Delaval et al.[53] Lord Mansfield granted an information against the defendants for an executed conspiracy to apprentice a young girl eighteen years old to Sir Francis Delaval for purposes of prostitution, saying that "the general inspection and superintendence of the morals of the people belongs to this court [i. e., the Court of King's Bench], as custos morum of the nation . . . especially when the offense is mixed with confederacy and conspiracy, as in the present case." Here, as in the early cases concerned with conspiracies to cheat, the gist of the offense was the act done rather than the combination.

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conspiracy to entice a young man under eighteen years of age to marry a woman of ill fame, contrary to his father's wishes. Reg. vs. Tracy, 6 Mod. 169, 170 (1704), to arrest the plaintiff and illegally to hold him without bail. McDaniell's Case, 1 Leach Cr. L. 444 (1759), and Rex vs. Spragg, 2 Burr. 993 (1760), were conspiracies to indict innocent persons of crimes. These would have been conspiracies at any period after the time of Edward I. In Rex vs. Turnor, 13 East 226 (1810), Lord Ellenborough decided that a combination to commit a civil trespass was not an indictable conspiracy. This decision, however, was not followed in the later cases. See Chapter V.

It should be observed that in all of these cases (with the possible exception of Clifford vs. Brandon) there were elements of illegality present in addition to the mere damage or oppression suffered by the complainant. Thus, as to Rex vs. Thorp, we may point out that the procurement of such marriages was looked upon as unlawful, independently of the element of conspiracy; Reg. vs. Blacket & Robinson, 7 Mod. 39 (1703); In Re Seeles, Cro. Car. 557 (1639). Moreover, the attorney for the prosecution argued that the conspiracy was mentioned only as matter of aggravation. In any event, no judgment was given in that case. In Rex vs. Cope, Reg. vs. Tracy, McConnell's Case and Rex vs. Spragg, the acts done would have amounted to civil wrongs if performed by single individuals. In Elizabeth Robinson's Case there was a scheme to defraud. Of Rex vs. Eccles, Lord Ellenborough said, in Rex vs. Turnor, that it "was considered as a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public." The statement in Clifford vs. Brandon is obiter dictum; and it seems that in the case cited in the note thereto the element of combination was treated as matter of aggravation.

Thus it appears that the above cases present no exception to the principle soon to be announced that a conspiracy always contemplates the accomplishment of an unlawful purpose or the use of unlawful means.

[53] 1 W. Bl. 410, 440.

Conspiracies among merchants and others to raise the price of merchandise, and among workmen to enhance their wages, had found their way into the criminal courts during the period under consideration. We shall reserve our treatment of them, however, for a separate chapter. They may be classed under the general category of conspiracies to injure the public welfare.

By the end of the eighteenth century the definition of criminal conspiracy included combinations for a number of objects besides those known to the older law. The courts, moreover, had little hesitation in looking beyond the proximate to the ultimate purpose of the combination in order to determine its character. The principle that a conspiracy to do a lawful act to an unlawful end is illegal arose comparatively early. It first appears in the argument of counsel in Rex vs. Sterling.[54] It was pressed upon and approved by the court in Rex vs. Edwards et al., though not strictly as part of the ratio decidendi. Its spirit is plainly evident in the conviction in Elizabeth Robinson's Case,[55] where there had been a conspiracy to marry under an assumed name for the purpose of obtaining title to one Richard Holland's estate. Upon the same principle the court held criminal a combination among the overseers of a parish to procure a marriage between paupers[56] for the purpose of throwing

[54] 1 Keb. 650.

[55] 1 Leach Cr. L. 38 (20 Geo. II, 1746).

[56] There are a number of these cases in the books. In some, acts of this character were considered as criminal although performed by a single individual. See Rex vs. Watson et al., 1 Wils. 41 (1743)—several defendants, but no conspiracy; Anon., Sayer 260 (1755); Rex vs. Tarrant, 4 Burr. 2106 (1767). In others the element of conspiracy was present. See Rex vs. Edwards; Rex vs. Herbert et al., 2 Ld. Ken. 446 (1759); Rex vs. Compton et al.; Rex vs. Tanner et al., 1 Esp. 304 (1795)—acquittal because prosecution failed to prove its case.

In Rex vs. Fowler et al., East P. C. 461 (1788), the indictment was held not to lie; but this was because the purpose wrongfully to charge another parish had not been properly alleged.

Finally, in Rex vs. Seward, 3 M. & M. 557 (1834), it was held that such combinations are not conspiracies, because the purpose of charging another parish with the maintenance of a pauper is not illegal.

the expense of their maintenance upon another parish,[57] and a combination to bind a girl ostensibly as an apprentice in music but for the ultimate purpose of prostitution.[58] This principle became firmly established as a result of the holding in Rex vs. Eccles et al.,[59] that if a conspiracy to accomplish an illegal purpose is charged, the means to be employed need not appear in the indictment at all. In Rex vs. De Berenger et al.,[60] counsel for the defendants seemed to admit "that to conspire to do a lawful act to an unlawful end is a crime," and endeavored to prove that the purpose of the combination under discussion was not unlawful.

We turn now to a discussion of a few of the more general aspects of the conception of conspiracy as developed during the period under review.

Although it had been settled by the Poulterers' Case, Rex vs. Sterling, and Rex vs. Best that a conspiracy without more is a crime, the courts were rather loath to pursue this doctrine to its consequences. There are a number of statements by counsel and a few obiter dicta by the court that the conspiracy is the gist of the offense quite independently of the acts done. But the cases in which this principle was actually applied are rare. Court and counsel took that position only as a last resort. The general practice in conspiracy cases was to charge in the indictment that the prisoners had done certain acts per conspirationem inter eos habitam. In most instances the combination was treated as an element in the offense, or as matter of aggravation, emphasis being laid upon the acts done. Thus, in cases in which a conspiracy to cheat was noticed, the earlier holding, as we have seen, was that a cheat accompanied by a conspiracy is indictable. Lord Holt even went so far as to say that in Rex vs. Sterling[61] "the gist of the offense was its influence upon the public, and not the conspiracy."

[57] Rex vs. Edwards, 8 Mod. 320 (1725). Rex vs. Compton, Cald. 246 (1782).
[58] Rex vs. Delaval, 1 W. Bl. 410, 439 (1762).
[59] Willes 583 (1783).
[60] 3 M. & S. 68 (1814).
[61] Reg. vs. Daniell, 6 Mod. 100 (2 Anne, 1703).

Lord Mansfield thus describes the offense charged in Rex vs. Rispal:[62] "The crime laid is an unlawful conspiracy. This, whether it be to charge a man with criminal acts, or such as only may affect his reputation, is fully sufficient. The several charges in the indictment are not to be considered as distinct and separate counts; but as one and the same united and continued offense, pursued through its different stages, and then it is clear that the whole will amount to an indictable offense: viz., the getting money out of a man by conspiracy to charge him with a false fact."

In some cases, also, where the acts complained of had been done by a combination of malefactors, the element of conspiracy was not noticed in the indictment. In others, although the indictment alleged that the acts had been done "per conspirationem," attention was fixed solely upon the acts performed, and the conspiracy received no further mention. And even in cases, such as Reg. vs. Best,[63] Rex vs. Journeymen Tailors,[64] etc., in which it was held that the conspiracy was the gist of the offense, the acts done were described in some detail in the indictment, and the above principle was urged in reply to an objection that the facts had not been properly alleged.[65]

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[62] 1 W. Bl. 368 (2 Geo. III, 1760).

[63] 6 Mod. 137 (3 Anne, 1704).

[64] 8 Mod. 11 (8 Geo. I, 1721).

[65] Cases in which several persons joined in the wrong-doing, but the element of combination was disregarded: Reg. vs. Parry et al., 2 Ld. Raym. 865 (2 Anne, 1703); Rex vs. Watson et al., 1 Wilson 41 (1743).

Cases in which the conspiracy is mentioned, but apparently considered as a secondary element in the offense charged: Rex vs. Thode, 3 Keb. 111 (24 Car. II, 1672); Rex vs. Parkehurst et al., 3 Keb. 799 (1677); Rex vs. Ld. Grey, 1 East P. C. 460 (1682); Rex vs. Thorp, 5 Mod. 221 (1696); Rex vs. Grimes & Thompson, 3 Mod. 220 (1688); Reg. vs. Daniell, 6 Mod. 100 (1703); Reg. vs. Orbell, 8 Mod. 42 (1703); Rex vs. Edwards, 8 Mod. 320 (1725); Rex vs. Wheatley, 1 W. Bl. 273 (1760); Rex vs. Rispal, 1 W. Bl. 368 (1760); Rex vs. Delaval, 1 W. Bl. 410, 440 (1762); Rex vs. Hevey, 1 Leach Cr. L. 232 (1782).

In the following cases the conspiracy seems to be the gist of the offense: Reg. vs. Best et al., 6 Mod. 137 (1704); Rex vs. Cope, 1 Stra. 144 (1719); Rex vs. Kinnersley & Moore, 1 Stra. 193 (1719); Rex vs. Journeymen Tailors, 8 Mod. 11 (1721); Elizabeth Robinson's Case, 1 Leach Cr. L. 38 (1746); Rex vs. Parsons, 1 W. Bl. 392 (1762); Rex vs. Compton, Cald. 246 (1782).

The complete separation, in respect to their criminality, between the conspiracy and the act took place during the latter years of the reign of George III. In Rex vs. Eccles et al.,[66] the defendants had been convicted upon an indictment for a conspiracy to impoverish one H. Booth, a tailor, and to prevent him "by indirect means" from carrying on his trade. In arrest of judgment it was urged that the indictment should have described the acts committed, in order that the defendants might know the particular charges against them. Lord Mansfield said that "this is certainly not necessary, for the offense does not consist in doing the acts by which the mischief is effected, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means. The illegal combination is the gist of the offense." This principle was confirmed in Rex vs. De Berenger[67] and Rex vs. Gill and Henry.[68] In both cases the defendants had been convicted of a conspiracy to accomplish an unlawful purpose, and had urged in arrest of judgment that the means to be employed should have been set out. Both motions were overruled. Lord Ellenborough, in Rex vs. De Berenger, said that "the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete although it had not been pursued to its consequences, or the parties had not been able to carry it into effect." And Abbott, C. J., in Rex vs. Gill, stated that "the gist of the offense is the conspiracy. . . . The offense of conspiracy may be complete, although the particular means are not settled and resolved on at the time of the conspiracy."

Modern practice in reference to indictments for conspiracy is founded upon these cases; and it was by reason of the complete separation between the criminality of the conspiracy and that of the acts done that the broad scope given the former offense became possible.

There is little discussion in the early cases as to the

[66] 1 Leach Cr. L. 274 (24 Geo. III, 1783).
[67] 3 M. & S. 68 (54 Geo. III, 1814).
[68] 2 B. & A. 204 (59 Geo. III, 1818).

nature of the act of combining. It would appear that in civil actions of conspiracy the courts did not look beyond the mere fact that there had been a plurality of performers. During the reign of Henry VI we find it stated for the first time (in argument of counsel) that the plaintiff must show that there had been a previous "parlaunce" between the defendants as to how the thing should be done.[69] There is some evidence that for a time the mere consultation in respect to doing an unlawful act was sufficient. Thus, in Rex vs. Sterling[70] it is said that the defendants were found guilty of "assembling and consulting" to impoverish the fermors. So in Reg. vs. Best,[71] Lord Holt says, "If two or three persons meet together and discourse and conspire how to accuse another falsely of an offense, it is itself an overt act, and is an offense indictable." In the same case, however, Powell states the modern rule: "If people meet together to consult or conspire, to make it criminal they ought to come to some resolution." He adds a proviso, however, apparently taken from Bagg's Case,[72] that "if it appeared that he repented, it might alter the case." This exception, however, is not considered to be valid at the present time.

Almost contemporaneously with the doctrine that an unexecuted conspiracy is a crime, the courts adopted the principle that the acts done are to be treated as evidence of the concerted design. Thus, in Rex vs. Sterling,[73] Twisden, J., said, "If any of the particular facts, which are but evidence of the design charged, be found, it's sufficient to support the indictment." Lord Mansfield, in Rex vs. Parsons et al.,[74] instructed the jury "that there was no occa-

[69] Y. B. 35 Hen. VI, f. 14.
[70] 1 Lev. 125.
[71] 11 Mod. 55.
[72] Cause of disfranchisement of a burgess should be "an act or deed, and not a conation or an endeavor, which he may repent of before the execution of it and from whence no prejudice comes." The context indicates that the court considered this principle equally applicable to a conspiracy. 11 Co. 93 b, 98.
[73] 1 Keb. 650.
[74] W. Bl. 392 (3 Geo. III, 1763).

sion to prove the actual fact of conspiring, but that it might be collected from collateral circumstances." After the complete separation for purposes of indictment had taken place between the combination and the act, this principle served to keep them in their proper relation.

There is little discussion in the early books as to the theoretical basis of the criminality of conspiracy. The civil liability for conspiracy rested ultimately upon the damage suffered by the plaintiff. This view seems to have been adopted at first by the criminal courts. In the Poulterers' Case the reason given for punishing the unexecuted conspiracy was that such a policy tended to prevent crime and injury to innocent third parties. The modern view that the criminality of conspiracy lies in the intent, which is declared by the acts done, was first suggested in Rex vs. Sterling.[75] Except in these few passages, however, the judges do not attempt, until the nineteenth century, to justify the punishment of a bare agreement to commit an unlawful act. Conspiracy was considered as of an "odious nature." It was a "crime of blacker dye than barratry," comprehended under the denomination of crimen falsi, a conviction of which destroyed the competency of the party as a witness.[76] Hence it doubtless appeared to the courts that the reasons for punishing conspiracy were too obvious to require explanation. An interesting evidence of this attitude is seen in the principle that what is lawful for a single individual to do may be unlawful if done by a combination. This view, which had its origin in two Star Chamber decisions[77] of the time of Elizabeth, and was thought by some to have been laid down in Rex vs. Sterling, was received with some favor, and without discussion, during the seventeenth and eighteenth centuries.[78]

[75] 1 Keb. 675.

[76] Rex vs. Priddle, 1 Leach Cr. L. 442 (1787).

[77] Amerideth's Case, Moore 562 (1600); Lord Grey's Case, Moore 788 (1607). See note 7, pp. 55, 56.

[78] In Rex vs. Thorp, 5 Mod. 221 (1696), counsel for the king argued that "that which is lawful for one man to do, may be made unlawful to be done by conspiracy," citing Rex vs. Sterling.

The punishment of those convicted of conspiracy has varied. In the civil courts the penalty was originally damages to the plaintiff, a fine to the king, and imprisonment. The criminal courts were more severe, and subjected conspirators to the "villanous judgment,"[79] which seems to have had its origin in the common law. The last "villanous judgment" of which there is a record was passed in the reign of Edward III.[80]

As time went on, punishments for conspiracy became lighter. In the Star Chamber, barbarous penalties lingered longer than they did in the common-law courts. We accordingly find during the reign of James I cases in which conspirators were fined, whipped, pilloried, branded or

This idea was approved and applied in Rex vs. Journeymen Tailors, 8 Mod. 11 (1721). The court said: "A conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it, as appears in the case of the Tubwomen vs. the Brewers of London." The latter case is supposed to be the popular name of Rex vs. Sterling. In Rex vs. Martham Bryan, 2 Stra. 866 (1729), the court said obiter, in regard to Reg. vs. Best, "There the conspiracy was the crime; and an indictment will lie for that, though it be to do a lawful act." The same principle was approved, again obiter, by Lord Mansfield in Rex vs. Eccles, 1 Leach Cr. L. 274 (1783), and by Grose, J., in Rex vs. Mawbey, 6 T. R. 619 (1796). Although no authority was cited, both Lord Mansfield and Grose, J., evidently had in mind Rex vs. Journeymen Tailors.

At the present time a combination to accomplish a legal purpose by legal means is not a criminal conspiracy. Even today, however, a combination may be criminal although the acts contemplated would be merely unlawful, not indictable, if performed by a single individual. The same is true of a combination to employ lawful means as part of an unlawful scheme. See Chapter IV.

[79] The character of the villanous judgment appears from the following report (46 Lib. Ass. 11): "A man was attainted of conspiracy at the suit of the king upon indictment. Wherefore it was adjudged he lose his 'frank-law,' so that he should not henceforth be put upon juries, nor assizes, nor otherwise received in testimony of the truth, and that he shall not come within twelve leagues of the place where the king's court may be; and that his lands be seized into the king's hands, and his fields laid waste, and his wife and his children ousted and his trees uprooted, and his body taken and imprisoned. But if he be attainted at the suit of a [private] party, he shall have only simple judgment that the plaintiff recover his damages; and that he be imprisoned." See also 27 Lib. Ass. 59.

[80] Lord Mansfield so states in Rex vs. Spragg, 2 Burr. 993 (1796).

mutilated. In Miller vs. Reignolds and Basset[81] all of these punishments were inflicted, and Reignolds, who was an attorney, was also degraded and "cast over the common pleas barre."

In the court of King's Bench, fine and imprisonment were the usual punishments, though corporal punishment was sometimes inflicted. Rex vs. Brissac and Scott[82] is the last case recorded in which a conspirator was pilloried. The amount of the fine and imprisonment of course varied with the enormity of the offense. In Rex vs. Priddle[83] a conviction of conspiracy was held to have destroyed the competency of the prisoner as a witness.

By the end of the eighteenth century the law of conspiracy had assumed very nearly its present shape. Its growth, however, had been extremely unsystematic and dependent upon casual circumstances. The task of the courts in the nineteenth century, therefore, has been to develop and apply principles already suggested, to extract general doctrines from the confusion of the earlier cases, and to reduce the law to some degree of orderly and scientific arrangement. The manner in which this was attempted will be discussed in the following chapter.

[81] Godb. 205.
[82] 4 East 166 (1803).
[83] 1 Leach Cr. L. 442 (28 Geo. III, 1787).

CHAPTER IV.

The Criminal Law of Conspiracy in the Nineteenth Century.

It was laid down in Rex vs. Gill that since the combination is the gist of the offense of conspiracy, all that need be charged in an indictment is a combination for an illegal object. The overt acts performed serve merely as evidence to prove the conspiracy, and hence, in accordance with the general rule, are not required to be set out.

This principle is perfectly logical, but in practice it was found to work hardship upon persons accused of conspiracy. The connection between the combination and the acts to be done is too close to allow the prosecution to keep the accused in entire ignorance up to the time of the trial of what facts he will be called upon to disprove. Accordingly the practice arose of compelling prosecuting attorneys in conspiracy cases, upon the request of the defendants, to furnish bills of particulars giving more specific information in respect to the charges to be repelled. Just when this practice originated cannot be stated with certainty. In an anonymous case[1] decided in 1819, Abbott, C. J., refused to order a bill of particulars, saying that the gist of the indictment was the conspiracy, and that the application for such a bill was "unprecedented." But by 1836 these applications had come to be regarded with favor. Ordering a bill of particulars in proper cases was said to be a "highly beneficial practice."[2] In Reg. vs. Ryecroft[3] (1852) and Reg. vs. Stapylton[4] (1857) the defendants

[1] 1 Chitty 698.
[2] Rex vs. Hamilton, 7 Car. and P. 448, 454.
[3] 6 Cox C. C. 76.
[4] 8 Cox C. C. 69.

claimed and were supplied with bills of particulars as a "matter of right."

The custom of granting bills of particulars, however, cannot be construed as a modification of the doctrine laid down in Rex vs. Gill. It was simply an "expedient now employed in practice"[5] to protect defendants against being put at a disadvantage by the vagueness of indictments which merely described in general terms a conspiracy to effect an evil purpose. The prisoner was not necessarily entitled to know all the details of the case against him, such as the specific acts he was charged with having done, and the times and places at which they were done.[6] He could demand only such information as was reasonably sufficient to enable him fairly to defend himself in court; not a degree of particularity which would unduly hamper the prosecutor in the conduct of his case.[7] A bill of particulars, in short, needed only to contain such information as would appear in a special count. It would be refused, therefore, if the indictment contained a special count, unless the defendant made affidavit that the special count did not give sufficient information regarding the overt acts to enable him to meet the accusation.[8]

In this way were solved the practical difficulties caused by the lack of specific information as to overt acts in indictments for conspiracy. But other problems springing from the generality of indictments drawn subsequently to Rex vs. Gill engaged the attention of the courts for almost forty years (1819–1859) after that famous decision. Guided by the principle there laid down that the conspiracy and its object are all that need be stated, the prosecuting attorney

[5] Reg. vs. Kenrick, D. & M. 208 (1843).
[6] Rex vs. Hamilton et al. (1836), 7 Car. & P. 448.
[7] Reg. vs. Stapylton (1857), 8 Cox C. C. 69, 71.
[8] See the above cases. Even if a bill of particulars were furnished, the prosecution was not necessarily confined to the matters therein stated. "If," said Littledale, in Rex vs. Hamilton et al., "the prosecutors give a distinct and separate notice, that they mean to go into other evidence, and the defendants at the trial object to that, and rely upon the particulars, the judge at the trial will decide whether he will receive any evidence beyond the particulars."

would endeavor to tell in the indictment as little about his case as possible. The accused could then demand his bill of particulars. In many cases, however, he would prefer to take his chances at the trial, and then upon conviction he would move in arrest of judgment upon the ground that the indictment was defective in that it did not describe the offense with sufficient accuracy or fullness. The authority of Rex vs. Gill and Rex vs. Eccles was called in question a number of times, and the courts were compelled to scrutinize again and again the doctrines laid down in those decisions.[9] The result was a complete triumph for the principles there announced. The courts consistently decided that the indictment for conspiracy need only allege a combination, and a purpose which the court can see is unlawful. Hence, in respect to conspiracies to cheat and defraud, it was repeatedly affirmed that the indictment need not specify the fraudulent methods and pretences to be employed, nor the names of the persons to be defrauded, nor the goods to be embezzled, and the like.[10] These details were said to be merely matters of evidence to prove the conspiracy. In this manner the separation between the combination and the acts done was strongly emphasized.

The courts, however, took care that the unlawful purpose should be described with sufficient particularity to reveal the true nature of the concerted intention.[11] If there was a variance between the purpose as charged in the

[9] See Reg. vs. Kenrick, D. & M. 208 (1843); O'Connell vs. Reg., 11 Cl. & F. 155, 194–197 (1844); Reg. vs. King et al., 7 Q. B. 780 (1845); Reg. vs. Gompertz, 9 Q. B. 824 (1846); Sydserf vs. Reg., 11 Q. B. 245 (1848).

[10] Anon., 1 Chitty 698 (1819); Reg. vs. Kenrick et al., D. & M. 208 (1843); Reg. vs. Blake & Tye, 6 Q. B. 126 (1844); Reg. vs. King et al., 7 Q. B. 780 (1845); Sydserf vs. Reg., 11 Q. B. 245 (1848); Reg. vs. Whitehouse et al., 6 Cox C. C. 39 (1852).

[11] In Rex vs. Fowle & Elliott, 4 C. & P. 592 (1831), the indictment charged that the defendants "did confederate, combine and conspire to cheat and defraud the just and lawful creditors" of Fowle. Lord Tenderden, C. J., said: "This count appears to me to be much too general. It does not state what was intended to be done, or the persons to be defrauded. I should be very sorry to give effect to so general a count as this." However, he let the case proceed, and the defendants were acquitted. As to necessity for naming the persons to be defrauded, see note 10, supra.

indictment and the purpose as proved by the evidence, the indictment was thrown out.[12] The same was true if the object of the combination as described in the indictment was not unlawful by necessary intendment.[13] And although the overt acts need not be enumerated in the indictment, yet if they were alleged at all, and the averment of the particular intent was dependent upon them, they had to be proved as laid;[14] otherwise the defendants would not be found guilty of the particular conspiracy charged. In Reg. vs. Parker et al.[15] (1842) the ownership of goods of which the prosecutor was alleged to have been defrauded by a conspiracy was held necessary to be shown. In Reg. vs. King et al.[16] it was even said that where the circumstances of the case indicated that the persons to be de-

[12] In Rex vs. Thomas et al., 1 C. & P. 472 (1824), persons accused of a conspiracy to procure false witnesses in a certain action of ejectment were acquitted because the description of the court so imposed upon was uncertain, and also because there was a variance between the action mentioned in the indictment and that shown in the proof.

In Rex vs. Biers, 1 A. & E. 327 (1834), an indictment for conspiracy to charge the prosecutors with an offense under a certain act of Parliament was held to be vitiated by a misrecital of the act.

See also Reg. vs. Steel, Car. & M. 337 (1841), a case of variance between the indictment and the evidence.

[13] In Rex vs. Jones et al., 4 B. & A. 345 (1832), judgment was arrested upon a conviction of conspiracy to embezzle the estate of Jones, a bankrupt, in order to cheat his creditors, because the indictment did not indicate beyond a doubt that Jones was legally a bankrupt. Denman, C. J., said (p. 349): "Here the indictment charges a conspiracy to remove and conceal the goods of Jones: but if the commission was bad, Jones had a right to remove them. If we were to hold such an indictment good, it would follow as a consequence, that a party who was entitled to recover goods in an action, if taken from him, might be declared a felon for removing the very same goods. There is nothing stated on the face of this indictment to constitute an offense." In Reg. vs. Peck, 9 A. & E. 686 (1839), he said, "Now obtaining goods without paying is, as Mr. Murphy argued, not necessarily a fraud: the words might apply to the obtaining goods to sell on commission."

See also Rex vs. Richardson et al., 1 Mod. & R. 402. Rex vs. Seward et al., 3 M. & N. 557 (1834): "When the charge is that it was intended to do the act by unlawful means, it must appear how those means are unlawful" (p. 561).

[14] Reg. vs. Dean et al., 4 Jur. 364 (1840).

[15] 3 Ad. & E. N. S. 741. See also Reg. vs. Bullock, 1858.

[16] 7 Q. B. 795, 806 (1845).

frauded were certain and definite individuals, they should have been named, or reasons given why they had not been named. In all these instances, however, the court simply exhibits the desire that the acts set out shall be sufficient to evidence and identify the guilty intent which is at the foundation of the offense of conspiracy.[17]

The principle that the criminality of the conspiracy is independent of the criminality of the overt acts following upon it has been logically applied, and has received some interesting illustrations in practice. Thus, in Reg. vs. King et al.[18] (1845) it was said that if the first part of an indictment alleged a complete conspiracy, the overt acts set out would not reduce it to something not indictable even though they were in themselves innocent, their only object "being to give information of the particular facts by which it is proposed to make out the conspiracy." Again, in Reg. vs. Button[19] (1848), the attorney for the defendants accused of conspiracy to commit larceny argued that the conspiracy, being a misdemeanor, merged in the larceny, which was a felony; also, that unless this objection were sustained, they might be twice punished for the same offense. The court overruled both defenses, saying that the two offenses are "different in the eye of the law," though Denman, C. J., thought that if the defendants should be prosecuted for larceny after a conviction of conspiracy, the court should apportion the sentence with reference to the former conviction. In Reg. vs. Thompson et al.[20] (1851) it was held that a conspiracy to violate an act of Parliament was not cured by the subsequent repeal of the act.[21] The fact, also, that the acts done in pursuance of a conspiracy to

[17] Upon a plea of autrefois acquit, however, the identity of the conspiracy must be a matter of evidence in ninety-nine cases out of a hundred. Reg. vs. Blake & Tye, 6 Q. B. 126 (1844).

[18] 7 Q. B. 780.

[19] 3 Cox C. C. 229.

[20] 16 Q. B. 832.

[21] The fact, also, that one of the accused enjoys a statutory immunity from prosecution for the unlawful acts agreed upon will not affect the liability of either party for the conspiracy to do them. Rex vs. Duguid, 75 L. J. K. B. 470 (1906).

defraud would not result in barring the title of the party to be injured will not affect the liability of the prisoners.[22] In Reg. vs. Kohn[23] (1864) the jury were instructed that a conspiracy entered into at Ramsgate between foreigners to scuttle a foreign ship upon the high seas was cognizable by the English courts, although they would have no jurisdiction to punish the acts done. The doctrine under discussion received its farthest extension in the recent case of Reg. vs. Whitechurch[24] (1890), in which the court held that a conspiracy between a woman and several others to commit an abortion upon her person was criminal, although she had been mistaken in believing herself pregnant.[25]

It must be borne in mind, however, that this separation between the combination and the act done relates to the criminality of the two elements. Usually the conspiracy is closely bound up with the overt acts, because only by means of the latter can the combination be made out. The doctrines laid down in the cases respecting the nature of the evidence whereby conspiracy is to be proved are interesting and throw considerable light upon the conception of the offense entertained by the courts.

If in a prosecution for conspiracy the crown is able to produce a witness, not a co-conspirator,[26] who can testify directly to the fact of combination, the case is easy of proof. But, as Erle, J., well says,[27] "It does not happen once in

[22] Reg. vs. Carlisle & Brown, 1 Dears. C. C. 337 (1854).
[23] 4 F. & F. 68.
[24] 24 Q. B. D. 420.
[25] The Act of 5 and 6 Victoria, C. 38 (1842), creates a more definite relation between the criminality of the conspiracy and that of the act done by providing that no justice of the peace or recorder of any borough shall at any session of the peace or at any adjournment thereof try any person or persons for certain offenses; among them (Sec. 16), "Unlawful combinations and conspiracies, except conspiracies or combinations to commit any offense which said justices or recorder respectively have or has jurisdiction to try when committed by one person."
[26] "So in the case of several persons indicted for burglary or conspiracy; one may be convicted on his own confession, which, though in terms involving the others is no legal evidence against them" (obiter dictum). Robinson vs. Robinson & Lane, 1 Sw. & Tr. 362, 365.
[27] Reg. vs. Duffield, 5 Cox C. C. 404, 434.

a thousand times that anybody comes before the jury to say, 'I was present at the time when these parties did conspire together, and when they agreed to carry out their unlawful purpose.'" Hence the courts have consistently held that the prosecution is not obliged to prove that the persons accused actually met and laid their heads together, and after a formal consultation came to an express agreement to do evil. On the contrary, if the facts as proved are such that the jury, "as reasonable men [can] see there was a common design, and they [i. e., the prisoners] were acting in concert to do what is wrong, that is evidence from which the jury may suppose that a conspiracy was actually formed."[28] In other words, the overt acts may properly be looked to as evidence of the existence of a concerted intention. "If," said Coleridge, J., to the jury in Reg. vs. Murphy et al.[29] (1837), "you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they are pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect the object." To the same purpose was the instruction of Erle, J., in Reg. vs. Duffield[30] (1851): "If you see several men taking several steps, all tending towards one obvious purpose, and you see them through a continued portion of time, taking steps that lead to an end, why it is for you to say whether these persons had not combined together to bring about that end, which their conduct so obviously appears adapted to effectuate."[31] Thus, in Reg. vs. Hall et al.[32] (1858), it was held that in a prosecution for a conspiracy among mer-

[28] Reg. vs. Brown, 7 Cox C. C. 442 (1858).
[29] 8 Car. & P. 297.
[30] 5 Cox C. C. 404, 434.
[31] "Conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them and which hardly ever are confined to one place." Grose, J., (obiter) in Rex vs. Brissac et al., 4 East 166, 169 (1803).
[32] 1 F. & F. 33.

chants to dispose of their goods in contemplation of bankruptcy, with intent to defraud their creditors, their clandestine removal of the goods, prior to an absconding, would be evidence of such a conspiracy. So, too, letters passing between the accused may be offered to prove or disprove a conspiracy.[33]

The overt acts are not merely evidence that there was a common design on the part of the accused. They may also be relied upon as a means of detecting the object of the combination. This principle, in conjunction with the principle that the criminality of the conspiracy lies in the concerted intention, supplies an intelligible basis for the doctrine that when once a conspiracy is shown to exist, the acts of each conspirator in furtherance of its object are evidence against each of the others; and this whether such acts were done before or after his entry into the combination, in his presence or in his absence. This doctrine was announced as early as the time of Elizabeth,[34] but it received its greatest development and application during the nineteenth century. According to its tenets, the prosecution must first prove that several persons had combined to effectuate a common design.[35] Evidence is also receivable at this preliminary stage of the case to show the general nature of the combination and its object.[36] Before all this can be made to affect any particular person accused of conspiracy, however, it must be clearly proved that he had become a participator in the combination so made out. But as soon as he is thus connected with the "general intent and

[33] Reg. vs. Banks, 12 Cox C. C. 393 (1873). Rex vs. Whitehead, 1 Car. & P. 67 (1824).

[34] "If many do conspire to execute treason against the prince in one manner, and some of them do execute it in another manner, yet their act, though different in the manner, is the act of all of them who conspire, by reason of the general malice of the intent." Blunt's Case, 1 How. St. Tr. 1410, 1412 (43 Eliz., 1066). See also Hardy's Case, 24 How. St. Tr. 438 (1794); Horne Tooke's Case, 25 How. St. Tr. 27 (1794); Rex vs. Stone et al., 6 T. R. 527 (1796); Rex vs. Hammond et al., 2 Esp. 719, 720 (1799); Reg. vs. Salter et al., 5 Esp. 125 (1804).

[35] Queen's Case, 3 B. & B. 309 (1820).

[36] Reg. vs. Lacey, 3 Cox C. C. 517 (1848).

objects of the conspiracy,"[37] as soon as his privity with the combination and its object and his adoption of the acts already performed are shown, each conspirator becomes bound by the antecedent and the consequent acts of his co-conspirators. As Coleridge, J., well says, in Reg. vs. Murphy[38] (1837): "It is not necessary that it should be proved that these defendants met to concoct this scheme, nor is it necessary that they should have originated it. If a conspiracy be already formed, and a person joins it afterwards, he is equally guilty. . . . If you are satisfied that there was concert between them, I am bound to say, that being convinced of the conspiracy, it is not necessary that you should find both Mr. Murphy and Mr. Douglas doing each particular act, as, after the fact of the conspiracy is once established in your minds, whatever is either said or done by either of the defendants in pursuance of the common design, is, both in law and in common sense, to be considered as the act of both."[39]

The reason for this doctrine is plain. Conspirators are not thereby subjected to punishment for offenses committed by their fellows. But since the crime lies in the concerted intention, and this is to be gathered from the acts done, such acts preceding the entry of a particular person into the combination are evidence to show the nature of the concert to which he becomes a party, and the subsequent acts of the other members indicate further the character of the common design in which all are presumed to be equally concerned. Therefore it follows that only acts done in furtherance of the common object are admissible in evidence against co-conspirators. A declaration by one conspirator after the completion of the transaction is not evidence against the others. In Reg. vs. Blake and Tye[40] (1844) the defendants had been accused of a conspiracy illegally to secure the entry of imports without the payment of

[37] Reg. vs. Stenson, 12 Cox C. C. 111 (1871).
[38] 8 Car. & P. 297, 310.
[39] See also O'Keefe vs. Walsh et al. (1903), 2 Ir. R. 681.
[40] 6 Q. B. 126, 139.

duties and so defraud the queen of her customs. It was held that Tye's daybook showing that the quantity of goods entered was much greater than had been declared to the customs officials should be received, but not a statement in his checkbook that a certain check afterwards drawn had been the means whereby he had transferred one half the profits of the scheme to Blake.

Several principles laid down in the cases follow logically from the above doctrines. In Wright vs. Reg.[41] it was objected that an indictment for a conspiracy to obtain the "means and power" of securing certain East India stock belonging to a widow was defective in not charging the unlawful object with sufficient certainty. But Denman, C. J., thought that it should be sustained, as "the statement of the means used for effecting the object of the conspiracy is so interwoven with the charge of conspiracy as to show upon the face of these counts an unlawful conspiracy." Creswell, J., in Reg. vs. Read[42] (1852), instructed a jury that "it is not necessary to prove that all the parties met together. If any evidence or circumstances had been adduced safely leading to the conviction that Read was a party, although absent, that would do." In Reg. vs. Stenson et al.[43] (1871), Kelly, C. B., said, "There can be no doubt that anything done at any time, even as late as the day before the trial, which shows that a person had been at a former time a party to a conspiracy, is admissible in evidence against him."

The fundamental principle that the act of combination is the gist of the offense of conspiracy received careful statement and development during the nineteenth century. Williams, J., in Rex vs. Seward[44] (1834), expressed a doubt "whether, without an overt act, the conspiracy itself amounts to any crime." No weight can be allowed to this remark, however, in the face of the numerous statements

[41] 14 Q. B. 147, 168.
[42] 6 Cox C. C. 134.
[43] 12 Cox C. C. 111, 117.
[44] 3 M. & M. 557, 563.

that a bare agreement to accomplish a forbidden purpose is indictable quite independently (except as explained above) of what is actually done in pursuance of it.[45] The modern rule is well stated by Brett, J. A., in Rex vs. Aspinall[46] (1876): "Now, first, the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offense, that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless the crime is complete; it was completed when they agreed."

A combination among the prisoners, however, must be proved. If unlawful acts are done without concert, the charge of conspiracy cannot be maintained. Nothing turns upon the word "conspiracy."[47] As Lord Campbell puts it in Reg. vs. Hamp[48] (1852), "Conspire is nothing, agreement is the thing." In Reg. vs. Brown[49] (1858) the same judge cautions the jury "against supposing that, if one or several have done what is improper, that will establish the charge against them," unless it is shown that there was "a joint design, a joint combination and conspiracy." In Reg. vs. Barry[50] (1865), Martin, B., said: "What I want is evidence of a conspiracy, which means a combination. In the books it is always called an agreement. In order to make out a conspiracy, there must be some concert. The parties must put their heads together to do it." In the

[45] Rex vs. Kenrick, D. & M. 208 (1843); O'Connell vs. Reg., 11 Cl. & F. 155, 233; Reg. vs. Hamp, 6 Cox C. C. 167 (1852); Reg. vs. Brown et al., 7 Cox C. C. 442 (1858); Reg. vs. Barry, 4 F. &. F. 389 (1865); Mulcahy vs. Reg., Ir. R. 1 Com. Law 13 (1866–7); Reg. vs. Banks, 12 Cox C. C. 393 (1873); Reg. vs. Bunn, 12 Cox C. C. 316 (1872); Reg. vs. Hilbert, 13 Cox C. C. 82 (1875); Reg. vs. Aspinall, 2 Q. B. D. 48 (1876); Reg. vs. Parnell et al., 14 Cox C. C. 508 (1881).

[46] 2 Q. B. D. 48, 58.

[47] Reg. vs. Murphy, 8 Car. & P. 297, 310 (1837).

[48] 6 Cox C. C. 167, 173.

[49] 7 Cox C. C. 442, 445.

[50] 4 F. & F. 389, 399.

great case of Mulcahy vs. Reg.[51] (1868) Mr. Justice Willes advised the House of Lords that conspiracy consists, not in the mere intention, but in the agreement, to do the forbidden act.[52] And in Reg. vs. Banks[53] (1873) the court instructed the jury that they must "be satisfied that an agreement actually existed between Leah and Elizabeth [Banks] to destroy the child when born. The jury must say whether the letter from Leah to Elizabeth, and the three previous letters from Elizabeth to Leah, indicated any such agreement. A mere suggestion from one to the other would not be sufficient."

It follows as a corollary from this proposition that if several are indicted jointly for conspiracy, the acquittal of all but one operates to free him also. The verdict of guilty rendered against a single person would be inconsistent with the charge of a concerted design. In Reg. vs. Thompson et al.[54] (1851) the jury found that Thompson had conspired with either Tillotson or Maddox, but they were unable to say which one. Cresswell, J., directed a verdict of not guilty against Tillotson and Maddox, and guilty against Thompson. Upon rule nisi for a new trial, Lord Campbell and a majority of the Court of Queen's Bench were of the opinion that the verdict could not stand. The indictment and the evidence tended to prove a conspiracy among the three; and hence if two were acquitted, the third could not have been guilty of the conspiracy set out in the indictment. Erle, J., dissented, believing that the charge was against each prisoner separately, wherefore a verdict that Thompson had conspired with some one (the jury did not know with whom) should have

[51] L. R. 3 H. of L. 306, 316.

[52] The same idea had been expressed in Rex vs. Nield et al., 6 East 415 (1805), in these words: "And it is necessary to show a criminal object as well as a criminal intent. . . . But here the offense does not consist in intent merely. It is not enough that the agreement should be for the purpose of controlling; but it must be entered into for controlling, that is, for effecting that object." The language employed is inaccurate, but the meaning is clear enough.

[53] 12 Cox C. C. 393, 399.

[54] 16 Q. B. 832.

been rendered and sustained. The opinion of the majority in this case, however, is really not inconsistent with the general principle contended for by Erle. It was applicable to the form of the verdict as actually rendered and the evidence upon which it had been based. The court expressly said that if there had been a conspiracy among "five or six," and Tillotson and Maddox had been acquitted, the matter might have been different; in other words, there would have been room for a verdict that Thompson had conspired with a person unknown. Reg. vs. Thompson was cited and followed in Reg. vs. Manning[55] (1883). The indictment was against Manning and Haman for conspiracy to cheat and defraud. The jury found a verdict of guilty against Manning, but were unable to agree in regard to Haman, and hence were discharged from giving a verdict as to him. A new trial was ordered. Manning, J., said: "The rule appears to be this. In a charge for conspiracy in a case like this where there are two defendants, the issue is raised whether or not both the men are guilty, and if the jury are not satisfied as to the guilt of either, then both must be acquitted."[56]

If, however, a verdict of guilty against a single defendant does not amount to a "legal impossibility" by reason of repugnancy apparent upon its face, the verdict will stand.[57] In Rex vs. Cooke[58] (1826) several were indicted for a conspiracy. Two pleaded not guilty, one never appeared, one pleaded in abatement. While the plea in abatement was pending, the trial of the two who had pleaded not guilty took place. One of these was acquitted, and the other was found guilty of conspiring with the defendant who had

[55] 12 Q. B. D. 241, 243.

[56] The farthest extension of the general principle under discussion is shown in Rex vs. Plummer, 71 L. J. N. S. 805 (1902). The three defendants had been indicted for obtaining money under false pretences, and for conspiracy to defraud. Plummer pleaded guilty to the charge of conspiracy, not guilty as to the rest. The other two defendants were afterwards acquitted upon the whole indictment. The court held that the conviction of Plummer must be quashed, since his plea was inconsistent with the verdict.

[57] Reg. vs. Quinn, 19 Cox C. C. 78 (1898).

[58] 5 B. & C. 538.

pleaded in abatement, and who had not yet been tried upon the merits of the case. The court refused even to stay judgment until the latter defendant could be tried. "We are not warranted in presuming that the other defendant in this case will be acquitted."[59] Littledale, J., however, remarked, "If the other defendant, R. S. Cooke, shall be hereafter acquitted, perhaps the judgment may be reversed." Very similar was Reg. vs. Ahearne[60] (1852), in which one of several defendants accused of conspiracy to murder was tried alone, found guilty, and sentenced to death. The court refused to stay judgment, although it was argued that the other prisoners might be acquitted, from which the innocence of Ahearne would follow by necessary intendment. Lefroy, C. J., said, "The reasons offered here by the prisoners' counsel may be good grounds for respiting execution, but certainly not for respiting or arresting judgment."

Conspiracy, then, is an agreement. The parties must unite in a common intention. But there must be something more. Mere concert is not in itself a crime, although the principles applied by the Court of Star Chamber and perhaps by the earlier Courts of King's Bench may have taught otherwise. The additional element of intention to effect a forbidden purpose is necessary to constitute the offense of conspiracy.[61] Hence, a person accused of conspiracy may offer in evidence letters showing that although he had participated in the unlawful scheme, he had been the dupe of the other defendant, and so had been without privity in the concerted illegal intention to do wrong.[62] It has been expressly laid down in reference to indictments for con-

[59] Ibid., p. 545.
[60] 6 Cox C. C. 6.
[61] Reg. vs. Murray, 1 Burns, J. (30th Ed.), 976 (1823). Reg. vs. Parnell, 14 Cox C. C. 508 (1881). Reg. vs. Aspinall, 2 Q. B. D. 48 (1870).
[62] In Rex vs. Pollman et al., 2 Campb. 229 (1809), Lord Ellenborough said: "You must prove that all the defendants were cognizant of the object of the conspiracy, and the mode stated in the indictment by which it was to be carried into effect. A contrary doctrine would be extremely dangerous."

spiracy to defraud the public by issuing a false prospectus describing shares of stock in a corporation,[63] and to defraud the public, the shareholders, and the customers of a bank by publishing false balance-sheets and other public representations regarding the affairs of the institution,[64] that the prosecution must prove, in addition to the performance of the acts charged, the existence of a common intention to defraud. If the defendants had had an honest belief in the truth of the statements so made, they could not be found guilty of conspiracy, although their conduct might not have been wholly free from elements of impropriety. So in Reg. vs. Burch[65] (1865), Smith, J., instructed the jury that they "must be satisfied, before they could convict, that there was a conspiracy on the part of both to make a false balance-sheet, and that they had an intention to defraud. The questions for consideration are three in number—first, whether there was a conspiracy or concert between them to make a balance-sheet; secondly, whether that balance-sheet was false and untrue; and thirdly, whether they conspired to defraud and deceive the shareholders. If they found all these questions in the affirmative, they would convict; if they found either in the negative, it would be their duty to acquit them."

It should be noted, in reference to this doctrine, that the "intent" is not necessarily identical with the particular intention in the minds of individual defendants. It extends to the consequences naturally following from the acts agreed upon; and if the object, adopted with full knowledge by the defendants, is illegal, the guilty intent to accomplish it must be ascribed to the conspirators, although their individual desires may have been proper enough. In Reg. vs. Burch[66] (1865), accordingly, Smith, J., told the jury that "it would be no answer on the part of the defendants to say that they had no personal advantage to obtain by mak-

[63] Reg. vs. Brown, 7 Cox C. C. 442 (1858).
[64] Reg. vs. Burch, 4 F. & F. 407 (1865). Reg. vs. Gurney, 11 Cox C. C. 414 (1869).
[65] 4 F. & F. 407, 422.
[66] 4 F. & F. 407, 422.

ing the false balance-sheet." In Reg. vs. Hamp[67] (1852) there was an indictment for a conspiracy to obstruct the course of justice. It appeared that Hamp, having falsely charged one Brown with having cheated him in a certain transaction, had been bound by recognizance to appear and prosecute. Afterwards, fearing lest he render himself liable for perjury, Hamp and others agreed with Brown's wife that if she would pay them £400 (which was £100 less than the amount of the recognizance under which Hamp had been placed), the latter would not appear or give evidence against Brown. It was argued that here was evidently no intent to obstruct justice, but only a desire to get Hamp out of trouble. But Lord Campbell said,[68] "If the necessary effect of the agreement was to defeat the ends of justice, that must be taken to be the object." In Ex Parte Dalton[69] (1890), a case in which there had been a conspiracy among certain inhabitants of Ireland to induce the Irish tenants of A. H. Smith-Barry not to pay their rent, the court said, "The intent to injure . . . is in the present case involved as matter of law in the object of the conspiracy."

We now approach the question as to what is the nature of the concerted intent constituting the gist of conspiracy. Or, in other words, since the intention is bound up in the object of the combination, What is the general character of the purpose which renders illegal a combination to effect it?

Here lies the crux of modern discussion upon the subject of conspiracy. Shortly stated, the problem before the courts is to frame a general definition of conspiracy broad enough to include all criminal combinations, and at the same time sufficiently definite and consistent to enable the judges to apply the law with precision in the manifold conspiracy cases which find their way into the courts.

This problem did not begin to exercise the courts until the nineteenth century. The growth of the law of con-

[67] 6 Cox C. C. 167.
[68] Ibid., p. 172.
[69] 28 L. R. Ir. 36.

spiracy during the three preceding centuries had been guided by few general principles. The conception of the offense had been freely expanded to take in new combinations which the courts thought deserving of punishment, with little discussion or reference to any fixed standard.[70] Of course partial groupings of the cases had taken place. Thus, a number of more or less heterogeneous combinations were comprised under the general captions of conspiracy to injure the public,[71] conspiracy to cheat, and the like. But no conscious attempt had been made to extract from the multiplicity of the cases any general principle which should serve as a reliable test to distinguish criminal

[70] It is noteworthy that until 1834 there had been only one important case in which the court held that the combination before it was not indictable as a conspiracy. The only other case was Rex vs. Salter, 2 Show. 443 (1685). This was an indictment "for that [the defendant] being an evil man, etc., and conspiring to aggrieve one Laud, pretended that he had broke his arm, and accordingly counterfeited the same, and upon that pretence refused to seek his living by any labor, and exhibited a complaint against him to the justices of the peace, etc." The indictment was quashed upon motion "as a matter not indictable." This case, however, is anomalous and possesses little significance.

But in Rex vs. Turnor et al., 13 East 226 (1810), Lord Ellenborough arrested judgment upon a conviction of conspiracy to trespass upon a game preserve and snare, kill and destroy the hares therein. He said (p. 231): "But I should be sorry that the cases in conspiracy against individuals, which have gone far enough, should be pushed still farther; I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offense which would subject them to infamous punishment." He seems, however, to recognize the principle making punishable combinations to achieve their objects "by some falsity" (p. 230).

This case was expressly overruled by Erle, J., in Reg. vs. Rowlands, 2 Den. C. C. R. 364, 388 (1851), upon the ground that the object which the conspirators had in view was also indictable, as well as actionable. But later cases have firmly established the principle that a combination to commit a tort is criminal. (See page 102.)

[71] Conspiracies of this kind reported during the nineteenth century were: To pervert the course of justice by procuring false witnesses, Rex vs. Thomas et al., 1 C. & P. 472 (1824); Bushell vs. Barrett, Ry. & M. 434 (1826). To secure a passport in the name of one person for use by another, Rex vs. Brailsford et al. (1901), 2 K. B. 730.

In addition, we may include combinations to defraud the public in various ways (see note 85, p. 103), and certain combinations among workmen (see Chapter V).

conspiracies from other combinations. Not until the nineteenth century had rooted out the instinctive antipathy of former times to all combinations, and had awakened the courts[72] to the danger lurking in the extreme elasticity of the law of conspiracy, did the necessity for such a test make itself felt. In the meantime, however, the principle that the conspiracy is the crime had become firmly established, and the variety of the cases had made it necessary that the generalization possess wide limits.

The classic judicial definition of criminal conspiracy is a sentence uttered by Lord Denman in Rex vs. Jones[73] (1832). Several persons had been indicted for a conspiracy to conceal and embezzle the personal estate of Jones, a bankrupt, for the purpose of cheating his creditors. Upon conviction, the defendants made a motion in arrest of judgment, objecting that the indictment did not disclose beyond a doubt that Jones had been legally declared a bankrupt. Lord Denman said: "The indictment ought to charge a conspiracy, either to do an unlawful act, or a lawful act by unlawful means. Here the indictment charges a conspiracy to remove and conceal the goods of Jones; but if the commission was bad, Jones had a right to remove them. . . . There is nothing stated on the face of this indictment to constitute an offense."

Now it is clearly evident that the above antithesis was intended to limit the offense of conspiracy, not to define it. The court simply meant that the object of every criminal conspiracy must be unlawful, not necessarily that every combination for an unlawful object is criminal. Lord Denman himself said in a later case,[74] in answer to a citation by counsel of the antithesis, "The words 'at least' should accompany that." In Rex vs. Seward[75] (1834) he again relied upon the antithesis as a limitation: "No indictment for a conspiracy can be maintained unless it charge

[72] Observe the language of Lord Ellenborough in Rex vs. Turnor et al., 13 East 226 (note 70, p. 98).
[73] 4 B. & A. 345, 349.
[74] Reg. vs. King, 7 Q. B. 782, 788 (1845).
[75] 3 M. & M. 557, 561.

that the defendants conspired to do an unlawful act, or to do a lawful act by unlawful means; and I see neither of these requisites here." And in Reg. vs. Peck[76] (1839) the same judge said, "I do not think the antithesis very correct." But the part which it played in the later decisions presents another very striking illustration of the accidental, unsystematic method by which the law of conspiracy has developed. In Reg. vs. Vincent et al.[77] (1839) Alderson, B., employed Lord Denman's antithesis for the first time as a definition, saying that conspiracy "is a crime which consists either in a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means." In spite of its author's dissatisfaction with it, this antithesis has been treated as a definition ever since. As such it serves as the very foundation of the modern law of conspiracy. It has been cited, always with approval and without examination or criticism, in a long line of nineteenth and twentieth century cases,[78] until its terms have become firmly embedded in the structure of the national jurisprudence.

A considerable portion of the progress made by the law of conspiracy during the past seventy-five years has taken the direction of simple deduction from Lord Denman's antithesis. The problem has been to determine the meaning of the words "unlawful act" and "unlawful means." The manner of its solution during the nineteenth century is largely responsible for the broad scope characteristic of the modern conception of criminal conspiracy. The earlier

[76] 9 A. & E. 686, 690.

[77] 9 C. & P. 91, 109.

[78] See Rex vs. Seward et al., 3 M. & M. 557 (1834)—by Lord Denman; Reg. vs. Vincent, 9 C. & P. 91 (1839); O'Connell vs. Reg., 11 Cl. & F. 155, 233 (1844); Reg. vs. Carlisle & Brown, 1 Dears. C. C. 337 (1854); Reg. vs. Brown et al., 7 Cox C. C. 442 (1858); Reg. vs. Howell et al., 4 F. & F. 160 (1864); Mulcahy vs. Reg., Ir. Rep. 1 Com. Law, 13, 31 (1866–7); Reg. vs. Bunn, 12 Cox C. C. 316 (1872); Reg. vs. Aspinall, 2 Q. B. D. 48 (1876); Reg. vs. Orman & Barber, 14 Cox C. C. 381 (1880); Reg. vs. Parnell et al., 14 Cox C. C. 508 (1881); Ex Parte Dalton, 28 L. R. Ir. 36 (1890); Quinn vs. Leathem, 70 L. J. R. C. 76 (1901); Rex vs. Brailsford (1905), 2 K. B. 730.

cases had settled little more than that concerted enterprises directly harmful to the public, and schemes of blackmail by false charges, are punishable as conspiracies.

It is obvious that an indictable offense is an "unlawful act." Combinations to commit crimes, of statutory or of common-law origin, therefore, clearly fall within Lord Denman's definition. This principle was laid down expressly by Erle, J., in Reg. vs. Rowlands[79] (1851), overruling Rex vs. Turnor: "An agreement to commit an indictable offense undoubtedly amounts to a conspiracy." A large number of the conspiracy cases decided during the nineteenth century were of this character, among them numerous conspiracies to cheat, wherein the means employed would have rendered an individual guilty of the crime of obtaining money under false pretences.[80]

[79] 2 Den. C. C. R. 364, 388.

[80] The following are cases in which the objects of the combinations were themselves indictable offenses. To cheat the king by false vouchers, Rex vs. Brissac et al., 4 East 166 (1803). To hold an unlawful, seditious and disorderly meeting, Rex vs. Hunt et al., 3 B. & A. 566 (1820). To obtain enhanced wages, in violation of St. 39 and 40 Geo. III, Rex vs. Ridgeway, 5 B. & A. 527 (1822). To carry away a young lady under sixteen years of age from the custody of her parents and guardians and marry her to one of the conspirators, contrary to St. 3 Hen. VII, C. 2, Rex vs. Wakefield, 2 Lew. 1 (1827). To poison a man, Maudsley's Case, 2 Lew. 51 (1830). To conceal and embezzle the goods of a bankrupt, and so to cheat his creditors, Rex vs. Jones et al., 4 B. & A. 345 (1832). To raise an insurrection and obstruct the laws, Reg. vs. Shellard, 9 C. & P. 277 (1840). To hold an unlawful assembly and create disaffection, Reg. vs. Vincent et al., 9 C. & P. 91 (1839). To cheat and defraud by false pretences, Reg. vs. Parker et al., 3 Ad. & E. N. S. 741 (1842). To cheat of money by false pretences, Reg. vs. Kenrick, D. & M. 208 (1843). To create disaffection, hatred and sedition, etc., O'Connell et al. vs. Reg., 11 Cl. & F. 155 (1844). To forge a post-office money order, and thus to defraud the queen and others, Reg. vs. Brittain & Shackell, 3 Cox C. C. 76 (1848). To use a dyer's materials wrongfully to dye goods for other persons (under circumstances such as to make the conspirators liable for larceny or embezzlement of the materials), Reg. vs. Button et al., 3 Cox C. C. 229 (1848). To violate Act 6 Geo. IV, C. 129 (see Chapter V), Reg. vs. Duffield et al., 5 Cox C. C. 404 (1851); Reg. vs. Rowlands et al., 5 Cox C. C. 436 (1851). To commit murder, Reg. vs. Ahearne, 6 Cox C. C. 6 (1852); Reg. vs. Bernard, 1 F. & F. 240 (1858). To destroy a ship with intent to prejudice the underwriters (a felony by Stat. 24-5 Vict., C. 79), Reg. vs. Kohn, 4 F. & F. 68 (1864). To defraud a benefit society of its funds, Reg. vs. Knowlden et

But the courts made the term "unlawful" as used in Lord Denman's definition include many acts which would not have been criminal if performed by a single person. Thus, they held that a combination to induce a girl to become a common prostitute was an indictable conspiracy, as being a combination "to bring about an unlawful thing."[81] Also, it was specifically decided in several cases, and finally generalized in Reg. vs. Duffield[82] (1851) and in later cases down to Ex Parte Dalton[83] (1890), that an agreement to do (or threaten to do) an act which would amount only to a private wrong if performed by a single person is a criminal conspiracy,[84] such object being "illegal" within the meaning of the definition. Again, a great variety of combinations to cheat and defraud—by far the largest class of criminal combinations at the present

al., 9 Cox C. C. 483 (1864). To liberate from gaol a prisoner charged with treason (a felony), Reg. vs. Desmond et al., 11 Cox C. C. 146 (1868). To commit larceny, Reg. vs. Taylor and Smith, 25 L. T. N. S. 75 (1871). To kill an infant after it should be born, Reg. vs. Banks, 12 Cox C. C. 393 (1873). To commit abortion, Reg. vs. Whitechurch, 24 Q. B. D. 420 (1890). To defraud by false pretences, Rex vs. Plummer, 71 L. J. N. S. 805 (1902). To take a child out of the custody of its guardians (a felony by St. 24 and 25 Vict., C. 100, Sec. 56), Rex vs. Duguid, 75 L. J. K. B. 470 (1906).

Within this class of conspiracies should be included combinations among workmen to do acts forbidden by statute. See Chapter V.

[81] Reg. vs. Howell et al., 4 F. & F. 160 (1864). See also Reg. vs. Mears, T. & M. Cr. C. 414 (1851).

[82] 5 Cox C. C. 404.

[83] 28 L. R. Ir. 36.

[84] In the following cases the acts contemplated by the conspirators would have amounted to legal injuries if performed by single individuals. To poison cattle with arsenic, Rex vs. King et al., 2 Chitty 217 (1820). To extort money by a false charge of forgery and felony, Rex vs. Ford & Aldridge, 1 N. & M. 776 (1833). To extort goods by a threat to imprison, Bloomfield vs. Blake et al., 6 C. & P. 75 (1833). To charge a person with a crime, Rex vs. Biers, 1 A. & E. 327 (1834). To extort money by a threat to charge with a crime, Reg. vs. Yates et al., 6 Cox C. C. 441 (1853). To impoverish Irish landlords by inducing and compelling tenants not to pay rent, Reg. vs. Parnell et al., 14 Cox C. C. 508 (1881); Ex Parte Dalton, 28 L. R. Ir. 36 (1890).

The principle that a conspiracy to commit a legal injury is indictable was stated generally in Reg. vs. Parnell (supra), Kearney vs. Lloyd, 26 L. R. Ir. 268, Quinn vs. Leathem, 70 L. J. R. C. 76 (1901).

time—were brought within the conception of conspiracy, although the deception practised was not of such a character as would render a single person guilty of the crime of obtaining money under false pretences.[85] All these were

[85] The following combinations may be embraced within the general category of conspiracies to cheat and defraud. To obtain goods on credit with intent to defraud the merchant of the price, Rex vs. Roberts et al., 1 Campb. 399 (1808). To cheat and defraud by selling an unsound horse, Rex vs. Pywell et al., 1 Starkie 402 (1816). To defraud of goods, Anon., 1 Chitty 698 (1819). To defraud by misrepresenting value of certain lands and properties and thus inducing the prosecutor to loan large sums of monev, Rex vs. Whitehead, 1 Car. & P. 67 (1824). To cheat and defraud (but indictment said to be "too general"), Rex vs. Fowle & Elliott, 4 C. & P. 592 (1831). To buy goods with intent not to pay for them, etc., Reg. vs. Peck, 9 A. & E. 686 (1839). To defraud of goods by false pretence that the defendant was a certain merchant named Grantham, Reg. vs. Steel, Car. & M. 337 (1841). To cheat and defraud of the fruits of a verdict (but charge said to be "too general"), Reg. vs. Richardson et al., 1 Moo. & R. 402 (1841). To defraud the queen by procuring the illegal entry of dutiable imports without payment of the duty, Reg. vs. Blake & Tye, 6 Q. B. 126 (1844). To cheat and defraud by false pretences in a sale of two horses and a mare, Reg. vs. Ward, 1 Cox C. C. (1844). "To cheat and defraud of goods and chattels," Sydserf vs. Reg., 11 Q. B. 245 (1848). To defraud of money by inducing a person by false pretences to accept certain bills of exchange, Reg. vs. Gompertz et al., 9 Q. B. 824 (1846). To cheat and defraud by securing goods on credit and selling them to one of the defendants upon execution after a collusive action, Reg. vs. King et al., 7 Q. B. 780 (1845). To cause foreign goods to be removed unlawfully from a bonded warehouse, with intent to defraud the queen of duties payable thereon, Reg. vs. Thompson et al., 16 Q. B. 832 (1851). To obtain goods from tradesmen with intent not to pay for them, Reg. vs. Whitehouse et al., 6 Cox C. C. 39 (1852); Reg. vs. Ryecroft et al., 6 Cox C. C. 76 (1852). To cheat and defraud of leasehold tenements and messuages, Reg. vs. Whitehouse et al., 6 Cox C. C. 129 (1852). To cheat and defraud by false representations as to the soundness of horses, Reg. vs. Carlisle & Brown, 1 Dears. C. C. 337 (1854). To defraud of money by exchanging cancelled notes for good money, Reg. vs. Bullock & Clarke, Dears. C. C. 653 (1856). Among tradesmen, to dispose of their goods in contemplation of bankruptcy, with intent to defraud creditors, Reg. vs. Hall et al., 1 F. & F. 33 (1858). To cheat and defraud by false representations as to the solvency or trade of another person, whereby the prosecutor was induced to enter into partnership with him and suffered loss, Reg. vs. Timothy et al., 1 F. & F. 39 (1858). Among directors of a corporation, by false representations in a balance-sheet to defraud shareholders and the public, Reg. vs. Brown et al., 7 Cox C. C. 442 (1858). To defraud a railway company by obtaining and selling non-transferable excursion tickets to other persons for use by them, Reg. vs. Absolon & Clarke, 1 F. & F. 498 (1859). To

held to be combinations for "illegal" purposes. A good statement of the modern law upon the subject is found in Reg. vs. Aspinall[86] (1876). Erle, J., said: "It is not, of course, every agreement which is a criminal conspiracy. It is difficult, perhaps, to enumerate an exhaustive or a complete definition; but agreements may be described which are undoubtedly criminal. An agreement to accomplish an end forbidden by law, though by means which would be harmless if used to accomplish an unforbidden end, is a criminal conspiracy. An agreement to accomplish, by means which are if done by themselves forbidden by law, an end which is harmless if accomplished by unforbidden means, is a criminal conspiracy. An agreement made with a fraudulent or wicked mind to do that which, if done, would give to the prosecutor a right of suit founded on fraud, or on violence exercised on or towards him, is a

cheat by procuring a person to bet upon a proposition which had been "fixed" beforehand (guilt of offenders was not relieved by the fact that the prosecutor had intended in the same manner to cheat one of the defendants), Reg. vs. Hudson et al., Bell C. C. 263 (1860). To defraud of money by false pretences, Latham et al. vs. Reg., 5 B. & S. 635 (1864). To defraud an insurance company by sending in false lists of goods destroyed in a fire, Reg. vs. Barry et al., 4 F. & F. 389 (1865). To defraud shareholders in a corporation by publishing a false balance-sheet, Reg. vs. Burch et al., 4 F. & F. 407 (1865). To cheat the public by circulating a false prospectus leading to the sale of worthless shares of stock, Reg. vs. Gurney et al., 11 Cox C. C. 414 (1869). Between a partner in a firm and a third person to defraud the other partner of the share of assets to which he was entitled upon a dissolution of the partnership, Reg. vs. Warburton, 11 Cox C. C. 584 (1870). To defraud certain booksellers by circulating forged testimonials respecting a certain book which they were thereby induced to buy, Reg. vs. Stenson et al., 12 Cox C. C. 111 (1871). To defraud by procuring by false pretences the listing of certain stock by the stock exchange, Reg. vs. Aspinall et al., 2 Q. B. D. 48 (1876). To defraud tradesmen of certain jewelry by obtaining it on credit without intention to pay for it, Reg. vs. Orman & Barber, 14 Cox C. C. 381 (1880). To sue for and collect a debt which had been already paid, Reg. vs. Taylor & Boynes, 15 Cox C. C. 265 (1883). To cheat and defraud, Reg. vs. Manning, 12 Q. B. D. 241 (1883). To cheat the public by inducing persons to buy stock given a fictitious value by manipulation, Scott vs. Brown, 61 L. J. Q. B. 738 (1892). To cheat and defraud of goods, Reg. vs. De Kromme, 17 Cox C. C. 492 (1892). To cheat and defraud a railway company by abstracting and selling return half-tickets, Reg. vs. Quinn et al., 19 Cox C. C. 78 (1898).

[86] 2 Q. B. D. 48.

criminal conspiracy; see Reg. vs. Warburton. There may be and probably are others."

There seems to be no doubt at the present time that the above described combinations are criminal conspiracies. Now the question arises, Are there any cases in which a combination, whose object, whether proximate or remote, was not "illegal" in the senses above indicated, has been authoritatively declared to be criminal?

This question has been raised most frequently in connection with combinations in furtherance of industrial disputes. These will be discussed in detail in the following chapter. It may be stated generally, however, that during the nineteenth century every combination held to be a criminal conspiracy had for its object, either proximate or remote, something which was clearly illegal. In a few cases it is doubtful whether the acts contemplated were unlawful in the sense of being criminal or even tortious. Thus, in Rex vs. Serjeant[87] (1826) the defendants were convicted of conspiracy by false oath and false pretences to cause a marriage between an infant and a prostitute, with the intent thereby to injure the infant, deprive him of his property, and bring him into public scandal. Also, in Levi vs. Levi[88] (1833), Gurney, B., said obiter that a combination among brokers to refrain from bidding against one another at an auction sale, and afterwards to share the profits arising from the low selling prices thereby induced, would be an indictable conspiracy. Again, in Rex vs. Mott[89] (1827), Abbott, C. J., instructed the jury that a combination to fabricate shares in a corporation in addition to the number authorized in the charter was a conspiracy, although there had been a defect in the formation of the company.[90] There are other cases

[87] 1 R. & M. 352.
[88] 6 Car. & P. 239.
[89] 2 Car. & P. 521.
[90] Observe the difference between Rex vs. Mott and Rex vs. Stratton et al., note to Buck vs. Buck, 1 Campb. 549 (1808), wherein the defendants had been indicted for a conspiracy to deprive a man of his office as secretary in an unincorporated company with transferable shares. Lord Ellenborough held that the indictment could not be maintained, saying: "This society was certainly il-

of the same general character.[91] But in all of them either the object aimed at or the means employed was certainly "illegal" in the sense of deceitful, fraudulent, against public policy, or the like. Often the acts done might be cognizable by the courts in proper cases, though not giving rise to an action under the particular circumstances shown.

Understanding its terms in a wide sense, therefore, we may accept Lord Denman's antithesis as a comprehensive definition of the offense of conspiracy in modern English law.

There is some apparent confusion and contradiction in the nineteenth century cases as to the status of combinations to effect an admittedly illegal purpose by the use of means not illegal per se.

As we have seen, it was declared during the eighteenth century that such combinations were indictable, no matter whether the means to be employed were lawful or not. There are also cases in the nineteenth century in which this principle was affirmed. In Rex vs. Hollingberry[92] (1825) the prisoners were convicted of a conspiracy to extort money from the prosecutor by indicting him for keeping a

legal. Therefore to deprive an individual of an office in it, cannot be treated as an injury. When the prosecutor was secretary to the Company, instead of having an interest which the law would protect, he was guilty of a crime." Such companies had been forbidden by St. 6 Geo. I, C. 18, and branded as common nuisances.

[91] The following cases should be noted in addition to those set out in the text. To defraud by holding a mock auction and collusively bidding up inferior goods, Rex vs. Lewis, 11 Cox C. C. 404 (1834). To prevent the collection of a church rate by gathering riotous assemblies before the broker's house and directing public hatred against him, Rex vs. Murphy et al., 8 Car. & P. 297 (1837). To disquiet a person in possession of leasehold estates by molesting the tenants, etc., Rex vs. Cooke, 5 B. & C. 538 (1826). To defraud a legatee of money under a will by making a false oath that a certain third person was the testator's grandson, Reg. vs. Dean et al., 4 Jur. 364 (1840). To defraud a widow of East India stock by fraudulently obtaining letters of administration upon the estate of her husband, etc., Wright vs. Reg., 14 Q. B. 147 (1849). To extort money by threat to charge a person with a crime of which he was really guilty, Rex vs. Hollingberry, 6 D. & R. 345 (1825); Reg. vs. Yates et al., 6 Cox C. C. 441 (1853); Reg. vs. Jacobs et al., 1 Cox C. C. 173 (1845).

[92] 6 D. & R. 345, 349.

gaming house, although the jury found specifically that the charge was true. Abbott held that this latter circumstance was immaterial, "because the question was whether they exhibited them [the charges] illegally, with an illegal intent and for an illegal purpose, which the jury, after full consideration, have found that they did." This ruling was cited and confirmed in Reg. vs. Jacobs[93] (1845). Likewise, in Reg. vs. Hall[94] (1858) a conspiracy among traders to dispose of their goods in contemplation of bankruptcy, with intent thereby to defraud their creditors, was held to be indictable, and in Reg. vs. Taylor and Boynes[95] (1883) it was decided that a combination to sue for and collect a sum of money to which the defendants knew they were not entitled was a criminal conspiracy. Lord Coleridge said "that a legal proceeding perfectly regular might yet be fraudulent, or a step taken or means used in the prosecution of a fraudulent scheme." This direction was approved by the entire court upon motion for a new trial. As Mathew, J., put it, "the broad question was this—whether these two defendants laid their heads together to obtain a judgment for £30, very little of which, as they knew, was due."

In addition to these specific cases, the books contain a number of general statements confirming the doctrine that the legality vel non of the means employed in execution of the conspiracy is immaterial. In Reg. vs. King[96] (1845) Lord Denman said: "It was argued that the overt acts limit the allegation in the first part of the indictment, and that even if that showed a criminal conspiracy, the statements afterward reduce it to something not indictable. But I think that result does not follow, even if the overt acts alleged are innocent; the only object of those being to give information of the particular facts by which it is proposed to make out the conspiracy, and the mode in which the prosecutor asserts that it was carried into effect." The

[93] 1 Cox C. C. 173.
[94] 1 F. & F. 33.
[95] 15 Cox C. C. 265.
[96] 7 Q. B. 780.

same view appears in the opinion of Brett, J., in Reg. vs. Aspinall[97] (1876). In elaborating Lord Denman's definition of conspiracy, he says in terms, "An agreement to accomplish an end forbidden by law, though by means which would be harmless if used to accomplish an unforbidden end, is a criminal conspiracy."

Some apparent doubt was cast upon this doctrine by the cases of Rex vs. Seward[98] (1834) and Reg. vs. Taylor and Smith[99] (1871). In the Seward case there had been a conspiracy among several parish officers to procure a marriage (by a promise to secure the marriage license, pay the expenses of the marriage, and give the husband £3) between a male pauper and a female pauper with child of a bastard, for the purpose of throwing the burden of the woman's maintenance upon the husband's parish. The Court of King's Bench unanimously held that this combination was not indictable. The majority of the judges based their decision upon the ground that the purpose of the transaction (i. e., to charge the other parish) was not illegal, provided no unlawful means were used. Hence, the question as to a conspiracy to accomplish a wrongful purpose by innocent means was not really before the court. But in answer to an argument by the prosecution that conspiring to do a lawful act for the purpose of injuring another is indictable, Littledale, J., said (p. 560), "If parties conspire to do an unlawful act, or a lawful act by unlawful means, this is a conspiracy, for which they may be indicted; but that is not so where the parties conspire to do a lawful act, for the purpose of injuring another." The prosecution then urged that the gist of the offense was not "a conspiracy to procure a marriage between paupers, but for conspiring unlawfully to remove a burden from their own parish, and unlawfully to charge the other parish;" that this was an indictable offense, wherefore the means employed need not be stated. But Denman, C. J., answered, "But when overt acts are stated, some of them must be unlawful."

[97] 2 Q. B. D. 48, 58.
[98] 3 M. & M. 557.
[99] 25 L. T. N. S. 75.

The idea apparently in Lord Denman's mind seems to have been clearly expressed in Reg. vs. Taylor and Smith.[100] Here was an indictment for conspiracy to commit larceny. The evidence offered at the trial showed "that the prisoners and another were seated on a door step; that when a well-dressed man or woman went into the crowd, one of the prisoners nudged the others, whereupon two of them rose and followed that person. In the case of a man, they lifted his coat-tail, as if to ascertain if there was anything in his pocket; but they did not attempt to insert a hand in the pocket. In the case of a woman, they went and stood by her side; the hand of one of the prisoners was seen to be against her gown, but it was not seen as attempted to be thrust into her pocket, nor was any complaint made by these persons of any such attempt." Cox, Serjeant, held that there was not sufficient evidence of conspiracy or attempt: "It appears to me to be impossible to say that the doing of an act not illegal is evidence of a conspiracy to do an illegal act, there being no other evidence of conspiracy than the act so done." Accordingly, a verdict of not guilty was returned under the instruction of the court.

It would seem that the doctrine that a combination to effect an admittedly illegal purpose by means not illegal per se is an indictable conspiracy is sound upon both reason and authority. It is limited, however, by the Taylor Case, to this extent: a conspiracy to accomplish an illegal purpose cannot be proved by a series of legal acts. This limitation goes not to the essence of the offense, but to the evidence by which it is to be made out. An indictment, consequently, which charges a conspiracy to effectuate an unlawful purpose would not be vitiated by the fact that the overt acts set out are not illegal per se. This follows from the principle laid down in Rex vs. Gill that the means to be employed are no part of the charge of conspiracy, the latter resting wholly upon the combination for an unlawful object. The overt acts alleged might be rejected as surplusage and

[100] 25 L. T. N. S. 75 (1871).

leave the charge itself untouched. Of course, if the acts described showed conclusively that the intent imputed to the conspirators had not in reality been entertained by them, the indictment would fail; but the same practice would be followed in respect to indictments for any other offense. Ordinarily, an indictment charging a conspiracy to attain an unlawful object by lawful means should be sustained upon demurrer, but at the trial the prosecutor should be required to adduce other evidence of the unlawful purpose than the doing of perfectly legal acts. The point becomes clear when we compare Rex vs. Taylor and Smith with Rex vs. Taylor and Boynes. In the former case there was no evidence of the illegal combination beyond the acts mentioned above. In the latter there was the additional circumstance that the debt sued for had already been paid to the prisoners, and hence their subsequent resort to an action at law to collect it could only have been for the purpose of defrauding the prosecutor of her money.

It is interesting to note that in only two cases decided during the nineteenth century did the courts attempt to give any reason why a mere agreement should be punished as a crime. In both, the formidable character of the combination is cited as the justification. Thus, in Reg. vs. Duffield[101] (1851) Erle, J., said: "It is most obvious, in a word, that if persons, intending to break the law, are compelled to act single-handed, those on the side of the honest part of the community can very well oppose them, and for the most part keep them under, but if those who are determined to break the law combine and coöperate together for that illegal purpose, they are a much more formidable enemy, and the law has said that combination for an illegal purpose is an indictable offense."

To the same effect is the statement of Fitzgerald, J., in his charge to the jury in Reg. vs. Parnell[102] (1881): "The agreement to effect an injury or wrong to another by two or more persons is constituted an offense, because the wrong

[101] 5 Cox C. C. 404, 432.
[102] 14 Cox C. C. 508, 514.

to be effected by a combination assumes a formidable character." From this view the limitation suggested in Rex vs. Kenrick[103] (1843) as to punishing combinations as criminal conspiracies follows logically. The court said, "Doubts have also been expressed how far an indictment for conspiracy may be maintained, where the object of it was of a trivial nature, or where the whole matter might be thought to sound in damage, not in crime."[104]

There are several indications in the cases that the courts regard conspiracy as a more or less anomalous offense. Thus, in Reg. vs. Hilbert[105] (1875), Cleasby, J., said, "It [conspiracy] differs from other charges in this respect, that in other charges the intention to do a criminal act is not a crime of itself until something is done amounting to the doing or attempting to do some act to carry out that intention." This remark, however, betrays a misconception of the nature of the offense. It was brought out very clearly in the argument of counsel in Mulcahy vs. Reg.[106] that a conspiracy involves "some outward act distinct from the mere operation of the mind of one person. Two persons cannot conspire and agree without some communication, either by word or in writing." That is, the crime consists,

[103] D. & M. 208, 216.

[104] A somewhat similar idea as to the limitation to which the law of conspiracy should be subjected was suggested as early as 1752, in the case of Chetwynd vs. Lindon, 2 Ves. & Sr. 450. The defendant had demurred to such part of a bill in chancery as sought to compel her to discover a conspiracy or attempt to set up a child which she pretended to have had by a person who had lived with her and was desirous of having a child by her, because such a disclosure might subject her to penal proceedings. Lord Hardwicke said: "The question is whether it is so charged, as, if confessed in the answer, would be a ground for a criminal prosecution in a court of law; for it is not every conspiracy will be a ground for a criminal prosecution. If that was the case, almost all the causes in this court would come within that description. The boundaries are often very nice, where a matter is near indictable and a fraud in this court. This setting up a private fraud does not impede the course of descent in law so as to defeat the heir at law; for if so, it might be a conspiracy indictable: but this is to the disherison of no one; and by this means several frauds in this court might be covered by demurrer." Demurrer overruled.

[105] 13 Cox C. C. 82, 86.

[106] Q. R. Rep. 1 Com. L. 13, 28.

not in the mere intention, but in the agreement to do wrong. Since, therefore, "their agreement is an act in advancement of the intention which each of them has conceived in his mind," it was held to be an overt act sufficient to support a conviction for treason.[107] In this particular there seems to be no generic difference between criminal conspiracy and criminal attempt.

The principle that an agreement to do an act not in itself a crime is a punishable offense was several times attacked by counsel during the nineteenth century, but without success. The only case in which the court expressed any dissatisfaction with this principle was Reg. vs. Warburton[108] (1870). Cockburn, C. J., there said: "There may be a doubt whether the law of England is consistent in saying that what is not criminal in one man alone is criminal when done by two men. This, however, is not a case in which it is desirable to put any restriction on the rules of law relating to conspiracy." In other cases in which the point was raised the courts have been content with laying down as a matter of "common learning" that what may be done by one man with impunity may render a combination to do it guilty of conspiracy.

The consciousness of the anomalous character of conspiracy as a criminal offense appears very plainly in the case of Reg. vs. Selsby[109] (1847). Rolfe, B. (afterwards Lord Cranworth), remarks upon the fact that the defendants were indicted, not for the acts done, but for a conspiracy to do them, "the having done which is the proof of the conspiracy. It is never satisfactory, although undoubtedly it is legal."

At the present time the crime of conspiracy as defined by the law of England consists in the bare agreement to do something illegal. Any such agreement may be punished; but the courts, in passing upon specific cases, will determine whether particular unlawful combinations are serious

[107] L. R. 3 H. of L. 306, 316, 328.
[108] 11 Cox C. C. 584, 587.
[109] 5 Cox C. C. 495 (note).

enough in their consequences to deserve criminal penalties. Conversely, it is very improbable that the judges will hold criminal any combination which purposes committing only legal acts, however oppressive to individuals such acts may be. Even in the civil courts, in which such combinations have been most discussed, the general principle seems still to remain intact that the fact of combination will not transform an otherwise legal undertaking into an actionable wrong.[110] The only exception has reference to certain combinations among workmen, which will be treated in the following chapter.

It would be interesting to inquire in detail as to how far the practice of punishing bare agreements to do evil can be justified upon sound principles of jurisprudence. We cannot deny that the English law relating to criminal conspiracy is unique. Being largely the creature of special circumstances, it has no parallel in the legal systems of France, Germany, and other continental countries in which the conditions under which it originated and grew were not duplicated. We may say generally, however, that the offense of conspiracy does not in reality constitute an exception to the fundamental principle that the law will not take cognizance of a bare intent to do evil. But whenever the law punishes criminal acts, it can and does examine into the intent of the actor. In all crimes the intent is at least as important as the act done; in some, it is much more important. Thus, in the crime of attempt to commit a criminal offense, the element of guilty intent is the principal factor. The nature and consequences of the act done are wholly immaterial. It appears, therefore, that in some cases at all events the law will punish an intent, provided it be manifested in an act done to effectuate it. The English courts have given open expression to this principle in discussing the crime of treason. Upon the same principle we can justify the punishment of criminal conspiracy. The latter,

[110] Kearney vs. Lloyd, 26 L. R. Ir. 268; Sweeny vs. Coote (1906), 1 Ir. R. 51; (1907) W. N. 92.

as we have shown, consists in a criminal intent manifested by the act of agreement. It differs from criminal attempt only in respect to the nature of the act in which the intent appears.

There is some difference of opinion as to whether the English law of conspiracy has received too wide an extension. This, however, is a subject with which we need not at present concern ourselves. It will be sufficient to say that, upon the whole, the principles relating to illegal combinations play a useful part in the administration of criminal justice. Through them the law is enabled to reach a number of wrongful enterprises which would otherwise be immune from punishment. The criminal liability thus created may well operate as a deterrent upon the pernicious activities of that considerable class of citizens who feel no scruple against engaging in almost any scheme of fraud or oppression not involving the doing of acts which are in themselves indictable offenses.

CHAPTER V.

Combinations of Labor.

During the nineteenth century the law relating to criminal conspiracy has affected combinations of labor much less in England than it has upon this side of the Atlantic. Our English brethren have preferred to deal with this important subject by means of carefully drawn statutory enactments, whereas in America the problems growing out of the conflict between capital and labor have been thrown largely upon the courts for solution. In late years Parliamentary labor legislation has been directed against specific acts rather than against combinations to act. In years gone by, however, the element of combination occupied a prominent place in the field of labor law; and an account of its vicissitudes forms an interesting and instructive chapter in the history of our subject.

The labor problem began to engage the attention of Parliament at an early period. The first Statute of Laborers was passed in 1349 (23 Edw. III), and was aimed against the rise of wages consequent upon the Black Death. It provided that all unemployed able-bodied persons below the age of sixty years might be compelled "to serve him which so shall him require," upon pain of imprisonment. They were to take no more than the customary wages, and were not to depart from service before the end of the period agreed upon. By a second act passed in the following year (25 Edw. III, Stat. 1, 1350) the wages to be paid to the different classes of laborers were specifically prescribed, and strict provision was made for the enforcement of the law.

The policy of state regulation of labor so inaugurated was continued and extended by a number of acts subsequently passed. Attempts were made to regulate in great

detail the conditions of labor. Laborers were permitted to "use but one mystery."[1] They were restricted to the hundred in which they resided, and after they had reached the age of twelve years they were compelled to follow the trade of their fathers.[2] Upon leaving employment they were required to obtain testimonials, and other persons were forbidden to employ any workman who had not such a testimonial. The hours of labor, the dress which laborers should wear, the arms they might carry, the games they might indulge in, even the time to be allowed them for meals[3]—all these matters claimed the attention of Parliament, and the justices of the peace were directed to enforce the laws rigidly.[4] In 1389 (13 Rich. II) statutory regulation of wages was replaced by a policy of allowing them to be prescribed at Easter and Michaelmas by a justice of the peace. This policy was continued by Statute 6 Henry VI (chap. 3, 1427), directing that wages be fixed by justices at quarter sessions, and in the towns by the mayor and the bailiffs, "because masters could not get servants without giving higher wages than allowed by the statute." Direct statutory regulation of wages was tried again in 1514 (Stat. 6 Hen. VIII, C. 3), but was finally abandoned in 1562, when the great Statute of Laborers (5 Eliz., C. 4) was passed.

This famous act was a consolidation of previous labor laws. Most of the provisions of the foregoing statutes were retained and elaborated. Wages were to be fixed and revised from time to time by justices of the peace, and the giving or taking of more than the prescribed rate was made punishable. A new feature was a careful regulation of apprenticeship.

The Act of 5 Elizabeth marks the highest point attained by state regulation of labor in England. It gradually became a dead letter, but was not finally repealed until 1875.

[1] 36 Edw. III (1362); 34 Edw. III (1360).
[2] 12 Rich. II (1388)—restriction as to place removed by 2 and 3 Edw. VI, C. 15, Sec. 4 (1548).
[3] 12 Rich. II (1388); 6 Hen. VIII, C. 3 (1514); 4 Hen. IV (1402).
[4] 2 Hen. V, C. 4 (1414).

"Throughout the whole of the seventeenth and the greater part of the eighteenth century," says Sir James Stephen, "no act was passed for the general regulation of trade and labor in any degree comparable in importance to the 5 Elizabeth, C. 4."[5]

The laborers themselves, however, were not pleased with this strict policy of regulation. The attempts made by them to advance their own interests in spite of the law soon developed organization, and this it was that brought the element of combination among workmen to the attention of the lawmakers. Such organizations began to grow up almost immediately after the first Statute of Laborers (23 Edw. III, 1349). Eleven years after its passage, Parliament mildly declared void "all alliances and covins between masons, carpenters and guilds, chapters and ordinances." The ineffective character of this prohibition and the strength of the resistance engendered by the labor laws of the reigns of Edward III, Richard II, Henry IV and Henry V are evidenced by the peremptory terms of the statute 3 Henry VI, C. 1 (1424). Reciting that "by the annual congregations and confederacies made by the masons in their general chapters assembled the good course and effect of the statute of laborers are publicly violated and destroyed in subversion of the law," the act commanded "that such chapters and congregations be not henceforth held," under severe penalties.

The growth and increased efficiency of the rudimentary combinations of labor which sprang up during the following century and a quarter find an eloquent testimonial in the next act upon the subject, "The Biil of Conspiracies of Victuallers and Craftsmen," Statute 2 and 3 Edward VI, C. 15 (1548). This statute enacted that "if any artificers, workmen or laborers do conspire, covenant or promise together, or make any oaths, that they shall not make or do their works but at a certain price or rate, or shall not enterprise or take upon them to finish that another hath begun,

[5] "History of the Criminal Law of England," Vol. 3, p. 205.

or shall not do but a certain work in a day, or shall not work but at certain hours and times; that then every person so conspiring, covenanting, swearing or offending" shall suffer a fine of £10 or twenty days' imprisonment for the first offense, and a severer punishment for subsequent offenses. Moreover, section 2 provided that such a conspiracy entered into by a majority of any society, brotherhood or company of such persons should work an instant dissolution of their charter, besides subjecting them individually to the above penalties.

The Elizabethan Statute of Laborers (5 Eliz., C. 4, 1562) said nothing about combinations of labor. The law was silent upon this subject until the year 1720, when the first of the notable eighteenth century statutes against combinations among laborers was passed.

This act (7 Geo. I, Stat. 1, C. 13) was directed against combinations among journeymen tailors. It enacted "that all contracts, covenants and agreements . . . made or entered into . . . by or between any persons brought up in, or professing, using or exercising the art or mystery of a taylor, or journeyman taylor . . . shall be and are hereby declared to be illegal, null and void to all intents and purposes;" and any one convicted before two justices of the peace of remaining in such combinations after May 1, 1721, might be committed to the House of Correction or to the common gaol for not more than two months.

Four years later (12 Geo. I, C. 34, 1725) a statute entitled "An act to prevent unlawful combinations of workmen employed in the woollen manufactures, and for better payment of their wages" similarly provided that contracts and agreements, by-laws and ordinances made and entered into by such workmen for regulating the prices of their goods, or raising their wages, or shortening their hours of labor, should be "illegal, null and void to all intents and purposes." Those who entered into or remained in such combinations after June 24, 1726, might be summarily punished as described in Act 7 George I. Subsequent acts made like provision against combinations of workmen in

other specified trades. The Act 22 George II, C. 27, Sec. 12 (1749), extended the operation of Act 12 George I, after June 24, 1749, to journeymen dyers, hot pressers and others engaged in the manufacture of woollens; also to all workmen employed in the making of felts and hats, and in the fur, iron, leather, mohair, fustian and various textile manufactures. In 1777 (17 Geo. III, C. 55) an act was passed more especially directed against the organization and meeting of societies and clubs of persons working at the manufacture of hats. By the Act 36 George III, C. 111 (1796), provisions similar to the foregoing series were extended to workmen employed in the paper trade.

The culmination of the anti-combination laws was reached in the Acts of 39 and 40 George III (1799, 1800), which contained general enactments similar to the specific prohibitions in previous acts. These famous statutes represented the highest point ever reached by repressive labor legislation in England.

Reciting the prevalence of unlawful combinations among workmen, and the ineffectiveness of former laws to suppress them, the Act 39 George III, C. 81, enacted " that from and after the passing of this act all contracts, covenants and agreements whatsoever . . . heretofore made or entered into between any journeymen manufacturers or other workmen, or other persons within this kingdom, for obtaining an advance of wages of them, or any of them, or any other journeymen manufacturers or workmen, or other persons in any manufacture, trade or business, or for lessening or altering their or any of their usual hours or time of working, or for decreasing the quantity of work, or for preventing or hindering any person or persons from employing whomsoever he, she or they shall think proper to employ in his, her or their manufacture, trade or business, or for controlling or any way affecting any person or persons carrying on any manufacture, trade or business, in the conduct or management thereof, shall be, and the same are hereby declared to be illegal, null and void to all intents and purposes whatsoever."

Section 2 provided further that "no journeyman, workman, or other persons" at any time after the passage of this act should enter into, "or be concerned in the making of or entering into" such illegal contract, covenant or agreement; and "every journeyman workman, or other person, who, after the passing, shall be guilty of any of the said offenses," being convicted in a summary proceeding before justices of the peace, should be imprisoned in the common gaol for not more than three months, or in a House of Correction at hard labor for not more than two months.

Section 3 imposed the same penalty upon "every workman who shall at any time after the passing of this act enter into any combination to obtain an advance of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or for any other purpose contrary to this act." The other offenses similarly punished were certain acts done by individuals, which were made criminal without regard to the element of combination.

Sections 4 and 5 were more particularly aimed at trade unions. "For the more effectual suppression of all combinations among journeymen" and other workmen, section 4 pronounced the same punishment against persons who might attend, or in any way endeavor to induce any workman to attend, any meeting held for the purpose of forming or maintaining any agreement or combination for any purpose declared illegal by this act, or who might endeavor in any manner to induce any workman to enter into or be concerned in any such combination; also against those who should collect or receive money from workmen for any of the aforesaid purposes, or who should pay or subscribe money toward the support or encouragement of any such illegal meeting or combination. Section 5 imposed a penalty of £5 or imprisonment upon any person who might contribute toward the expenses incurred by any persons acting contrary to the statute, or toward the support or maintenance of any workman for the purpose of inducing him to refuse to work or be employed. By section 6 money

already contributed for any purpose forbidden by the act, unless divided within three months after its passage, was declared forfeited.

The remainder of the act (sections 7–17) prescribed in detail the manner of its execution, and granted supplementary powers essential thereto.

In the following year (1800) it was found "expedient to explain and amend" the foregoing act, and accordingly the Acts of 39 and 40 George III, C. 106, were passed for this purpose. The later act repealed the former, and substituted other provisions in its place. The first sixteen sections of the new act, however, were identical with the corresponding sections of the old, except for a few minor improvements, chiefly verbal. But the new act introduced two novel features. Section 17 declared that all contracts and agreements between "masters or other persons, for reducing the wages of workmen, or for adding to or altering the usual hours or time of working, or for increasing the quantity of work," should be illegal and void; and any person convicted in a summary proceeding before any two justices of the peace of entering into such an agreement should forfeit £20, or be imprisoned in the gaol or the House of Correction for not less than two or more than three months. Sections 18 to 23 provided an elaborate system for the compulsory arbitration of trade disputes.

The net result of the above mentioned acts (in so far as they concern our present purpose) was to render illegal and criminal any and every combination among masters or workmen to fix the wages or alter the conditions of labor.

The Anti-Combination Acts of George III were passed during the period of the dominance of Old Toryism, but even at that time the new school of Individualism was issuing its challenge to the reactionary and oppressive doctrines of the older school. The manner in which the teachings of Bentham and his disciples gained the ascendancy need not be detailed here. It will be sufficient to note that just twenty-five years after the Acts of 39 and 40 George III the entire legislative policy of England toward combina-

tions of labor was fundamentally transformed. This change was brought about by two acts: 5 George IV, C. 95 (1824), and 6 George IV, C. 129 (1825).[6]

The first of these statutes began with a long section repealing, specifically and generally, all former "laws, statutes and enactments now in force throughout or in any part of Great Britain and Ireland" relative to combinations of workmen for the purposes therein specified. It then enacted (sec. 2) "that journeymen, workmen, or other persons who shall enter into any combination to obtain an advance, or to fix the rate of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or to induce another to depart from his service before the end of the time or term for which he is hired, or to quit or return his work before the same shall be finished, or not being hired, to refuse to enter into work or employment, or to regulate the mode of carrying on any manufacture, trade or business, or the management thereof, shall not therefore be subject or liable to any indictment or prosecution for conspiracy, or to any other criminal information or punishment whatever, under the common or statute law." By section 3 masters entering into combinations for the opposite purposes were exempted from punishment to a like extent.

Laboring men and others were regulated by means of the prohibition of certain specified acts, whether performed by an individual or by a combination. Section 5 provided that "if any person by violence to the person or property, by threats or by intimidation shall wilfully or maliciously force another" to cease working or to refuse employment, or should employ the above methods toward another on account of his not complying with rules, orders, or regulations made to obtain an advance of wages, etc., or should endeavor by such means to force an employer to change his

[6] "To the desire to extend contractual freedom belongs the reform in the Combination Law, effected under the direct influence of the Benthamite school in accordance with the principles of individualism by means of the two Combination Acts of 1824–1825." Dicey, "Law and Opinion in England," p. 190.

mode of conducting his business, the offender should be imprisoned for not more than two months. Section 6 imposed the same punishment upon persons who "combine and" do the above things, the criminality being evidently attributed to the acts done, not to the mere combining to do them. The other sections provided summary proceedings for cases arising under the act, and contain other matter relating to procedure.

The Act of 5 George IV, C. 95, remained in force but a single year. It was repealed and replaced by the Act of 6 George IV, C. 129 (1825). The details of the former act, and not its underlying principle, are changed. After reciting that the provisions of the Act of 5 George IV, C. 95, "have not been found effectual," and after reënacting the long repealing section of the former act, the new statute (first repealing the old one) forbids the accomplishment, "by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another," of certain purposes. These were but a more comprehensive enumeration of the purposes forbidden by 5 George IV, C. 95, Sec. 5, and embrace the following: forcing or endeavoring to force, by the above means, any workman to quit work, to return his work before the same shall be finished, to refuse to accept employment, to belong to any club or association, to pay any fine or penalty for not belonging to such club or for not complying with any order of regulation for the advancement of the unionists' policies or for not contributing to the union funds; also, by the above methods, forcing or endeavoring to force any employer to alter the mode of carrying on his business, to limit the number of his apprentices, or to limit the number or description of his workmen. "Every person so offending, or aiding, abetting or assisting therein" was made liable, upon conviction in a summary proceeding, to imprisonment at hard labor for not more than three months.

The above acts were rendered criminal whether perpetrated by an individual or by a combination. Certain labor combinations, however, by a carefully drawn section of

narrower scope than the corresponding section of the former act, were expressly declared not to be criminal, in these words (sec. 4): "Provided always, and be it enacted, That this act shall not extend to subject any persons to punishment, who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices, which the persons present at such meeting or any of them, shall require or demand for his or their work, or the hours or time for which he or they shall work in any manufacture, trade, or business, or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them, shall require or demand for his or their work, or the hours or time for which he or they will work, in any manufacture, trade or business; and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing; any law or statute to the contrary notwithstanding." Section 5 extended the same protection in the same words to masters who meet, consult and agree upon rates of wages and times of working to be paid to or required of their journeymen, workmen or servants.

The policy of making cognizable the acts done irrespective of the combination, and also of allowing the workmen freedom to combine as far as compatible with the legitimate interests of the employer and of the public, was continued and extended in subsequent acts. Most of these were intended to specify with greater accuracy and detail what particular methods workmen might not employ in furtherance of trade disputes. Attempts to widen their right to combine, however, were made in a few instances. The Act of 22 Victoria, C. 34 (1859), explanatory of the Act of 6 George IV, C. 129, declared "that no workman or other person, whether actually in employment or not, shall by reason merely of his entering into an agreement with any workman or workmen or other person or persons, for the purpose of fixing or endeavoring to fix the rate of

wages or remuneration at which they or any of them shall work . . . be subject to any prosecution or indictment for conspiracy." A further protection to trade unions in this respect was given by the Acts of 34 and 35 Victoria, C. 31, Sec. 2: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise." This principle was retained in the Acts of 34 and 35 Victoria, C. 32 (proviso at end of Sec. 1), which repealed Acts 6 George IV, C. 129, and 22 Victoria, C. 34. The final stage in the decadence of the importance of criminal conspiracy as applied to labor combinations is to be found in the Conspiracy and Protection of Property Act, 1875, 38 and 39 Victoria, C. 86. Section 3 of this act provided: "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employees and workmen shall not be indictable as a conspiracy if the same act committed by one person would not be punishable as a crime." This provision extends to combinations for the above purposes a protection from prosecution not enjoyed by combinations with different objects. The Trade Disputes Act, 1906 (6 Edw. VII, C. 47), similarly denied to the element of combination any effect even upon the civil liability incurred by workmen for what they might do in the conduct of a strike, etc., providing (sec. 1), "An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

From the history of legislation touching combinations of labor we turn to a review of the decisions of the courts upon the same subject.

Up to the year 1721 combinations among workmen to raise their wages or otherwise to alter the conditions of labor were apparently not regarded as criminal conspiracies

at common law. Such combinations were certainly not included in the Definition of Conspirators (33 Edw. I). As long as conspiracy retained its original technical meaning and narrow scope, of course neither court nor counsel would be likely to think that combinations of labor were judicially cognizable. Hence the number of early statutes upon the subject. The frequency of these acts, and the terms in which they were couched, would seem to indicate a belief that the combinations prohibited were being made unlawful for the first time. Indeed, since the objects for which these combinations were formed were for the most part forbidden by the various statutes of laborers, the early anti-combination laws tend to show that the definition of conspiracy was not currently regarded as including even combinations to violate a statute.

In 1721 (8 Geo. I), just one year after the passage of the act declaring illegal all combinations among tailors to raise their wages, etc., the famous case of the King vs. The Journeymen Tailors of Cambridge[7] arose. This decision, which declared that a combination to raise wages was a conspiracy at common law, so profoundly affected the attitude of the courts toward such combinations in later times that a careful analysis of it should be made.

One Wise and several other journeymen tailors, of or in the town of Cambridge, were indicted for a conspiracy to raise their wages. Upon a verdict of guilty they moved in arrest of judgment. Among other objections it was urged that no crime appeared upon the face of the indictment, "for it only charges them with a conspiracy and refusal to work at so much per diem, whereas they are not obliged to work at all by the day, but by the year, by 5 Eliz., C. 4." In reply, the prosecution boldly affirmed "that the refusal to work was not the crime, but the conspiracy to raise the wages."

The court sustained the position of the prosecution. "The indictment," they held, "it is true, sets forth, that the defendants refused to work under the wages which they

[7] 8 Mod. 11 (Nov. 6, 1721).

demanded; but although these might be more than is directed by the statute, yet it is not for the refusing to work, but for conspiring, that they are indicted, and a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it, as appears in the case of the Tubwomen vs. The Brewers of London."

The defendants further urged that since the offense was a crime within the Stat. 2 and 3 Edward VI, C. 15, and the "late Statute 7 Geo. I, C. 13," the indictment should have concluded "contra formam statuti." For the king it was replied that the defendants had been indicted, not for "the denial to work except for more wages than is allowed by the statute, but it is for a conspiracy to raise their wages," which is "an offense at common law." The court again sustained the prosecution, saying, "This indictment need not conclude contra formam statuti, because it is a conspiracy, which is an offense at common law." Accordingly, the judgment "was confirmed by the whole court quod capiantur."

The authority of the Journeymen Tailors' Case has been called in question by later writers, and doubts have been thrown upon the authenticity of the report which has been preserved to us. There is indeed little question that the case represents a notable piece of judicial legislation. The principles laid down in it, however, are thoroughly in harmony with the development then taking place in the law of conspiracy in general. They can be deduced from certain wider principles current at the time, and are enforced by several cases of an analogous character decided previously.[8]

[8] As to the statement that "a conspiracy of any kind is illegal," etc., Wright says: "This general expression was in no way necessary for the decision; it is not supported by its reference (Starling); and it amounts to the proposition which is negatived by every previous and subsequent authority, that combination is per se criminal, independently of its purposes. Moreover that the report is untrustworthy appears from the fact that the reporter makes the arguments as to a case at Cambridge turn on the 7 George I, C. 13, which did not apply to Cambridge, but only to the metropolis." Wright on Conspiracy, p. 42.

However this may be, the fact remains that the Journeymen Tailors' Case settled the law for the time being that a combination of the kind therein discussed was a criminal

In defense of the Journeymen Tailors' Case, however, we may adduce the following considerations: (1) The proposition that what is lawful for one person to do may yet render unlawful a combination to do it would by no means have seemed absurd in 1721. Several earlier cases had held criminal a combination to do an act not in itself a crime. Moreover, the two Star Chamber decisions directly in point (see note 7, pp. 55, 56) had never been overruled. In addition, Sterling's Case was well calculated to produce the impression that the court had approved this principle. That it was so interpreted is indicated by the language used in the argument of counsel in Reg. vs. Thorp, 5 Mod. 221, 223 (1696): "That which is lawful for one man to do, may be made unlawful to be done by conspiracy: for instance, it is lawful for any brewer to brew small beer, but if several shall conspire together to brew no small but all strong beer, on purpose to defraud the king of his duties, such conspiracy is unlawful. And so it was held in Sir Samuel Sterling's Case," etc. Moreover, the prominence given to the element of conspiracy in Reg. vs. Best, decided but a few years before (1705), doubtless had its effect likewise. So there is nothing improbable in the view taken by the court in the Journeymen Tailors' Case if the attendant circumstances be borne in mind. (2) Rex vs. Sterling, however, had marked the beginning of the principle that a combination to injure the public was undoubtedly criminal. There can be little doubt that such a combination of workmen was regarded as highly prejudicial to the public welfare. This clearly appears in the language of the Act of 7 George I, St. 1, C. 13, and in the industrial history of the period. The treatment likely to be accorded to a combination to raise wages, moreover, is significantly foreshadowed by the cases holding illegal the endeavor by individuals and combinations to raise artificially the price of merchandise. See 27 Lib. Ass., Ch. 44, Item 19; 29 Lib. Ass., f. 166, pl. 45; Anon., 3 Inst. 196; Lombard's Case, 41 Lib. Ass., f. 38; Rex vs. Sterling, 1 Keb. 655.

In view of these circumstances, there seems to be little room for doubt either as to the authenticity of the report of the Journeymen Tailors' Case, or as to the soundness of the decision judged according to the standard of contemporaneous conditions.

We may note, also, that not only was this case accepted without criticism or comment at the time, but it was never drawn in question even in the nineteenth century until Mr. Wright himself attacked it. It was cited with approval by Lord Brampton in Quinn vs. Leathem, 70 L. J. P. C. 76 (1901).

The general criticism which may be passed upon Mr. Wright's book is well expressed by Professor Dicey: "Wright's Law of Criminal Conspiracies—published before, but not republished after he was raised to the bench—contains elaborate arguments to show that this extension [i e., of the law of conspiracy in general] was illegitimate, and was not really supported by the authorities on which it is supposed to rest. From a merely historical point of view these arguments have great force, but from a merely legal point of view their effect is diminished by the reflection that sim-

conspiracy apart from legislative enactment. This appears both from the statutes and from the cases. The language of the former undergoes an immediate change. The phraseology of the Act of 12 George I, C. 34, passed four years after the decision of the above case, as compared with the Act of 7 George I, enacted the year before, is very significant.[9] Without going into details, it may be said that the language of the statutes passed after 1721 unmistakably indicates that the combinations attacked were looked upon as already contrary to law, and that the purpose of the acts was to declare the law and to make "more effectual provision . . . against such unlawful combinations."[10]

Turning now to the cases, we find the doctrine of the Journeymen Tailors' Case approved obiter by Lord Mansfield. In Rex vs. Eccles[11] (1783) he said: "The illegal combination is the gist of the offense, persons in possession of any articles of trade may sell them at such prices as they individually may please, but if they confederate and agree not to sell them under certain prices, it is conspiracy; so every man may work at what price he pleases, but a com-

ilar arguments if employed by a lawyer of as wide historical information and of as keen logical acumen as Sir R. S. Wright, would shake almost every accepted principle of English law, in so far as it does not depend upon statute." "Law and Opinion in England," p. 97, note.

[9] Thus the Act 7 George I, Stat. 1, C. 13 (1720), recites that the combinations among the tailors to raise their wages, etc., were "of evil example and manifestly [tend] to the prejudice of trade, to the encouragement of idleness and to the great increase of the poor; For remedy thereof" it is enacted that such combinations, etc., "shall be and are hereby declared to be illegal, null and void to all intents and purposes."

Act 12 George I, C. 34, however, entitled "An Act to prevent unlawful combinations of workmen," etc., recites the formation of "unlawful clubs and societies," and their presuming "contrary to law to enter into combinations;" also, that such persons "so unlawfully assembling and associating themselves" have committed violence; and that "more effectual provision should be made against such unlawful combinations . . . and for bringing all offenders in the premises to more speedy and exemplary justice."

This language, which is followed by the later statutes, including the Acts 39 & 40 George III, clearly shows that the above combinations were regarded as already unlawful.

[10] Preamble, 39 Geo. III, C. 81.

[11] 1 Leach Cr. L. 274, 276.

bination not to work under certain prices is an indictable offense." The same principle was cited in the argument of counsel for the king in Rex vs. Mawbey[12] (1796), and was recognized (though again obiter) by Grose, J., in the same case, thus: "In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement among themselves, would not have been illegal. As in the case of journeymen conspiring to raise their wages; each may insist on raising his wages, if he can; but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy." The above passages, together with the language of Grose and Lawrence, JJ., in Rex vs. Marks[13] (1802), clearly indicate that the courts of the eighteenth century entertained little doubt as to the illegality at common law of the combinations prohibited by the Acts 39 and 40 George III, and that they were also thoroughly in accord with the economic views which those statutes embodied.

There are but two cases[14] in the books arising out of the Anti-Combination Laws of George III. In only one of these (Rex vs. Ridgeway) was a combination to raise wages punished. The question there was as to the sufficiency in point of form of the conviction drawn up by the justices who had tried the case. The Court of King's Bench, quashing the order of the court of sessions holding the conviction defective in form, merely decided that the conviction was sufficient.

The most important cases relating to combinations of labor came after the Act of 6 George IV, C. 129. This statute, as we have seen, expressly legalized agreements among workmen or masters to raise or lower wages, but prohibited the accomplishment of this and other purposes

[12] 6 T. R. 619, 628, 636.
[13] 3 East 157. See post, p. 146.
[14] Rex vs. Ridgeway (1822), 5 B. & A. 527; Rex vs. Nield et al. (1805), 6 East 415.

by force, threats, obstruction or molestation. As soon, however, as the workmen endeavored to exercise the right of combination so conferred upon them, they came into immediate conflict with the courts. The judges had not experienced that complete change of opinion which had led Parliament to repeal the Anti-Combination Laws. They were desirous of protecting the master, as far as possible, from what they considered undue interference at the hands of his dissatisfied employees. The result was to confine within very narrow limits the privileges granted by the statute. This object the courts attained largely through the agency of the common-law doctrines regarding criminal conspiracy. The cases upon this subject, therefore, merit careful examination. Our present purpose, however, requires us only to ask, "How far was the definition of conspiracy modified or extended by the demands so put upon it?"

Whatever may have been the views of the judges as to the legality or illegality per se of a strike, it seems never to have been suggested, after the 6 George IV, C. 129, that a combination among workmen to secure an increase in their wages by a concerted refusal to work was a criminal conspiracy. It was never even urged in argument that the damage thus inflicted upon the employer might amount to an obstruction or molestation within the meaning of the act. This, however, is not surprising. The statute plainly contemplated the use of the strike as a means of making effective the combination to raise wages. The matter was regarded as too obvious for comment, as appears in the language of Rolfe, B. (afterwards Lord Cranworth), in Reg. vs. Selsby et al.[15] (1847): "It is doubtless lawful for people to agree among themselves not to work except upon certain terms."

Up to this point the law was clear. But a strike cannot succeed if the employer is allowed to engage new workmen in the strikers' places and to carry on his business unham-

[15] 5 Cox C. C. 495 (note), 498.

pered. Hence, the courts were soon called upon to decide whether a concerted effort on the part of the ex-employees to procure a cessation of labor by the strike-breakers was lawful under the statute.

This point was first raised in Reg. vs. Selsby et al.[16] (1847), the case just spoken of. There the strikers' attempts, by means of pickets, persuasion, handbills, etc., to induce the new workmen to quit work caused them to be indicted for a conspiracy to impoverish the employers. The court ruled that the question was as to the character of the methods utilized. If the strikers or the pickets had used threats or intimidation, they were guilty of conspiracy: these are "illegal means." But as to persuasion and peaceable inducement, he said: "It is doubtless lawful for people to agree among themselves not to work except upon certain terms; that being so, I am not aware of any illegality in their peaceably trying to persuade others to adopt the same view. . . . My opinion is, that if there was no other object than to persuade people that it was their interest not to work except for certain wages, and not to work under certain regulations complied with in a peaceable way, that it was not illegal. If I am wrong, I am sorry for it, but my opinion is, that this is the law."

Doubts, however, were cast upon this doctrine by the language of Erle, J., in Reg. vs. Duffield[17] (1851), and in Reg. vs. Rowlands (1851), both of which cases arose out of the same events. In the Duffield case, after conceding the right of workmen to combine to fix their wages by refusing to work, he said (p. 431): "But . . . I think it would be most dangerous . . . to suppose that workmen, who think that a certain rate of wages ought to be obtained, have a right to combine together to induce men, already in the employ of their masters, [to leave] for the purpose of compelling those masters to raise their wages. . . . I take it for granted that if a manufacturer has got a manufactory, and his capital embarked in it for the purpose of

[16] 5 Cox C. C. 495 (note).
[17] 5 Cox C. C. 404; Q. B. 436.

producing articles in that manufactory, if persons conspire together to take away all his workmen, that would necessarily be a molesting of him in his manufactory. . . . That . . . would certainly be a conspiracy for an unlawful purpose." This principle was reaffirmed in Rex vs. Rowlands. If, he instructed the jury (p. 462), "the combination was for the purpose of obstructing Messrs. Perry in carrying on their business, and so to force them to consent to this book of prices, and in pursuance of that concert, they persuaded the free men and gave money to the free men to leave the employ of Messrs. Perry, the purpose being to obstruct him in his manufacture, and so to force his consent, I am of opinion that that also would be a violation in point of law." The defendants were convicted of conspiracy, and the conviction was sustained by the Court of Queen's Bench upon appeal.[18]

The uncertainty created by these conflicting opinions, together with the caution uttered by Erle, J., to outsiders joining with workmen to aid the latter to secure an increase of wages, led to the enactment of the Statute 22 Victoria, C. 34 (1859). Reciting that "different decisions have been given on the construction" of 6 George IV, C. 129, it declared that no person, "whether actually in employment or not," who should endeavor "peaceably and in a reasonable manner, and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work" to obtain an increase of wages or to improve the conditions of labor, "shall be deemed or taken to be guilty of 'molestation' or 'obstruction,' within the meaning of the said act, and shall not therefore be subject or liable to any prosecution or indictment for conspiracy." The above provision, however, was not to apply if the strikers or the strike-breakers were bound by contracts of service.

In several subsequent cases[19] it was decided that the Statute 22 Victoria, C. 34, had legalized peaceable per-

[18] 2 Den. C. C. R. 364.

[19] Reg. vs. Druitt (1867), 10 Cox C. C. 592; Reg. vs. Hibbert (1875), 13 Cox C. C. 82.

suasion to quit work, "no matter what the consequences were."[20] It was also announced, as a corollary to this proposition, that a peaceful picket system, whose purpose was merely persuasion and inducement to quit work, was lawful. The courts were careful to state, however, that such pickets would be allowed to resort to no manner of threat or intimidation.

The attitude of the courts toward even peaceful picketing changed after the passage of the Acts of 1871 and 1875. Both of these statutes endeavored to define what should be considered "molestation and obstruction" upon the part of the workmen. The Act of 1871 declared that a person should be deemed to molest or obstruct another person. " . . . (3) If he watch or beset the house or other place where such person resides or works, or carries on business, or happens to be, or the approach to such house or place." Section 7 then repeals the 6 George IV, C. 129, and the 22 Victoria, C. 34. But the instruction of Cleasby, B., in Reg. vs. Hibbert et al.[21] (1875), showed clearly that the court still regarded peaceful picketing as lawful, and did not consider a combination so to picket as a criminal conspiracy, notwithstanding the passage of the Act of 1871 and the repeal of the 22 Victoria, C. 34. The Act of 1876, accordingly, was somewhat differently worded in this respect. Section 7 imposed a penalty of fine and imprisonment upon "every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority. . . . (4) Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place." Then a subsequent clause of the same section said that "attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communi-

[20] Reg. vs. Shepherd, 11 Cox C. C. 325 (1869).
[21] 13 Cox C. C. 82, 87.

cate information, shall not be deemed a watching or besetting within the meaning of this section."

The courts, quite properly it would seem, took the view that the language in which section 7 of the later act was couched manifested an intention to forbid picketing for any purpose other than the gathering and communication of information. This point is well brought out in a bit of dialogue which occurred in Reg. vs. Bauld[22] (1876). Parry, Serjeant, argued: "As to the charge of 'watching' and 'besetting' your Lordship is aware that there are two views which may be taken. If it were merely done for the purpose of persuading the men to quit their employment it would not be illegal.

"Huddlestone, B.—I cannot assent to that view of the law. The statute allows watching or attending near a place for the purpose of obtaining or communicating information, but this is the only exception.

"Parry, Serjt.—I accept your Lordship's correction, and I am sure that the men will accept your Lordship's exposition of the law now that they have heard it."

The Act of 1876 was similarly construed in the later cases. In Lyons vs. Wilkins[23] (1898) an injunction was granted to restrain the defendants "from watching or besetting the plaintiffs' works for the purpose of persuading or otherwise preventing persons from working for them or for any purpose except merely to obtain or communicate information." The decree of the lower court was confirmed by the Court of Appeal.[24] During the following year (1899) two injunctions were issued forbidding the strikers to attend at steamboat landings and railroad stations to persuade incoming strike-breakers to go away.[25] The theory embodied in all these cases was simply that such acts constituted a "watching and besetting" for pur-

[22] 13 Cox C. C. 282, 283.
[23] 65 L. J. Ch. 601, 604.
[24] 68 L. J. 146.
[25] Charnock vs. Court, 2 Ch. (1899), 35. Walters vs. Green, 68 L. J. 730.

poses other than the gathering and communication of information, and were therefore in violation of the Act of 1875.[26]

It is clear that the decisions of the courts in respect to combinations for the above purposes do not in any way modify or extend the general conception of criminal conspiracy. In each case the question was whether the acts complained of amounted to violations of the statutes. If this question were answered in the affirmative, the combination then had for its object the commission of a statutory crime. The illegal character of its design was thus manifest, and the agreement clearly fell within Lord Denman's definition of conspiracy. That this was the view taken by the courts appears from the language sometimes employed, and it is also evidenced by the fact that in many—particularly the later—cases individuals were often punished for persuading others to strike, for picketing, and the like, without reference to the element of combination which might be present. And when the injunction began to take the place of criminal prosecutions in such cases, all mention of combination as a constituent of the offense practically ceased.

What has just been said applies all the more fully to combinations to advance the interests of workmen or masters by acts or threats of physical violence and intimidation.

[26] This principle endured until changed by statute. The Trades Disputes Act, 1906, provides (sec. 2): "It shall be lawful for one or more persons acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working." Section 7 of the Act of 1875 is repealed from "attending at or near" to the end of the section.

The latest case upon the subject of picketing is Ward, Lock & Co. vs. Operative Printers' Assistants' Society (1906), 22 T. L. R. 327. Here the court held that a picket for the purpose of requesting workmen to become members of the union was not an offense within the Act of 1875. It was said that the object of section 7, subsection 4 of that act was to give a summary criminal remedy in respect to certain specified classes of acts for which there had previously been only a civil remedy. In other words, picketing was not criminal under the act unless it was of such character as to amount to a civil wrong at common law.

Such methods are mala in se as well as mala prohibita, and render punishable the individual who employs them as well as the several individuals who combine to employ them. The same is, of course, true if the acts to be performed are violatory of the statute, although not mala in se. These are criminally cognizable, whether done by a single person or by a combination;[27] and in recent years the practice has arisen of restraining them in proper cases by injunction.[28]

A more difficult question is raised by combinations among workmen to force their master, by threatening to strike, to discharge certain persons already in his service; or to compel satisfied employees, by threats of expulsion from the

[27] See Reg. vs. Harris et al. (1842), C. & M. 661 (note); Reg. vs. Selsby et al. (1847), 5 Cox C. C. 404; Reg. vs. Duffield et al. (1851), 5 Cox C. C. 404; Reg. vs. Rowlands (1851), 5 Cox C. C. 436; 2 Den. C. C. R. 364; Reg. vs. Druitt et al. (1867), 10 Cox C. C. 592; Springhead Spinning Co. vs. Riley (1868), L. R. 6 Eq. 551 (this is the first case in which an injunction was issued in a labor dispute); Reg. vs. Shepherd (1869), 11 Cox C. C. 325; Reg. vs. Hibbert et al. (1875), 13 Cox C. C. 82; Judge vs. Bennett (1888), 52 J. P. 247 (held, that the character of the picket, as coercive and minatory or not, must be determined with reference to the effect actually produced by it); Smith vs. Thomasson (1890), 16 Cox C. C. 740 (a case of "persistent following" within the Act of 1875); Kennedy vs. Cowie (1891), 60 L. J. M. C. 170; Reg. vs. Kennedy (1892), 61 L. J. M. C. 181; Reg. vs. Edmondes (1895), 59 J. P. 776; Ex Parte Wilkins et al. (1895), 64 L. J. M. C. 221; Smith vs. Moody (1902), 72 L. J. K. B. 43.

[28] The first case arising out of a trade dispute in which an injunction was issued seems to be Springhead Spinning Co. vs. Riley (1868), L. R. 6 Eq. 551, in which the court enjoined a trade libel which was part of an unlawful scheme of coercion and intimidation. We do not find another such case until 1892, when two injunctions were granted against the distribution of false and malicious circulars: Collard vs. Marshall, 1 Ch. (1892), 571; Pink vs. Federation of Trades and Labor Unions, 67 L. T. 258.

From this time on injunctions become quite common. See Trollope vs. London Building Trades Federation, 72 L. T. 342 (1895); Lyons vs. Wilkins, 65 L. J. Ch. 601 (1898); Charnock vs. Court, (1899) 2 Ch. 35; Walters vs. Green, 68 L. J. Ch. 730 (1899); Taff Vale Ry. Co. vs. Amalgamated Society of Railway Servants, 70 L. J. Q. B. 905 (1901); Chamberlain's Wharf Ltd. vs. Smith (1900), 2 Ch. 605.

After the Taff Vale Case (supra), both damages and an injunction were sometimes asked and granted. See Quinn vs. Leathem, 70 L. J. R. C. 76 (1901); Giblan vs. National Amalgamated Laborers' Union of Great Britain and Ireland (1903), 2 K. B. 600; South Wales Miners' Federation vs. Glamorgan Coal Co., 74 L. J. K. B. 525 (1905).

union, boycotting, etc., to quit work. These cases are at first perplexing, but upon closer examination they are seen to present no real exception to the principle that a criminal conspiracy must have an illegal object or make use of illegal means.

The cases in which the defendants were indicted for a combination of the kind just described are few. The first was Rex vs. Bykerdyke[29] (1832). The charge was a conspiracy to compel the discharge of certain workmen by threat of a strike. It was argued in behalf of the defendants that the men had a right to combine not to work by virtue of the Act of 6 George IV, C. 129. The prosecution replied that the statute would not protect a combination of the present character, but only a combination to obtain higher wages, to regulate hours of work, etc. The court took this view, and instructed the jury "that the statute never meant to empower workmen to meet and combine for the purpose of dictating to the master whom he should employ; and that this compulsion was clearly illegal."

The only other case in which the indictment was grounded upon a conspiracy for the above purpose was Reg. vs. Hewitt et al.[30] (1851). Here was an indictment for "a combination by workmen, contrary to 6 George IV, C. 129, and for a conspiracy." The defendants were officers and members of the Philanthropic Society of Coopers, a benefit society providing sick and funeral benefits. The society, in accordance with its rules, had inflicted upon Charles Evans, a member, a fine of £10 for working in a yard in which steam machinery was used. Upon his refusal to pay, the other members struck against him, and he was in consequence deprived of his employment. Lord Campbell said that the society was legal and beneficial, "but it cannot be permitted that, under the guise of such laudable objects, the members shall enter into a combination or conspiracy to injure others. By law every man's labor is his own property, and he may make what bargain he pleases

[29] 1 Moo. & R. 179.
[30] 5 Cox. C. C. 162.

for his own employment; not only so—masters or men may associate together; but they must not, by their association, violate the law; they must not injure their neighbor; they must not do that which may prejudice another man. The men may take care not to enter into engagements of which they do not approve, but they must not prevent another from doing so. . . . They cannot be permitted to injure their neighbors in carrying out that which they may consider to be a protection to themselves." The defendants were accordingly found guilty.

Beginning with In Re Perham[31] (1859), however, the element of combination in offenses of this nature ceases to be of primary importance. Perham had told certain workmen that if they dared to work for a certain employer, "we shall consider you as blacks, and when we go in we shall strike against you, and strike against you all over London." He was convicted of endeavoring by threats to compel an employee to leave his services, contrary to 6 George IV, C. 129, Sec. 3, and the conviction was affirmed by the Court of Exchequer.

In the two following cases of Walsby vs. Anley[32] (1861), and O'Neill et al. vs. Longman[33] (1863), the element of combination was invested with a secondary importance which should be noted. The first of these cases grew out of a threat by Walsby and thirty others to quit work unless the respondent discharged several men who had signed a "declaration" that they were not and would not become members of a trade union. Walsby was accordingly convicted under 6 George IV, C. 129, Sec. 3, of endeavoring by threats to force the respondent to limit the description of his workmen. The Court of Queen's Bench upheld the conviction. They said that, although a single person might refuse to work unless an obnoxious companion were discharged, yet if a number of employees combined to coerce the master, by the threat of quitting work in a body, to

[31] 5 H. & N. 30.
[32] 3 El. & El. 516.
[33] 4 B. & S. 376.

dismiss the others, such combination would be "illegal," and those taking part in it would be guilty of a threat and a molestation within the statute. In O'Neill vs. Longman the appellants, officers of the United Boilermakers and Iron Shipbuilders' Society, told Longman that unless he left the service of Kruger, Dannott & Co., who were permitting "encroachments," he would be expelled from the union, his name would be published in the list of expelled members and sent all around the country, and he would be despised and "put to all sorts of inconveniences." The appellants were convicted under 6 George IV, C. 129, Sec. 3, of "by threats and intimidation endeavoring to force Longman to depart from his employment." The Court of Queen's Bench confirmed the conviction, upon the authority of Walsby vs. Anley. The defendants, said the court, had been guilty of a threat to form an "illegal combination" against Longman: "The society as a body were confederate and agreeing to make a combination to deprive him of his work."

The defendants in these cases had been prosecuted for the statutory offense of endeavoring by threats to coerce the masters, and not for a combination to do anything. The court, nevertheless, having no doubt as to the illegality of the combination in which the defendants were engaged, attributed to it the unlawful character of the threats made. The holding was, in effect, that intimidation under the statute consists in the threat to do something unlawful; and here the unlawful thing contemplated was the formation of an illegal combination. Thus, although the prosecution was for acts done, it was in reality grounded upon the supposed illegality of the combination present. In subsequent cases, however, this theory was abandoned. The effect produced upon the mind of the person threatened with loss was regarded as the essence of the coercion; and the legal or illegal character of any agreement among the persons guilty of the threats was entirely disregarded. This point of view is well illustrated by the case of Skinner vs. Kitch[34]

[34] 10 Cox C. C. 493.

(1867). The secretary of the local lodge of the General Union of Carpenters and Joiners sent a letter to Kitch saying that the committee of the society would call his men out unless he would discharge one James Jordan, a non-union man. This was held an offense within the statute, namely, an endeavor by threats to compel Kitch to limit the description of his workmen. Citing the preamble of the statute, Blackburn, J., said: "Now one object of the section is plainly to protect the masters, as in the previous part the Legislature endeavored to protect the workmen. In the second part, I think the great object the Legislature had in view was to protect the masters where it was sought to compel them to limit the description of the workmen they employed to union men; and probably this was the principal object. I certainly think that it is within the words of the act, and plainly within the spirit. It is impossible to read these two clauses without seeing that it is a very beneficial provision, for a greater piece of tyranny than to insist that a master shall have his work stopped unless he consent to punish the men who are his journeymen for refusing to belong to a union cannot well be."[35] Evidently the legality vel non of the combination was not regarded as an issue in the case.

It may be noted at this point that the last case in which a combination among workmen was indicted as a conspiracy was Reg. vs. Hibbert et al.[36] (1875). From that time punishment has been inflicted for acts done in contravention of the statutes. After 1867 it was generally considered that the threat to strike, or to order a strike, for the purpose of forcing the discharge of non-union men, etc., was an unlawful threat within the meaning of the Act 6 George IV, C. 129, Sec. 3. It was held in Gibson vs. Lawson and in Curran vs. Treleaven,[37] decided in 1891, that the Act of 1875, C. 86, had changed the law in this respect. In the first of these cases the respondent had been summoned for

[35] See also Shelbourne vs. Oliver (1866), 13 L. T. N. S. 630.
[36] 13 Cox C. C. 82.
[37] 61 L. J. M. C. 9.

an offense under section 7 of the act. As a shop delegate of the Amalgamated Society of Engineers he had informed Palmer & Co., in pursuance of a resolution of the Society, that all members would quit work unless the appellant (also an employee of Palmer & Co.) would give up his membership in the National Society of Engineers and join the Amalgamated. As a result, the appellant was discharged. Similarly, in Curran vs. Treleaven, the appellant, as secretary of the National Union of Gasworkers and General Laborers, had called a strike to compel Treleaven to discharge certain non-union men. The Supreme Court of Judicature held that these acts did not constitute "intimidation" in the sense in which the term is employed in section 7 of the Act of 1875. In Gibson vs. Lawson, Coleridge, C. J., said that acts not indictable under that statute "are not now, if indeed they ever were, indictable at common law." In both cases the court intimated that "intimidation" means "a threat of personal violence."

As we review this series of decisions, in the endeavor to determine whether they broaden the scope of the crime of conspiracy, we find that Reg. vs. Hewitt et al. alone raises any real question. In that case Lord Campbell apparently based the illegality of the combination squarely upon the fact that its purpose was to inflict damage upon a third person. As no illegal means were contemplated, Lord Campbell evidently regarded the object as illegal because it was oppressive and hurtful in its actual effect upon that person. Such a conclusion was not supported by the preceding authorities.

In respect to Reg. vs. Hewitt, however, we may point out that it was never followed in the later decisions. On the contrary, as has been shown, the element of combination in similar cases was first relegated to a subordinate position, and was shortly afterward eliminated altogether. The courts soon came to observe that the acts done might be construed as violations of the statute. Naturally the judges chose this method of protecting masters and non-union men in preference to stretching out of all semblance

of certainty the already too shadowy principles relating to criminal conspiracy. Lord Campbell, therefore, correctly voiced the judicial policy of the period in declaring criminal the actions charged, but the reasons which he adduced in support of his decision were different from those subsequently adopted.

Walsby vs. Anley and O'Neill vs. Longman are seen, upon close examination, not to be in conflict with the general law of conspiracy. In the first place, the statements by the court that these combinations were "illegal" were really not necessary. The indictments had charged, not conspiracies, but the statutory crime of having attempted by threats to coerce. The courts needed only to have held broadly, as was done in subsequent cases, that the acts proved constituted intimidation. But even if the judges had said that the same acts done by a single individual would not amount to a threat, they would not thereby have enlarged the legal conception of conspiracy. Such a statement would only mean that the intimation of an intention to employ concerted action would have a coercive effect which the threat of individual action could not produce. But this undoubted truth does not necessarily involve the assertion that the mere combination to effect the particular purpose in view is in itself a criminal act.

Again, the combinations were said to be "illegal." But they might be "illegal" without being at the same time "criminal."

In Rex vs. Bykerdyke, however, such a combination appears to have been held indictable. Remembering this, and assuming also that the courts in Walsby vs. Anley and in the later cases intended to declare that these combinations were still criminal, let us inquire whether the latter really fall outside of Lord Denman's antithesis.

The Anti-Combination Laws of George III were currently regarded as being in affirmance of the common law of conspiracy, and it was generally thought that the combinations thereby prohibited were criminal quite apart from the statute declaring them so. The Acts of 5 and 6 George

IV testify to a change of Parliamentary policy in respect to labor combinations. But the courts still looked with unfriendly eyes upon agreements among workmen in furtherance of trade disputes. This feeling of hostility was reflected in the judicial interpretations of the Act of 6 George IV, C. 129. It was repeatedly declared that this act, by repealing former statutes, had revived the common law relating to combinations of labor. But at common law, the judges said, all such combinations were illegal and criminal. Hence, a special statutory exemption was necessary to legalize any combination among workmen to advance their interests by the peculiar methods usually employed by them for that purpose. Now the Act of 6 George IV, C. 129, expressly legalized only combinations to advance wages, etc. Combinations for any other object, therefore, remained criminal by the common law; and since combinations to compel by threat of strike the discharge of other workmen, etc., were not in terms declared lawful, they were still regarded as criminal, in spite of the Act of 6 George IV.

The above view plainly inspired the decision of Patteson, J., in Rex vs. Bykerdyke[38] (1832). It was expressly announced by Crompton, J., in Hilton vs. Eckersley[39] (1855); and although Lord Campbell in the same case expressed the opinion that combinations to raise wages were not criminal at common law, the later cases proceeded upon the other theory. Thus, Crompton, J., in Walsby vs. Anley,[40] said: "Statute 6 George IV, C. 129, by repealing all the previous statutes on the subject, appears to me to have reëstablished the common law as affecting combinations of masters or workmen. I adhere to the opinion that, at common law, all such combinations are illegal. . . . That being so, it was necessary, by sections 4 and 5 of the statute, to render legal the combinations therein referred to respectively, and which would, at common law, have been illegal."

[38] 1 Moo. & R. 179.
[39] 6 El. & El. 47.
[40] 3 El. & El. 516.

Whence it followed that since the combination then before him did not fall within the protection of those sections, it remained illegal. Likewise, Brett, J., in Reg. vs. Bunn[41] (1872), ruled that the Act of 1871 had not affected the common law of conspiracy, except as to matters expressly provided for. This case was criticized by Coleridge, C. J., in Gibson vs. Lawson[42] (1891), who laid down the principle in respect to the Act of 1875 that acts not indictable under that statute "are not now, if indeed they ever were, indictable at common law." But the former view recurred in Lyons vs. Wilkins[43] (1898). Smith, L. J., stated that the Acts of 1871 and 1875 had legalized certain otherwise illegal acts, and that as the acts complained of did not come within the statutes, they remained illegal.

Thus it appears that the weight of authority is upon the side of the principle that combinations among workmen to dictate to their master whom he should employ were illegal and criminal at common law, and had not been rendered legal by the Act of 6 George IV, C. 129.

This brings us to the essential point in our inquiry. Why were combinations of the above character illegal at common law? There is some evidence of a judicial opinion that the means—namely, strikes—to be employed for accomplishing the purpose of the combination should be regarded as unlawful. For example, Blackburn, J., in Hornby vs. Close[44] (1867), said: "Further, I think this society is constituted for an illegal purpose. . . . The Justices have found, and were justified in finding, that the object of this society was to encourage strikes." This view recurs as late as 1898. In Lyons vs. Wilkins, decided by the Court of Appeal, Smith, L. J., said, "Prior to that date [1871] I do not think there can be a doubt that a strike or a picket would have been illegal." Kay, L. J., expressed the same opinion, and then added, "The combination of a number

[41] 12 Cox C. C. 316.
[42] 61 L. J. M. C. 9, 16.
[43] 65 L. J. Ch. 601, 611.
[44] 8 B. & S. 175, 183.

of persons to induce and encourage and bring about a strike would also have been an illegal act."

But the real reason for this hostility on the part of the courts was more fundamental. We find little difficulty in attributing the illegality of combinations to strike or otherwise to advance the interests of labor, not to the material loss inflicted upon the employer concerned, but to the harm supposed to result from their activities to the public at large. The theory that such combinations worked injury to the community as a whole was thoroughly in accord with the trend of political and economic thought until the end of the first third of the nineteenth century. Old Toryism regarded all combinations with a dread springing from a lively remembrance of the Reign of Terror in France.[45] At a later period economic thought confirmed this vague distrust of combinations of workmen by adducing the Wage Fund Theory, which taught that labor could not, by any effort of its own, secure a larger share of the fruits of production than the natural play of industrial forces would automatically set aside as a fund for its recompense. From this it would follow that the disturbance and loss caused by strikes were unmitigated evils, since not even the workmen themselves were benefited by the ruin which they brought upon the business community.

The change in the legislative policy of England toward industrial combinations did not, as we have seen, procure for organized labor the favor of the courts; and their enmity, based largely upon the above elements, found modern expression in the doctrine that such combinations were "illegal" because in "restraint of trade." This principle received its first explicit statement in Rex vs. Marks et al.,[46] decided in 1802. Comparing combinations to promote mutiny and sedition with an association of workmen formed for the purposes of regulating wages and of compelling other journeymen to join it, Lawrence, J., said: "Combinations formed for such purposes are undoubtedly highly prej-

[45] Dicey, "Law and Opinion in England," p. 100.
[46] 3 East 157.

udicial to the State, and might be the primary object of the attention of the legislature; but I cannot say that combinations like this, which strike at the root of the trade of the kingdom, may not be, though not so immediately, yet ultimately, as mischievous in their consequences, and in the event beget a danger to the State itself, to an extent beyond the power of the government to repress."

As long as the courts assumed that labor combinations were economically harmful, the restraint of trade doctrine so announced was never judicially questioned. But as time went on, the arguments of those who contended that trade unions had a sound economic justification began to attract attention and gain support. The result was the introduction of an element of doubt into the minds of the judges as to the validity of the restraint of trade doctrine in its application to trade unions; a doubt which divided the Court of Queen's Bench in 1869, and led to the annulment of the doctrine, in so far as it raised a criminal liability, by act of Parliament. This line of development can be traced through a trio of leading cases, covering the period from 1855 to 1869, and culminating in the Act of 34 and 35 Victoria, C. 31, passed in 1871.

The first of these cases was Hilton vs. Eckersley.[47] The question was as to the legality of a bond entered into by a number of mill-owners providing for concerted action against certain combinations of workmen. The Court of Queen's Bench held the bond void as against public policy. Crompton, J., said (p. 52): "I think that combinations like those disclosed in the pleadings in this case were illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade and manufacture. . . . Combinations of this nature, whether on the part of workmen to increase or of masters to lower wages were equally illegal." The words of Lord Campbell, however, show the influence of advancing economic thought: "I enter upon such consideration with much reluctance and

[47] 6 El. and El. 47 (1855).

with great apprehension, when I think how different generations of Judges, and different Judges of the same generation, have differed in opinion upon questions of political economy, and other topics connected with the adjudication of such cases." But he finally said: "When I look at this bond, I have no hesitation in concluding that the association which it establishes ought not to be permitted, and that the enforcing of the bond will produce public mischief. I, therefore, feel compelled, as a Judge, to declare that it is void." The Court of Exchequer Chamber affirmed the judgment that the bond was illegal as in restraint of trade.

So much of this opinion as applied to labor combinations was, of course, obiter dictum. But the views therein expressed were approved a dozen years later in the case of Hornby vs. Close,[48] which was directly in point. The defendant had been accused of embezzling the funds of the Bradford Branch of the United Order of Boilermakers and Iron Shipbuilders. The facts were proved, but the defendant urged that he should not be punished for the reason that the Order was not entitled to protection as a friendly society under Stat. 18 and 19 Victoria, C. 63, and for the further reason that it was illegal and in restraint of trade. The Court of Queen's Bench unanimously accepted this view, holding that the objects of the Society, as disclosed by its rules, were those of a trade union. Cockburn, C. J., cited at length Hilton vs. Eckersley, and concluded, "So the rules of this Society are in restraint of trade, and consequently illegal by the law of the land." Blackburn, J., thought that "this Society is constituted for an illegal purpose," namely, "to encourage strikes." Mellor and Lush, JJ., concurred, holding that the Society was in effect a trade union, and hence illegal. All expressly declined to state whether the combination could be prosecuted as a criminal conspiracy.

The practical hardship worked by the principle laid down in this celebrated case lent added force to the unionists'

[48] 8 B. & S. 175 (1867).

arguments, and the influence exerted upon the minds of the judges by economic discussion upon the subject of labor combinations is strikingly shown by the language used in the case of Farrer vs. Close,[49] decided in 1869. The facts were identical with those in Hornby vs. Close. The defendant, charged with the embezzlement of the funds of the Amalgamated Society of Carpenters and Joiners, had been released by the justices of the peace because they considered that the Society was a trade union and illegal. Its rules, proved in evidence, made provision for strikes and strike benefits. Upon appeal to the Court of Queen's Bench, Cockburn, C. J., with whom Mellor, J., concurred, took the narrow ground that this case came within the principle of Hilton vs. Eckersley and Hornby vs. Close. He held that as the purposes of the Society were those of a union it was not entitled to protection. The policy of the law laid down in these cases he declined to discuss. He admitted that the unions had found defenders, but added: "It must not, however, be forgotten that while some strikes may be perfectly justifiable to enforce honest and just demands, others may be resorted to in order to extort unreasonable exactions or enforce tyrannical rules, and the only corrective against such attempts is to be found in the freedom of the labor market, which it is the purpose of these combinations to prevent."

Hannen, J., warmly disagreed with the Chief Justice. He denied that either the rules or the interpretation put upon them in practice showed an illegal object on the part of the Society, unless it were held that a strike is always illegal; and this he would not allow. Of the rule providing that striking members should be sent to other localities, he said: "The tendency of this undoubtedly is to support and maintain the strike for a longer time, and so to increase the chance of the men obtaining the object of the strike. This, it is alleged, is in restraint of trade, that is, it disturbs the course and postpones the effect of competition among the men, which, if left to itself, might sooner compel them to

[49] 10 B. & S. 553.

return to work; and, therefore, it is contended, is contrary to public policy. I think that our judgment ought not to be based on this line of argument. By the expression contrary to public policy, I understand it is meant that it is opposed to the welfare of the community at large. I can see that the maintenance of strikes may be against the interests of employers, because they may be thereby forced to yield at their own expense a larger share of profits or other advantages to the employed, but I have no means of judicially determining that it is contrary to the interests of the whole community, and I think that, in deciding that it is, and therefore that any act done in its furtherance is illegal, we should be basing our judgment not on recognized legal principles, but on the opinion of one of the contending schools of political economists." Hayes, J., "without professing to know much of what is public policy on this subject at the present time," agreed with Hannen; so, the court being equally divided, the appeal dropped.

Here the court broke away from its former position that trade unions are obviously without economic justification. The doctrine of restraint of trade as formerly applied was sharply attacked by two of the judges; and those who upheld it made little attempt to justify it, being content with saying merely that they were bound by the law as laid down in former cases. Under these circumstances we need feel no surprise at the provision in the Act of 1871 (C. 31, Sec. 2) already referred to: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise."

The foregoing history of the doctrine of restraint of trade enables us to see very clearly that in holding illegal all labor combinations not legalized by statute the courts were but applying the old principle that a combination to do that which amounts to a public injury is a conspiracy. From this it would follow that combinations to compel an employer

by strike to limit the description of his employees fell within the terms of Lord Denman's antithesis.

The above facts, therefore, warrant the conclusion that at no time has the law of England ever denounced as a criminal conspiracy any combination whose purpose, remote or primary, was not considered as being in itself clearly unlawful.

But this conclusion standing alone is not a complete description of the legal status of combinations among workmen in England. The attitude of the criminal courts toward them can be easily accounted for by a reference to the statutes, especially the Act of 1875. This act, by providing that a combination to do any act in furtherance of a trade dispute shall not be punishable as a conspiracy "if the same act committed by one person would not be punishable as a crime," clearly renders impossible any expansion by the courts of the orthodox definition of criminal conspiracy in connection with industrial combinations. At the same time, the statute forbade the employment, by single persons or by combinations, of a number of the more violent and oppressive methods usually resorted to by striking workmen. Thus ample criminal remedies against labor combinations have been supplied through ordinary channels, and the courts have consequently been relieved of the necessity of extending the scope of conspiracy in order to restrain the more flagrant acts of labor unions.

It seems certain, however, that the courts in England as elsewhere would be inclined to take all needful measures to protect employers and non-union men against undue oppressions whatever might be the nature of the specific acts done for the purpose. No amount of theorizing in regard to the inconsistency of punishing two men for agreeing to do that which a single individual may do with impunity will avail so long as public opinion refuses to tolerate the infliction upon a third person without just excuse of the peculiar hurt which only a number of persons acting in combination can inflict. The current morality brands such conduct as

wrong; and its judgment cannot be warped by lengthy discussions as to the legality or illegality per se of the methods employed. In defending the weaker person against aggression on the part of combinations of persons the courts have preferred, where possible, to do so without express reference to the element of combination present. When it has appeared necessary, however, they have not feared to assert openly that in some cases the fact of combination raises a liability where before, perhaps, no liability existed.

The above statements find ample confirmation in the history of the element of combination in civil cases. This is closely bound up with certain doctrines relating to malice and justification, a brief account of which must first be given.

After the passage of the Act of 6 George IV, C. 129, legalizing agreements to strike for certain enumerated purposes, the opinion began to find currency that the lawfulness vel non of combinations of labor in general depended upon their real object. This view first appeared in Reg. vs. Rowlands[50] (1851). Speaking of a combination among workmen and others to obtain an increase of wages, Erle, J., said: "I consider the law to be clear only to that point—while the purpose of the combination is to obtain a benefit for the parties who combine—a benefit which by law they can claim. I make that remark, because a combination for the purpose of injuring another is at once a combination of an entirely personal nature, and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves, gives no sanction to combinations which have for their immediate purpose the injury or hurt of another." The same principle was stated, though without mention of the element of combination, in Farrer vs. Close[51] (1869). Hannen, J., said that the legality or illegality of a strike "must depend on the means by which it is enforced, and on its objects." It may be criminal, or illegal, "or it may be perfectly innocent, as if it be the result of the voluntary

[50] 5 Cox C. C. 436, 460.
[51] 10 B. & S. 553, 566.

combination of the men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfillment of an engagement entered into between employers and employed, or any other lawful purpose."[52]

Now when cases grounded upon acts done or threatened by combinations of labor began to find their way into the civil courts, the doctrine of justification was called upon to play an important part in fixing the liability of the defendants. The doctrine began to develop that certain acts causing damage would be actionable if done for a purely malicious purpose, whereas the same acts would not give rise to liability if a legal justification could be shown. The most influential cases upon this point were Temperton vs. Russell[53] (1893) and the Mogul Steamship Co. vs. McGregor[54] (1892). The views therein expressed took root, and for a time seemed destined to attain prominence in the field of labor law. Thus in Curran vs. Trealeaven[55] (1891), wherein it was held that a strike to cause the discharge of non-union men was not intimidation within the terms of the Act of 1875, section 7, it was intimated that had the proof shown a "malicious conspiracy" to injure, or "malice in fact," the acts of the defendants might have been indictable and actionable. In Trollope vs. London Building Trades Federation[56] (1895) an injunction was granted against the black-listing of certain non-union men and non-strikers, upon the authority of the Mogul Case. Kekewich, J., said: "Their own benefit was, of course, one of the objects of their action, and it was to some extent—to use a philosophical expression—the 'final cause' of their action. But it was not the only cause, and I have no doubt from the evidence before me that another motive and the principal and primary motive, was to injure the workmen mentioned in the 'Black-

[52] See also Swaine vs. Wilson, 24 Q. B. D. 252 (1889); Sheridan's Case (1868), Wright on Conspiracy, 38.
[53] 62 L. J. Q. B. 412; (1893) 1 Q. B. 715.
[54] 61 L. J. Q. B. 295; 58 L. J. Q. B. 465; (1892) A. C. 25.
[55] 61 L. J. M. C. 9.
[56] 72 L. T. 342.

List' and also Messrs. Trollope and Sons, and to prevent them from carrying on their lawful trade or business with that freedom which is the privilege of Englishmen. That seems to me to be the direct object of the defendants' procedure, and is therefore, according to Lord Field, actionable." In Lyons vs. Wilkins[57] (1898), North, J., granted a preliminary injunction restraining the defendants "from maliciously inducing or conspiring to induce persons not to enter into contracts with the plaintiffs." He said, "If you have to forward your own interest by destroying the rights of others, it seems to me that that is express malice." This portion of the injunction, however, was stricken out after the decision of Allen vs. Flood[58] (1898), the reason, as stated by Byrne, J.,[59] being that "it was conceded by the plaintiffs that they could not succeed unless they could show malice; and it is the law, as finally determined by the House of Lords, that the existence of a malicious motive cannot in such a case as this render unlawful an act or acts otherwise lawful."

The above doctrines were such as to enable the courts to interfere upon the ground of malice with many acts deriving their formidable character from the numbers engaged in them, without express reference to the element of combination itself. But the decision in Allen vs. Flood that a malicious motive cannot transform an otherwise legal act into an actionable wrong closed this avenue of redress. The result was the unanimous holding by the House of Lords in Quinn vs. Leathem that the wrongful and malicious inducement, by persons acting in concert, of the plaintiff's customers and servants to cease dealing with him, was actionable, in spite of the decision of Allen vs. Flood. One of the distinctions drawn between the two cases was the fact that the present case was characterized by the element of conspiracy, which had been lacking in the earlier case. Several of the judges expressly stated that an individual may do

[57] 65 L. J. Ch. 601, 604.
[58] 77 L. T. Rep. N. S. 717.
[59] 67 L. J. Ch. 383, 385.

certain acts which a combination may not do, because the effects of concerted action are much more dangerous, coercive, and alarming than those of individual action. A grain of gunpowder is harmless, whereas a pound is destructive.

This principle was approved in the later cases. In Giblan vs. National Amalgamated Laborers' Union of Great Britain and Ireland[60] (1903) it was applied to a combination among trade-union officials to prevent, by calling strikes, a person from obtaining employment. In South Wales Miners' Federation vs. Glamorgan Coal Co.[61] (1905), Lord Lindley expressly said: "It is useless to try to conceal the fact that an organized body of men working together can produce results very different from those which can be produced by any individual without assistance. Moreover, laws adapted to individuals not acting in concert with others require modification and extension if they are to be applied with effect to large bodies of persons acting in concert. The English law of conspiracy is based upon and justified by this undeniable truth." The House of Lords, in Sweeney vs. Coote[62] (1907), the latest case involving combination brought before it, was careful to decide only that the evidence was not sufficient to support the allegation of a conspiracy to injure the appellant in her business and employment. The Earl of Halsbury went so far as to intimate that the case might be otherwise with a combination to procure her dismissal on account of personal objections, ill-will or spite.

The result of these and other cases[63] was an agitation by

[60] Court of Appeal (1903), 2 K. B. 600.
[61] 74 L. J. K. B. 525. House of Lords.
[62] (1907) A. C. 221.
[63] It had been decided in Lumley vs. Gye, 22 L. J. Q. B. 463 (1853), that maliciously inducing a breach of contract was actionable. This case was approved in Quinn vs. Leathem, in Read vs. Friendly Society of Operative Stone Masons, 71 L. J. K. B. 994 (1902), and in South Wales Miners' Federation vs. Glamorgan Coal Co., 74 L. J. K. B. 525 (1905), in which it was also said that the absence of ill-will was no justification. The matter is dealt with in the Trades Disputes Act, 1906, in these words (sec. 3): "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to

trade unionists which led to the passage of the Trades Disputes Act, 1906, 6 Edward VII, C. 47. In this act the attempt is made to reverse the principles laid down by the courts in a number of previous decisions in which they had endeavored to protect non-union men and employers from undue interference by the unions. That liability should arise from concerted action is negatived in these words (sec. 1): "An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

This statute is the culmination of the attempts made by the legislature in England to deal with acts done in the course of the struggle between capital and labor, without regard to the element of combination. How it will be judicially interpreted cannot be foretold, as no case of the proper character has as yet come before the courts. We may venture the opinion, however, that even this act need not have the effect of removing all safeguards against oppressive measures which derive their efficacy from the number of the persons coöperating to employ them. The

break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he wills."

The latter part of the section is intended to negative certain statements in Quinn vs. Leathem and in other cases; especially the decision in Giblan vs. National Amalgamated Laborers' Union of Great Britain and Ireland (1903), 2 K. B. 600.

The Taff Vale Ry. Co. vs. Amalgamated Society of Ry. Servants, 70 L. J. Q. B. 905 (1901), Giblan vs. National Amalgamated Laborers' Union, etc. (supra), South Wales Miners' Federation vs. Glamorgan Coal Co. (supra), Denaby & Cadeby Main Collieries vs. Yorkshire Miners' Assn., (1906) A. C. 384, and Ward, Lock & Co. vs. Operative Printers' Assistants' Society, 22 T. L. R. 327 (1906), had established that a registered trade union might be held liable like a corporation for its collective acts and for the acts of its officers within the scope of their authority. The Trades Disputes Act, 1906, changed the law in this particular: "Sec. 4—An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court."

courts in the more recent cases have shown a disposition to regard chiefly the nature and effects of the acts done in concert, and to notice the combination only in so far as it invests certain acts with qualities which individual acts do not possess. From this it would follow that if a single person were placed in a position which enabled him to wield the combined powers of a multitude he should be subjected to a proper degree of legal responsibility for his acts. And evidences are not wanting that the courts may take this view. In Quinn vs. Leathem[64] (1902) Lord Robertson said in terms that if one man could have done what the combination did in that case, he would be civilly liable. So in Giblan vs. National Amalgamated Laborers' Union of Great Britain and Ireland[65] (1903), Romer, L. J., expressed the opinion that if one person had the peculiar power and influence to prevent a man from getting work, his conduct in so doing without justification would be an actionable wrong, "such an unjustifiable molestation of the man, such an improper and inexcusable interference with the man's ordinary rights of citizenship as to make that person liable in an action." Now this principle in substance means nothing more than that certain acts of a harmful and coercive character may not be performed without justification either by one person or by a combination of persons. As long as only the results of specific acts are regarded, this position would not be in any way affected by Section 1 of the Trades Disputes Act, 1906, in spite of the undeniable truth that the acts complained of derive their peculiar qualities from the number of the persons who perform them.

It would seem, therefore, that in future trade unionists will be able to secure greater freedom of action against their opponents only by means of statutes expressly legalizing their acts regardless of certain effects produced by them upon other persons. The element of injuria must be extracted from the damages inflicted. But this will prove

[64] 70 L. J. P. C. 95.
[65] (1903) 2 K. B. 600, 618.

a difficult task as long as the courts are inclined to place restrictions upon the activities of the unions. The judges show a willingness to create new rights in behalf of individuals which may not be infringed by the acts of their enemies in an industrial dispute. Thus, in the Trades Disputes Act, Parliament has been induced to declare that an act done in furtherance of such disputes shall not be actionable "on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he will." Unless the courts change their attitude, however, even this declaration may not be sufficient. They may hold that the acts complained of violate other rights so fundamental (e. g., the "ordinary rights of citizenship") that Parliament might hesitate long before giving to trade unions free leave to disregard them. It appears, therefore, that until the policies and methods of the unions shall have secured a fuller endorsement by public opinion, non-union men and others will continue to enjoy a tolerable degree of protection from at least the more flagrant varieties of interference and oppression on the part of organized labor.

ABBREVIATIONS FOR AUTHORITIES CITED.

A. & E.	Adolphus & Ellis's Reports, King's Bench.
Ad. & E. N. S	Adolphus & Ellis's Reports, King's Bench (New Series).
A. C.	Appeal Cases, House of Lords.
B. & A.	Barnewall & Alderson's Reports, King's Bench.
B. & C.	Barnewall & Cresswell's Reports, King's Bench.
Bell C. C.	Bell's Crown Cases.
B. & S.	Best & Smith's Reports, Queen's Bench.
B. & B.	Broderip & Bingham's Reports, Common Pleas.
Bulst.	Bulstrode's Reports, King's Bench.
Burn's J.	Burn's "Justice of the Peace."
Burr.	Burrow's Reports, King's Bench.
Cald.	Caldecott's Reports, King's Bench.
Camp.	Campbell's Reports, Nisi Prius.
Car. & M.	Carrington & Marshman's Reports.
Car. & P.	Carrington & Payne's Reports, Nisi Prius.
Ch.	Chancery Division.
Chitty.	Chitty's Reports, Bail Court.
Cl. & F.	Clarke & Finnelly's Reports, House of Lords.
Co.	Coke's Reports.
Comyn.	Comyn's Reports, King's Bench and Common Pleas.
Cox C. C.	Cox's Criminal Cases.
Cro. Car.	Croke's Reports, Temp. Charles I, King's Bench and Common Pleas.
Cro. El.	Croke's Reports, Temp. Elizabeth, King's Bench and Common Pleas.
Cro. Jac.	Croke's Reports, Temp. James I, King's Bench and Common Pleas.
D. & M.	Davison & Merivale's Reports, Queen's Bench.
Dears. C. C.	Dearsley's Crown Cases.
Den. C. C. R.	Denison's Crown Cases Reserved.
Dougl.	Douglas's Reports, King's Bench.
D. & R.	Dowling & Ryland's Reports, King's Bench.
East P. C.	East's Pleas of the Crown.
East.	East's Reports, King's Bench.
El. & El.	Ellis & Ellis's Reports, Queen's Bench.
Esp.	Espinasse's Reports or Digest, Nisi Prius.
Fitz.	Fitzherbert's Abridgement of the Law of England.
F. N. B.	Fitzherbert, "De Natura Brevium."
F. & F.	Foster & Finlason's Reports, Nisi Prius.
Gilb., Cases L. & Eq.	Gilbert's Cases in Law and Equity.
Godb.	Godbolt's Reports, King's Bench.

Gouldsb.	Gouldsborough's Reports, King's Bench.
H. & J.	Harris & Johnson's Reports, Maryland Court of Appeals.
How. S. Tr.	Howell's State Trials.
H. & N.	Hurlestone & Norman's Reports.
Inst.	Coke, Institutes of the Law of England.
Ir. R. Com. Law.	Irish Reports, Common Law Series.
Jones.	Jones's Reports.
Jur.	Jurist Reports in all the Courts.
J. P.	Justice of the Peace.
Keb.	Keble's Reports, King's Bench.
Keilway.	Keilway's Reports, King's Bench.
K. B.	King's Bench, Law Reports.
L. J.	Law Journal.
L. J. N. S.	Law Journal, New Series.
L. J. Ch.	Law Journal, Chancery.
L. J. K. B.	Law Journal, King's Bench.
L. J. M. C.	Law Journal, Magistrates' Cases.
L. J. P. C.	Law Journal, Privy Council Cases.
L. J. Q. B.	Law Journal, Queen's Bench.
L. R. Eq.	Law Reports, Equity Cases.
L. R. H. of L.	Law Reports, House of Lords Cases.
L. R. Ir.	Law Reports, Irish.
L. T.	Law Times.
L. T. R.	Law Times Reports.
L. T. Rep. N. S.	Law Times Reports (New Series).
Leach Cr. L.	Leach's Crown Law.
Leon.	Leonard's Reports, King's Bench.
Lev.	Levinz's Reports. King's Bench.
Lew.	Lewin's Crown Cases.
Lib. Ass.	Liber Assissorum, Temp. Edward III.
Ld. Ken.	Lord Kenyon's Reports, King's Bench.
Ld. Raym.	Lord Raymond's Reports, King's Bench.
M. & S.	Maule & Selwyn's Reports, King's Bench.
Mod.	Modern Reports, King's Bench.
M. & M.	Moody & Malkin's Reports, Nisi Prius.
Moo. & R.	Moody & Robinson's Reports, Nisi Prius.
Moore.	Moore's Reports, King's Bench.
N. & M.	Neville & Manning's Reports, King's Bench.
Palm.	Palmer's Reports, King's Bench.
Q. B. D.	Queen's Bench Division.
Q. B.	Queen's Bench, Law Reports.
Rot. Parl.	Rotulæ Parliamentariæ.
Ry. & M.	Ryan & Moody's Reports, Nisi Prius.
Salk.	Salkeld's Reports, King's Bench.
Saund.	Saunders' Reports, King's Bench.
Sayer.	Sayer's Reports, King's Bench.
Show.	Shower's Reports, King's Bench.
Sid.	Siderfin's Reports, King's Bench.
Starkie.	Starkie's Reports, Nisi Prius.
St. at L.	Statutes at Large, Great Britain.
Stra.	Strange's Reports, King's Bench.
Styles.	Styles' Reports, King's Bench.
Sw. & Tr.	Swabey & Tristram's Reports.
T. Jones.	T. Jones's Reports, King's Bench.
T. Raym.	T. Raymond's Reports.

T. & N. Cr. C.	Temple & New's Criminal Cases.
T. L. R.	The Times' Law Reports.
T. R.	Term Reports (Durnford & East), King's Bench.
Vent.	Ventris' Reports, King's Bench.
Ves.	Vesey's Senior Reports, Chancery.
Ves. & B.	Vesey & Beame's Reports, Chancery.
W. Bl.	W. Blackstone's Reports.
Willes.	Willes' Reports, King's Bench and Common Pleas.
Wils.	Wilson's Reports, King's Bench and Common Pleas.
Y. B.	Year Book.
Yelv.	Yelverton's Reports, King's Bench.

LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT

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CONTENTS.

PREFACE.

This study is the outgrowth of a paper read in 1907 before the Political Science Seminary of the Johns Hopkins University. To Professor W. W. Willoughby, the director of the Seminary, the thanks of the author are due for helpful suggestions in the preparation of the work.

J. M. M.

CASES CITED.

THE LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT.

CHAPTER I.

Preliminary Propositions.

The germ of the Fifteenth Amendment is contained in one of the plans considered by the Joint Committee on Reconstruction to remedy the alleged disparity in representative strength between North and South resulting from the emancipation of the negroes. The substance of this plan was so to amend the Constitution as to deprive the States of the power to disqualify politically on account of race or color. At the regular meeting of the committee, held January 20, 1866, the chairman of the Subcommittee on the Basis of Representation stated that the subcommittee had directed him to report for the action of the Joint Committee two alternative propositions for amending the Constitution. The first of these propositions, which had been drafted by Senator Fessenden of Maine, and proposed by him at the previous meeting of the subcommittee,[1] was couched in the following words: "All provisions in the Constitution or laws of any State whereby any distinction is made in political . . . rights or privileges on account of race . . . or color shall be inoperative and void."[2] The other proposition, of which James G. Blaine was the reputed author, provided that " whenever the elective franchise shall be denied or abridged on account of race . . . or color, all persons of such race

[1] Congressional Globe, 40th Cong., 3d sess., p. 1032.

[2] Journal of the Reconstruction Committee, p. 9. For earlier propositions from unauthoritative sources embodying the same principle, see Robert Dale Owen, Wrong of Slavery and Right of Emancipation, p. 197 (1864); and Worcester Speech of Charles Sumner, September 14, 1865, Works, Vol. IX, p. 473.

. . . or color shall be excluded from the basis of representation."[3]

The Fessenden plan, which involved the idea that finally took definite shape in the Fifteenth Amendment, was intended to secure the right of suffrage to the negroes by a direct guarantee. The Blaine plan, on the other hand, aimed at the same object by the indirectly coercive method of minatory inducements. The Joint Committee, after considering the merits of these two alternative propositions, decided by a vote of 11 to 3 to take the Blaine plan as the basis of action.[4]

Not only in the committee but also in open Congress was the project of immediate negro enfranchisement by means of a direct constitutional guarantee decisively voted down. The proposition of Senator Henderson, for example, providing that "no State, in prescribing the qualifications requisite for electors therein, shall discriminate against any person on account of color or race," was lost by a vote of 10 to 37.[5]

The opposition which was thus manifested in 1866 to measures embodying substantially the principle of the Fifteenth Amendment did not rest upon the supposed inapplicability of negro suffrage to the exigencies of the reconstruction problem. There was little real difference of opinion among the leaders in Congress as to the desirability of enlarging the sphere of political liberty for the negro race. The chief difficulty in accomplishing this result lay in the fact that is could apparently be done only by limiting the sphere of governmental action in all the States to a corresponding extent. There was a feeling too widespread to be safely antagonized that the regulation of the suffrage was a matter properly belonging to the state governments.[6] This was a right of the States, declared Conkling of New York, to which they would long cling. It did not matter whether

[3] Journal of the Reconstruction Committee, p. 9.
[4] Journal of the Reconstruction Committee, p. 10.
[5] Globe, 39th Cong., 1st sess., pp. 362, 1284.
[6] See remarks of Stevens of Pennsylvania, Globe, 39th Cong., 1st sess., p. 536; Wilson of Massachusetts, ibid., p. 1256; Banks of Massachusetts, ibid., p. 2532.

the innovation were attempted in behalf of the negro race or any other race; it was confronted by the genius of our institutions.[7] There was concrete evidence at hand that the States would hardly consent to surrender a power they had always exercised and to which they were attached.[8] Most of the Northern States did not allow negroes to vote, and some of them had repeatedly and lately pronounced against the practice.[9] In the decade immediately preceding 1867 numerous propositions involving impartial negro suffrage had been submitted to the popular decision in such States as New York, Connecticut, Ohio, Wisconsin, Minnesota, and Kansas, but they had been invariably voted down.[10]

It was in view of these circumstances that the Joint Committee on Reconstruction had come to the conclusion that three fourths of the States could not be induced to grant the right of suffrage, even in any degree or under any restriction, to the colored race.[11] There was no demand by either party that the local autonomy of the Northern States should be abridged by depriving them of the power to withhold suffrage from negroes,[12] yet this deprivation would be a necessary consequence of enacting a negro suffrage amendment to the Constitution. Thus at the outset was encountered the difficulty of dealing with a sectional problem by means of constitutional amendment, which, from its necessary generality in operation, is apt to produce undesigned results.

Since the objections to the immediate extension of suffrage to the negroes were too forcible to be overcome, an effort was made to secure for the race a prospective guarantee of this right. At the meeting of the Joint Committee, held on April 21, 1866, the following proposition was adopted by a vote of 8 to 4 and ordered to be reported to

[7] Globe, 39th Cong., 1st sess., p. 358.
[8] Cf. Report of Joint Committee on Reconstruction, H. Rept. No. 30, 39th Cong., 1st sess., p. xiii.
[9] Globe, 39th Cong., 1st sess., p. 358.
[10] Cf. Braxton, The Fifteenth Amendment: An Account of its Enactment, p. 5.
[11] Howard of Michigan, Globe, 39th Cong., 1st sess., p. 2766.
[12] This was evidenced by the suffrage plank in the Republican platform of 1868. See McKee's National Platforms, p. 78.

Congress: "From and after the fourth day of July, 1876, no discrimination shall be made by any State, nor by the United States, as to the enjoyment by classes of persons of the right of suffrage, because of race, color, or previous condition of servitude."[13]

When this action of the committee became noised abroad, the Republicans in Congress from New York, Illinois, and Indiana held caucuses, and decided that negro suffrage in any shape ought not to form a part of the Republican programme in the approaching elections.[14] The opposition which thus developed was sufficiently formidable to cause the committee to recede from its position, and so, for the time being, a quietus was given to the demand for the extension to negroes of suffrage, whether immediate or prospective, by a direct constitutional guarantee.

Meanwhile the proposed Blaine amendment, which the Joint Committee had selected in preference to that drawn by Fessenden, was reported to Congress and passed by the House, but was killed in the Senate.[15] The opposition of the Senate forced the committee to modify its phraseology by omitting all direct reference to disfranchisement on account of race or color, and in this more general form it finally became a part of the Constitution as the second section of the Fourteenth Amendment. Although applying prima facie to the whole country, this section would in reality seriously affect only those States, principally in the South, having a large proportion of non-voting male citizens. It became a part of the Fourteenth Amendment largely through the accident of political exigency rather than through the relation which it bore to the other sections of the Amendment. As far as subject-matter is concerned, it is really more germane to the Fifteenth Amendment than to the other sections of the Fourteenth Amendment.

The exact relation which this section of the Fourteenth

[13] Journal of the Reconstruction Committee, p. 24.
[14] Robert Dale Owen, "Political Results from the Varioloid," Atlantic Monthly, June, 1875, p. 666.
[15] Globe, 39th Cong., 1st sess., p. 1289.

Amendment bears to the Fifteenth Amendment, and the power which Congress has under it to reduce representation since the adoption of the latter, have been involved in some doubt. Congress has never exercised the power, and the courts have of course never passed upon the question. The statement has been recently made that "any attempt of Congress to exercise the power of reduction, when in fact the State has not discriminated against legal voters on account of race, would be unconstitutional, and as such would be promptly set aside by the courts . . . Congress no longer possesses the power to penalize States under the Fourteenth Amendment, for the penalizing clause was abrogated when the Fifteenth Amendment was adopted."[16]

The language of the penalizing clause lends, on its face, no support to this view. As we have seen, the opposition to its earlier form caused it to be generalized so as to apply to other forms of discrimination than those based on race or color. It was certainly realized at the time of the adoption of the clause that it was in terms broad enough to apply to discrimination on any grounds except sex, minority, rebellion, and crime.[17] The Committee on the Ninth Census even took steps to ascertain the number and extent of the various grounds on which persons were disfranchised in the States, in order to form a basis for the next decennial apportionment act, which was to be passed in conformity with the second section of the Fourteenth Amendment.[18]

Although the language of the penalizing clause was thus early perceived to be broad enough to apply to disfranchisement on grounds other than race or color, yet the object which the framers aimed at in proposing it, and without which it would not have been even suggested, was the penalization of a State for discriminating against persons on the grounds later prohibited by the Fifteenth Amendment. If

[16] Charles A. Gardiner, "Solution of the Negro Problem," New York University Convocation Address, 1903, p. 210.

[17] See remarks of Howard of Michigan, Globe, 39th Cong., 1st sess., p. 2767; and Haldeman of Pennsylvania, Globe, 41st Cong., 2d sess., p. 40.

[18] H. Rept. No. 3, 41st Cong., 2d sess.

it be admitted that cases involving the penalizing clause could be adjudicated in the courts, and that the clause could be so narrowed by construction as to apply only to the grounds of disfranchisement which the Fifteenth Amendment interdicts, then the two provisions would represent merely different methods of dealing with the same subject-matter. Now, the sense of the nation upon a particular subject of general interest is normally in a state of flux, and if, at two distinct stages in the evolution of public opinion, the sense of the nation upon that subject is crystallized into a part of the organic law, the opinion rendered at the second stage would seem to supersede that rendered at the first. Hence, according to this view, the penalizing clause was a preliminary or tentative form of the Fifteenth Amendment, and when the latter was adopted the preliminary arrangement was discarded like the scaffolding of a finished building.

The fallacy in this view lies in the supposition that the courts would confine the application of the penalizing clause to the grounds of discrimination prohibited by the Fifteenth Amendment. If the decisions of the Supreme Court bearing on the reconstruction amendments can be taken as indicating their probable attitude toward the penalizing clause, it is reasonably certain that they would not restrict the operation of the clause to the object which Congress had in view in proposing it if its language plainly and unambiguously covers a wider field. It is true that the court has at times given some color to the view that these amendments must be treated historically,[19] but this ruling has not been adhered to.[20] In regard to the Thirteenth Amendment the court has declared that the slavery or involuntary servitude of the Chinese, Italian, or Anglo-Saxon race is as much within its compass as that of the African.[21] If this is so, then by analogy the exclusion of paupers, illiterates, or idiots from the suffrage would subject a State to liability of loss of representation. Hence, whenever a State withholds the elective

[19] Slaughter House Cases, 16 Wall. 36.
[20] Holden vs. Hardy, 169 U. S. 366.
[21] Hodges vs. United States, 203 U. S. 1.

franchise from persons on any grounds except those allowed by the penalizing clause or prohibited by the Fifteenth Amendment, Congress possesses the constitutional power to reduce the representation of such State in the proportion which the number of persons so disfranchised bears to the whole number of adult male citizens in said State.

The extension of suffrage to negroes in 1866 by a direct constitutional guarantee was prevented, as we have seen, by the opposition to such a measure encountered in the Northern States. The numerous elections in those States at which propositions involving colored suffrage were voted down showed that the right of the negroes to vote was not generally considered at the North as a good per se, for this would logically have required that it be introduced into the North as well as into the South. It was considered rather as a means toward the accomplishment of certain definite ends incident to the reconstruction of the Southern States, and as such it should properly be confined to that section of the country.[22] So long as the majority of the people in the Northern States maintained this attitude with sufficient firmness to determine the policy of their local and national representatives, the most effectual mode of securing negro suffrage at the South, to wit, by a constitutional amendment, could not be adopted. If it had been possible to propose an amendment similar in principle to the Fifteenth Amendment which could be made to apply only to the Southern States, there is little doubt that it would have been done in 1866. It was this very anomaly, however, which Congress later attempted, in effect, to enact.

Since the attitude of the North made a constitutional amendment impracticable, Congress determined to effect the same object, as far as the South was concerned, through its own enactments. Beginning with the Act of March 2, 1867,[23] the national legislature endeavored by every means in its power to make negro suffrage in the South as perma-

[22] Cf. Blaine, Twenty Years of Congress, Vol. II, p. 388.
[23] 14 Stat. at Large, 428.

nent as a constitutional amendment would make it, without in any way affecting the control of the Northern States over the qualifications of their voters. The state constitutions framed in accordance with the provisions of this act were required to establish universal manhood suffrage for negroes before they would be recognized by Congress. It was supposed that no change could afterwards be made in the suffrage provisions of these constitutions unless the proposed change were referred to the electorate established by the existing constitutions. This would seem to have made it difficult in most of these States to change the constitutions so as to disfranchise negroes. Yet this was not deemed a sufficient safeguard. By the Acts of June 22–25, 1868, seven of these States were admitted to representation upon the fundamental condition that the constitutions of none of them should ever be so altered as to deprive the enfranchised negroes of the right to vote.[24]

If such a condition was what it purported to be, namely, a fundamental and unchangeable part of the organic laws of those States, its effect would obviously be to secure all that a negro suffrage amendment to the Constitution could secure as far as the South was concerned, while leaving undisturbed the local autonomy of the Northern States. It would thus be equivalent to a constitutional amendment enacted into law by a simple act of Congress and having binding force on some States and not on others. If there had been no doubt as to the validity and unalterable character of such a condition, it would have made the Fifteenth Amendment to a large extent unnecessary. The fear was freely expressed, however, that the theory of the equality of the States was too deeply rooted in our constitutional system ever to make the observance of such a condition practically enforceable.[25] The prospective collapse of the muniments of negro suffrage set up by Congress at the South indicated that unless the

[24] 15 Stat. at Large, 72–4.

[25] See remarks of Bingham of Ohio, Globe, 40th Cong., 2d sess., p. 2211; and of Conkling of New York, ibid., p. 2666.

results of the reconstruction process were to be overturned, resort must be had to some more effectual and permanent method of securing the right of the negroes to vote. This condition of affairs cleared the way for the proposal of the Fifteenth Amendment.

CHAPTER II.

The Formation of the Amendment.

No concerted movement was made toward proposing the Fifteenth Amendment until after the presidential election of 1868, and the merits of such a measure were not involved in the issues of the presidential campaign.[1] Four days after the election, however, the Washington correspondents of the New York dailies telegraphed, on the strength of information derived from a "Radical Senator," that a suffrage amendment to the Constitution would be introduced into both houses upon the reassembling of Congress in December.[2] On the same day, Wendell Phillips issued a pronunciamento to the effect that the measure of primary importance to be at once initiated was an additional amendment to the Constitution forbidding disfranchisement, or proscription from official trust, on account of race or color, in any State or Territory of the Union.[3]

Now that most of the ex-Confederate States had been in large measure rehabilitated, it was realized that the practically complete control which Congress had exercised over them was gradually slipping away and must eventually come to an end. When this should happen, the only remaining security for negro suffrage in the South lay in the extent to which fundamental conditions of readmission had rendered the reconstruction constitutions unalterable in respect to suffrage. Confidence in the validity of these conditions was now perceptibly on the wane. Moreover, the attitude of the Southern whites left no doubt that, if these conditions should

[1] A search through the editorials and news columns of the leading newspapers of the country issued during the presidential campaign of 1868 fails to reveal a single direct reference to any proposed fifteenth amendment.

[2] See, e. g., New York World, November 8, 1868.

[3] Anti-Slavery Standard, November 7, 1868.

be adjudged invalid and no additional warrant should exist for the further interference of Congress in the Southern States, negro suffrage would be doomed. This condition of affairs emphasized the need of supplying a new basis for the continuance of congressional control over the suffrage conditions of the Southern States. This basis could be surely and safely supplied only by means of a new grant of power from the nation in the form of a suffrage amendment to the Constitution which should contain the authorization to Congress to enforce its provisions.[4]

The above consideration was the controlling motive which led to the enactment of the Fifteenth Amendment, but there were other influences leading toward the passage of a constitutional amendment on the general subject of suffrage. There was a widespread nationalistic feeling that, irrespective of the Southern situation, the general Government ought to be given further control of the suffrage conditions in the States. This, it was thought, would inure to the benefit both of the Government and of the individual.

From the standpoint of the Government the argument was put forth that no opportunity had ever been offered so auspicious as that which then existed for authorizing the nation itself to determine who should share in its government. If there was no nation, except in a vague and formal way, then each State must be left to determine for itself whom it would authorize to take part for it in the general deliberations. But if there was a nation, then the nation ought to determine the matter for itself by means of a constitutional amendment.[5]

From the standpoint of the individual the desire for change centered around the demand for the nationalization of political liberty. The spirit of our institutions required that every free American citizen should exercise equal political rights. There was a widely held belief that universal suffrage is the perfect antidote against all the

[4] Cf. editorial in New York Tribune, December 1, 1868.
[5] Harper's Weekly, November 28, 1868, p. 754. Editorial written presumably by George W. Curtis.

moral and political ills to which society is subject.[6] No reliance could be placed upon the States to secure universal equality in political rights, and this task must consequently be intrusted to the nation.

The groups of men favoring a suffrage amendment of some kind were, therefore, the politicians,[7] who aimed at congressional control over Southern elections, the nationalists, who desired a strong central government, and the universal suffragists, or humanitarians, as they may be called, who were laboring to base the enjoyment of political rights upon no distinction less comprehensive than humanity itself. Over against all three of these, and opposed to a suffrage amendment of any kind, were the local autonomists, proud of local tradition and jealous of national interference in local concerns.

Thus we have four distinguishable elements in the situation, three desiring a change, the fourth conservative if not reactionary. The politician, the nationalist, and the universal suffragist agreed in desiring a stronger central government, but for different reasons. The nationalist alone favored centralization as an end in itself. With the politician and the universal suffragist, this was incidental to control over the conditions of suffrage. The universal suffragist favored a broad, comprehensive amendment, while the politician preferred to confine it strictly to the matter of greatest political interest, to wit, negro suffrage. The politician was the initiator and real engineer of the movement, and without him it is probable that nothing could have been done. The New York Tribune, the leading Republican newspaper in the country, called upon the managers of the Amendment to make it broad enough to enfranchise all who were then disfranchised, adding that, if they launched "a onesided and partisan measure, look-

[6] Cf. editorial in the Nation, August 13, 1868.

[7] The word politician is here used, not in any opprobrious sense, but as describing men who had no particular theories as to the nature of government or the rights of man, but who were laboring for a certain, concrete object, fraught with definite, practical results.

ing to the enfranchisement of the Blacks alone," it would encounter a resistance too formidable to be overcome.[8] How far the politician could be induced to broaden the Amendment in deference to the views of the universal suffragists, or humanitarians, in his own party, would largely depend on the extent to which he was able to control the situation without their direct assistance. The Fifteenth Amendment was to emerge from the struggle of these four partly cooperating, partly opposing influences, its character determined through the process of equilibration between the diverse forces.

The debates in Congress over the proposed suffrage amendment centered around the forms reported to their respective houses by the Senate and House Judiciary Committees. The House committee directed their attention to remedying the evil of which the principal complaint was made, viz., that in some States men were deprived of the privilege of voting on account of their race, color, or previous condition, and on January 11, 1869, they reported a joint resolution proposing to amend the Constitution, the first section of which was as follows: "The right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of the race, color, or previous condition of slavery of any citizen or class of citizens of the United States."[9]

This proposition was not sufficiently broad to meet the views of the universal suffragists. On January 25 the entire Ohio delegation in the House held a caucus at which the decision was reached to throw the weight of the delegation toward the adoption of a universal suffrage amendment to the Constitution.[10] This delegation became the nucleus of the forces in the House which were endeavoring to secure a broader amendment than the Judiciary Committee had reported. The form of amendment which they

[8] November 13, 1868. Editorial under the caption, "Nationalizing the Right of Suffrage."
[9] Globe, 40th Cong., 3d sess., p. 286.
[10] Washington dispatch to Baltimore American, January 26, 1869.

desired to have substituted for the committee report was one prohibiting any State from denying to any citizen of the United States legally residing in that State the right to vote at any election except on the grounds of sex, minority, insanity, crime, and rebellion.[11] This would have meant, at least in the North, practically universal manhood suffrage. It was advocated on the ground that unless the amendment were made broad the time would come when it would have to be looked into and repaired.[12] The language should be made sufficiently comprehensive not to require amending again when, in a short time, some other injustice, not based on race, color, or previous condition, should grow up among the people.[13]

The argument was put forth, moreover, that colored persons ought not to be set above every other class of citizens in America by amending the Constitution exclusively in their interest to the neglect of equal protection of white citizens. An amendment like that reported by the committee would sweep away that equality of the law upon which American institutions were founded.[14] The claim was made that a universal suffrage amendment would form the capstone in the great temple of American freedom, would consummate the important work of regenerating the country, and would assure the peace and prosperity of the whole nation.[15]

It was pointed out, however, that both the amendment reported by the committee and that advocated by the universal suffragists deferred to some extent to the states' rights sentiment of the local autonomists, and were therefore defective from the nationalistic standpoint. Both of them circumscribed the control of the States over the subject, but did not define the right of suffrage affirmatively. The ultranationalists argued that the whole plan of attempting to impose limitations upon state authority in relation

[11] Globe, 40th Cong., 3d sess., p. 638.
[12] Ibid., Appendix, p. 130.
[13] Cullom of Illinois, Globe, 40th Cong., 3d sess., p. 652.
[14] Bingham of Ohio, ibid., p. 1427.
[15] Ward of New York, Globe, 40th Cong., 3d sess., p. 24.

to suffrage would prove inadequate. There was no correct mode except for the National Government to take under its protection the whole subject of citizenship and suffrage by means of a constitutional amendment declaring the right of every sane adult male citizen of the Republic, not guilty of infamous crime, forever to enjoy the right to vote for every officer to be elected under the state or national governments.[16] The most elementary principles of government and the plainest dictates of logic required that the Amendment should embody a "Federal definition of Federal electorship."[17]

Opposed to the contentions of the universal suffragists and the nationalists was the argument, based on expediency and deference to states' rights, that a broad proposition would array against itself so many peculiarities of the various States that it could not be ratified. To this argument the politicians also lent their support, alleging that if the Amendment were confined to remedying the one great and crying evil of race disfranchisement it would be stronger before the people.[18] A number of preliminary votes taken showed that the latitudinarians were able to muster only about one third of the House, and finally, on January 30, the amendment as reported by the Judiciary Committee was passed by a vote of 150 to 42.[19]

In the meantime, on January 15, the Judiciary Committee of the Senate had reported to that body a proposed amendment, the first section of which was as follows: "The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or by any State, on account of race, color, or previous condition of servitude."[20]

This proposition was attacked by the universal suffragists, or humanitarians, in the Senate on the ground that if

[16] Globe, 40th Cong., 3d sess., p. 1226.
[17] Shellabarger of Ohio, Globe, 40th Cong., 3d sess., Appendix, p. 98.
[18] Boutwell and Butler of Massachusetts, Globe, 40th Cong., 3d sess., pp. 725–7.
[19] House Journal, 40th Cong., 3d sess., p. 237.
[20] Globe, 40th Cong., 3d sess., p. 379.

the national will was to be invoked for amending the Constitution, it should be done in the name of humanity, not of a race. There was no source from which any class could derive the right to monopolize the elective franchise.[21] It was futile to resist the overwhelming current of public opinion and the irresistible drift of modern civilization toward the great characteristic of the age—universal suffrage.[22] In no way could individual liberty be so fully secured and the harmonious working of all the elements of our politics and society be so effectually sustained as by the establishment of universal suffrage in its broadest and completest sense. If it were admitted that any might be shut out from equal political rights, then by parity of reasoning all might be shut out, and monarchy would be the result.[23] Moreover, the logic of the American form of government led inevitably to universal and impartial suffrage. The government was based upon the theory that the sovereign power belongs to all the people. Since the right of self-government is inherent in manhood, each individual should have an equal share of political power.[24] Hence, the law of the Constitution should clearly define the power that all citizens should have in their own hands to maintain and defend those inherent rights to preserve which governments were ordained among men.[25]

The humanitarian principle here appeared as an offshoot of the old doctrine of inalienable, natural rights, like the fossil of a former mould of thought still embedded in the popular mind. The logical limit of their theory was that the right to vote inhered in every human being. In practice, however, they conceded that this was an unattainable ideal, for they admitted the necessity of qualifications as to age and residence. They explained these exceptions,

[21] Globe, 40th Cong., 3d sess., p. 710.
[22] Ibid., pp. 709, 862, 981.
[23] Ibid., pp. 982–3.
[24] Ibid., p. 861.
[25] Globe, 40th Cong., 3d sess., p. 710. To carry out these views to their logical conclusion would require that women also be admitted to the suffrage, but at this result most of the humanitarians balked.

however, on the ground that, although a person were not authorized for the time being to exercise the right of suffrage, yet the right in some mysterious way still inhered in him. "Dormitur aliquando jus, sed moritur nunquam." But the practical answer to this was, of course, that until he were authorized to exercise the right, he had, in the view of the law, no right at all. So that however undisputed the right might be in the realms of ideality, as soon as it was admitted that exceptions might be made the whole theory practically broke down.

In opposition to the views of the humanitarians the point was made that practical experience in France and elsewhere had demonstrated that universal suffrage gives no security for the preservation of civil liberty. The legitimate object of all government, it was conceded, is the greatest good of the whole people, but it did not follow that this object could be attained by vesting political power in every member of the community. The basis of all government was admitted to be the consent of the governed, and the powers of government are therefore intrusted, most safely for the benefit of all, to the people at large. But this, like all general propositions, was subject to exceptions, and was dependent for its practical application upon the condition of the community to which it is applied.[26]

From the nationalistic point of view, attention was called to a strange anomaly which existed in the Constitution of the United States. While to all other properly constituted governments in the world belonged the faculty of prescribing the qualifications of voters, it was a very singular fact that no such faculty pertained to the Government of the United States. In this respect the general Government was subject entirely to the action of the States. This was anomalous because the power to regulate suffrage ought to belong to the government which is to be affected by it.[27]

The determination of this question was alleged to be

[26] Globe, 40th Cong., 3d sess., p. 1012, and Appendix, p. 165. Cf. also editorial in New York World, November 14, 1868, p. 6.
[27] Globe, 40th Cong., 3d sess., p. 985.

really dependent upon the further question as to whether the federal or the state government was sovereign. To allow States to determine who of the citizens of the United States should exercise political power would be yielding to them the most essential and vital attribute of sovereignty.[28] Not only because the United States was sovereign, but also in order that it might remain so, was it important that it should have the power of creating voters. The possession of this power would enable the central Government to stand as the champion of the individual and to enforce the guarantees of the Constitution against the so-called sovereignty of the States. Unless that power be enforced by the central Government, that Government would fail of the object of its institution, and would be subject to encroachment by the States; for, when government fails to protect the individual in any of his rights, it forfeits to the degree of that failure its claim upon his allegiance and support.[29]

The last mentioned statement indicates the connection between the views of the nationalists and those of the humanitarians. Strictly speaking, it would seem to be immaterial from the nationalistic point of view whether suffrage were restricted or enlarged, but in practice it was intimated that the national consciousness would receive its greatest stimulus and the power of the National Government would consequently rise to its greatest height only when the nation should directly assert its power and give to every citizen the right to vote.

In order to effect this object the opinion was expressed that no mere prohibition on the States would be sufficient. There ought to be placed in the Constitution a grand affirmative proposition containing a national guarantee of the right of suffrage. In pursuance of this design, and as embodying the views of both the nationalists and the humanitarians, the following substitute was offered for the first section of the amendment proposed by the Judiciary Committee: "All male citizens of the United States, residents of

[28] Globe, 40th Cong., 3d sess., p. 862.
[29] Globe, 40th Cong., 3d sess., p. 984.

the several States . . . , of the age of twenty-one years and upward, shall be entitled to an equal vote in all elections in the State wherein they shall reside; the period of such residence as a qualification for voting to be decided by each State, except such citizens as shall engage in rebellion, or be convicted of infamous crime." This proposition was lost by a vote of 9 to 35.[30]

Some of the nationalists were opposed to placing in the Constitution an inflexible provision on the subject of suffrage, for, they argued, unless made in strict harmony with the spirit and genius of our institutions, it would, from the difficulty of repealing it, produce a tendency toward revolution.[31] The nation ought not to bind itself hand and foot for all coming time to any one rule on the subject, and, in order to avoid this difficulty, the following form of amendment was offered: "Congress shall have power to abolish or modify any restrictions upon the right to vote or hold office prescribed by the constitution or laws of any State."[32]

This proposition was based upon the theory that law is an organic growth, changing with the shifting conditions of time and place, and therefore it ought not to be petrified into an arbitrary rule, invariable in its application to every locality and to every period of time. The war and its consequences had brought the negro into overshadowing prominence, but the feeling was expressed that, in amending the Constitution, the possibilities of the future ought to be taken into consideration. There ought to be some way of providing against contingencies which might arise other than by the cumbrous method of constitutional amendment.[33]

Although this form of amendment possessed to a certain extent the advantages of elasticity and adaptability to time and condition, yet it was flexible in only one direction. Under it Congress might enlarge the area of suffrage to any

[30] Senate Journal, 40th Cong., 3d sess., p. 226.
[31] Globe, 40th Cong., 3d sess., p. 670. An element here overlooked was the potent agency of the courts in depriving constitutional provisions of their rigidity, and in moulding them by construction into harmony with our institutions.
[32] Globe, 40th Cong., 3d sess., p. 226.
[33] Globe, 40th Cong., 3d sess., p. 901.

extent, but would be incapable of placing any restrictions upon an unduly expanded electorate. Its chief defect was, however, that it laid the subject open to too many changes, dependent upon the political complexion of the majority in Congress. It was lost by a vote of 6 to 38.[34]

The defeat of both of the nationalistic propositions seemed to indicate that those who desired such an amendment would not be able to impress their views upon its final form. The difficulties in the way of such a proposition were very great. Those who argued that since all the other well-constituted governments had the power to make their own voters, therefore ours ought to have it, overlooked the fact that the difference between our form of government and that of other countries might make a different rule of suffrage not only proper but necessary. A uniform rule of suffrage was not likely to be equally adapted to all parts of a federal republic varying greatly as to local conditions. The reasons which had brought the Convention of 1787 to the conclusion that a uniform rule was impracticable still carried weight in 1869, in spite of the growth of national consciousness.[35] The States were still considered by many the best judges of the circumstances and temper of their own people. It was feared by some that reaction from the extreme states' rights doctrines of secession might go to as dangerous an extreme on the other side.[36] The apprehension was felt that when the thirty-seven distinct bodies of voters should have been melted down into one common mass, deriving their right to vote from the central authority, a monarchy could then be established by a simple and direct process.[37] An argument was put forth to show that the Federal Government ought to be restricted to those delegated powers which are necessary and proper to effect the objects for which it was organized. Among these objects neither uniformity nor universality of suffrage was contemplated.[38]

[34] Globe, 40th Cong., 3d sess., p. 999.
[35] Cf. Elliott's Debates, Vol. V, pp. 385–8.
[36] Globe, 40th Cong., 3d sess., p. 859.
[37] New York World, November 14, 1868, p. 6.
[38] Globe, 40th Cong., 3d sess., Appendix, p. 166.

The best conceived attack made by the local autonomists upon the project for a national suffrage amendment was based upon the nature of law in general and its relation to public opinion. It was a timely protest against the exaggerated confidence which was then widely entertained in the power and efficiency of a legislative fiat to change conditions and eradicate so-called popular prejudices. This, it was pointed out, was the reverse of the true law-making process. Organized society ought not to stand in loco parentis over the individual. The consent of the individual must not be anticipated or presupposed, enacted into law, and then enforced. It was not in the nature of human society to advance the popular operation of institutions out of harmony with the voice of the people. The limitations of written law were obvious, but there was no reversing a principle when it had become one of the unwritten laws of the social constitution. When the public mind had arrived at the recognition of a principle, it at once became the law of society. The decision of the popular mind was far stronger than a constitutional amendment, and could alone give it vitality.[89]

From these considerations conclusions were deduced in harmony with the position of the local autonomists. The declaration was made that before any amendment was proposed there ought to be a general expression of the will of the people favorable to it in the suffrage provisions of the various state constitutions. When reformations come from the individual through the State to the general Government, they are likely to become salutary and permanent. If, on the contrary, they begin with the Government and are extended by the authority of the nation over the individual, they reverse the true order of reform. The action of Congress ought not to be the initiation but the termination of

[89] Globe, 40th Cong., 3d sess., Appendix, pp. 194–5. It should be noted that this view, if carried to its logical conclusion, would preclude all enacted law as useless and unnecessary. It overlooked the power of the law to eliminate generally condemned evils, and to bring backward elements in the body politic up to the general level of social advancement.

the process. If the measure was not clearly the will of the people, it ought not to be forced upon them. If it was clearly the will of the people, it would at once pass into the state constitutions, and thus render entirely unnecessary any national provision on the subject.[40]

Opposed in many respects to all three of the other factions, but especially to the local autonomists, were the politicians, who were laboring for the accomplishment of one specific object, namely, the practical enforcement of the right of the negro to vote. They deprecated the complication of this definite issue by the introduction of irrelevant matters. The ponderous machinery of constitution-amending ought not to be set in motion for the purpose of remedying non-existent and imaginary evils, but the change in the law should reach only so far as the evil complained of extended, and should not project beyond that into theoretical amendments.[41] In order to confine the matter to this particular object, Howard of Michigan moved to substitute the following words for the first section of the amendment proposed by the Judiciary Committee: "Citizens of the United States of African descent shall have the same right to vote and hold office as other citizens."[42]

In urging this amendment, Howard said: "Why not come out plainly and frankly to the world and say what we mean, and not endeavor to darken counsel with words without knowledge, by circumlocution, by concealing or endeavoring to conceal, the real thing which we aim at? Give us, then, the colored man, for that and that only is the object that is now before us. The sole object of this whole proceeding is to impart by a constitutional amendment to the colored man the ordinary right of citizens of the United States."[43]

The form of amendment proposed by Howard met the approval not only of those who desired an affirmative proposition referring to the Africans alone, but also of the sena-

[40] Globe, 40th Cong., 3d sess., Appendix, pp. 195–6.
[41] Globe, 40th Cong., 3d sess., pp. 1008, 1309.
[42] Globe, 40th Cong., 3d sess., p. 828.
[43] Globe, 40th Cong., 3d sess., p. 985.

tors from the Pacific Coast, since it eliminated the awkward complication of Chinese suffrage, which might be involved in the amendment proposed by the committee.[44] On the other hand, it met strong opposition from those who were willing to support a suffrage amendment, but thought it unwise to confine it to one race. They declared that if the question were important enough for the national will to be invoked in adjusting the fundamental law, it was an outrage upon the good sense of a country, made up of the descendants of all nations, to impose upon it an amendment of that kind.[45] The opposition to the Howard amendment was too great to be overcome, and it was lost by a vote of 16 to 35.[46]

Thus the forces of the humanitarians, the nationalists, the local autonomists, and the politicians stood out against each other, none completely master of the situation, none fully able to impress their peculiar views upon the form of the amendment. This deadlock was temporarily broken by an unpremeditated coalition between the humanitarians and the politicians. An intimation was thrown out by the humanitarians that they would be content with a prohibition upon the States against the imposition of the five principal tests by which persons were or had been excluded from the suffrage in this and other countries, viz., race, poverty, religion, nativity, and illiteracy.[47] At the same time the politicians were becoming uneasy for fear that, if the committee amendment, which prohibited discrimination only on grounds of race, color, and previous condition, should be adopted, the Southern States might still be able to disfranchise most of the negroes by the imposition of educational and property tests.[48] Hence, the politicians assumed the role of quasi-humanitarians and, in combination with the humanitarians proper, carried through the Senate, by a vote of 31 to 27, an

[44] Ibid., pp. 863, 1008, 1309.
[45] Ibid., pp. 1008–13.
[46] Senate Journal, 40th Cong., 3d sess., p. 222.
[47] Globe, 40th Cong., 3d sess., p. 1013.
[48] See Washington dispatch to Baltimore Sun, February 5, 1869; and cf. Harper's Weekly, February 27, 1869, p. 131.

amendment prohibiting the imposition of tests on the grounds of "race, color, nativity, property, education, or creed."[49]

This action of the Senate aroused a storm of protest throughout the country, especially in regard to the prohibition of educational tests.[50] The amendment was rejected by the House, and there ensued between the two houses a wrangle in which the instability of the coalition between the humanitarians and the quasi-humanitarians was shown by the action of the Senate in deserting the coalition amendment, and then passing a resolution similar to the final form of the Amendment, except that it was designed to guarantee the right to hold office as well as the right to vote.[51] With exasperating variability, the House in turn disagreed, and the differences between the two branches had to be submitted to committees of conference, who reported an amendment in the exact form which it finally assumed. Their report was immediately agreed to in the House by a vote of 144 to 44,[52] but was violently attacked by many senators, who were incensed at the action of the committees in omitting the words "hold office." The consideration, however, that this was probably the best form obtainable, and that a refusal to accept it would endanger the success of the whole measure,[53] finally rallied to its support the various factions who favored a suffrage amendment of some kind, and on February 26, 1869, it was agreed to by a vote of 39 to 13.[54]

Thus the Fifteenth Amendment passed Congress after a struggle which finally resulted in the agreement of diverse

[49] Senate Journal, 40th Cong., 3d sess., p. 227.

[50] See, for example, editorial in the New York Times, February 15, 1869; The Nation, February 18, 1869, p. 126; Harper's Weekly, February 27, 1869, p. 131; and Wendell Phillips in Anti-Slavery Standard, February 20, 1869.

[51] Senate Journal, 40th Cong., 3d sess., p. 293.

[52] House Journal, 40th Cong., 3d sess., p. 449.

[53] Globe, 40th Cong., 3d sess., pp. 1626–9.

[54] Senate Journal, 40th Cong., 3d sess., p. 361. As finally passed it was in the following form:—

"Sect. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Sect. 2. The Congress shall have power to enforce this article by appropriate legislation."

forces upon a compromise. These forces were primarily principles, rather than men or groups of men. They were not always separable except in thought, for the same senator or representative was often influenced by more than one of them at the same time. The ideal of the humanitarian principle was the investment of all human beings with political rights. From this point of view, the location of the power to make voters, whether in the States or in the general Government, was immaterial. The humanitarian principle, in fact, logically required the enlargement of the sphere of individual liberty at the expense of both the state and the general government. The ideal of the nationalistic principle was the complete control of the suffrage by the National Government. From this point of view it was, strictly speaking, a matter of indifference whether the right to vote was vested in all human beings or restricted to a few. The local autonomic principle was diametrically opposed to the nationalistic principle, in that it required the retention by the States of full power over the suffrage; but here, also, the extension or the restriction of the area of suffrage was non-essential. These three views rested upon well defined theories, and those who held them were, in a certain sense, doctrinaires. The fourth view, that of the politicians, which looked forward to the definite, concrete object of negro enfranchisement, was based upon no general theory of government or of human rights, except in so far as it was affected with a quasi-humanitarianism.

If, in the light of these distinctions, we examine the Amendment, as finally passed, we find that it is a compromise between the four forces, in which each has gained something and conceded something. In so far as the Amendment failed to enfranchise everybody, it fell short from the humanitarian point of view. The fact, however, that it prohibited discrimination on grounds which in this country had operated to exclude a greater number of persons from the polls than all others combined was a long stride toward the humanitarian ideal. From the standpoint of government, as distinguished from liberty, the Amendment de-

prived both the National Government and the state governments of a certain amount of power over the suffrage which they had previously possessed. In this respect, therefore, the Amendment represented a breaking away from both the local autonomic and the nationalistic principles. The fact, however, that the national legislature was authorized to enforce the prohibition upon the States carried the national power over suffrage into a sphere whither it had not previously extended. In an absolute sense, the Amendment was an entire loss from the states' rights point of view. Yet the impress of the local autonomic principle upon the Amendment is seen in the fact that it does not disturb the source of voter-making power in the States, and does not diminish that power except in certain express particulars. From the standpoint of the politician, the Amendment was a very considerable gain, inasmuch as it prohibited the three most obvious and easily administered tests by which the negro might be excluded from the suffrage. It was not entirely satisfactory to the politician, however, because it did not directly and specifically guarantee the African's right to vote. As between the doctrinaires on the one hand and the practical politicians on the other, the Amendment was also a compromise. Of the three grounds of discrimination prohibited by the Amendment, two—race and color—are of general application, while the other—previous condition of servitude—is in this country applicable to the negro alone. The Amendment, therefore, contains a specific reference to the negro, while, at the same time, it rests to a certain extent upon a general principle.[55]

[55] In tracing the formation of the Amendment we have not noticed the second section, inasmuch as there was never any difference of opinion among the friends of the measure, either as to the desirability of including it in the Amendment or as to the form which it should assume.

CHAPTER III.

Contemporary Congressional Interpretation.

Having traced the process by which the Amendment reached its final form, we now proceed to inquire what effect and legal intendment Congress attached to the particular phraseology of the Amendment as finally passed, and what results were expected to flow from its adoption.

The peculiar abruptness with which the Amendment brings into the foreground the words "The right of citizens . . . to vote" was strongly objected to by those who did not wish even indirectly to indicate that any one had the right to vote until the law gave him that right. The language was thought to imply that there was a right of suffrage which inhered in the citizen as a mere natural right independently of any constitutional or legal grant to that effect.[1] Others thought it desirable that the Amendment should imply the inherent right of the citizen to vote. There ought to be some substantial foundation upon which the right of suffrage should rest, and the Amendment, it was said, very correctly made this basis citizenship.[2] The implication of a preexistent, duly qualified electorate was allowed to remain in the Amendment, probably in deference to the views of those who thought that the right to vote was among the privileges and immunities protected by the Fourteenth Amendment.[3] This implication has given some color to the view that the prohibition which the Amendment lays upon the States cannot be regarded as a limitation

[1] Drake of Missouri, Globe, 40th Cong., 3d sess., pp. 999–1000.
[2] Fowler of Tennessee, Globe, 40th Cong., 3d sess., p. 1303.
[3] The practical object in view in confining the protection of the right to vote to citizens was probably to allow the States to discriminate against unnaturalized persons. This would exclude the Chinese for the time being, but a bill was then pending to strike the word "white" from the naturalization laws. See Globe, 40th Cong., 3d sess., p. 1030.

upon the mode in which the States shall exercise the power to grant the right to vote in the first instance, but must be construed merely as a restriction on their power to revoke such grant in a discriminatory way.[4]

It will be noticed that the Amendment fails to specify the character of the elections at which the right in question is to be exercised. The second section of the Fourteenth Amendment was at one stage in its formation similarly indefinite.[5] Doubt arose as to whether, in this form, it was not broad enough to include local elections for school directors. Since the object was to embrace only general political elections,[6] it was amended so as to specify particularly what elections were referred to, and in this form was finally passed.[7]

With this precedent before them, the failure of the framers of the Fifteenth Amendment to insert any words limiting the number and kind of elections referred to indicated that they intended it to apply to all elections held under the authority of the constitution and laws of the United States or of the States. It was, in fact, well understood in Congress at the time the Amendment was under consideration that it applied to any election, from that for presidential elector down to the most petty election for a justice of the peace or a fence-viewer.[8]

The meaning of the term "abridged," as used in the Fifteenth Amendment, was not discussed at the time that measure was under consideration. The same word in the second section of the Fourteenth Amendment was thought by some to convey an erroneous idea. The right to vote was held to be a unit, as indivisible and incapable of abridgment as a mathematical point. A man must possess the right to vote either in its entirety or not at all.[9] This

[4] Cf. Albion W. Tourgee in the Forum, March, 1890, pp. 78–91.
[5] Globe, 39th Cong., 1st sess., p. 2286.
[6] Ibid., p. 3010.
[7] Ibid., p. 3029.
[8] See remarks of Vickers of Maryland, Globe, 40th Cong., 3d sess., p. 905.
[9] Howard of Michigan, Globe, 39th Cong., 1st sess., p. 3039.

reasoning would seem to be correct from the standpoint of any particular individual in respect to his right in connection with any particular election. But it merely shows that the Amendment was intended to apply to the right of suffrage in general, or to secure this right to classes as well as to individuals. The more usually accepted view in regard to the meaning of this word was that it was designed to prevent a State from imposing less easily attained qualifications for voting on one class of citizens than on another.[10]

The language of the Fifteenth Amendment indicates that it is intended to protect the right of citizens to vote against the hostile action not only of the States but also of the United States. There was, however, no preexistent condition supposed to call for remedy in the case of the United States as there was in that of the States. Wherever the Federal Government had direct control over the qualifications of voters, all racial distinctions had already been obliterated. To many, therefore, this restriction upon the power of the United States seemed uncalled for, and at one stage of the proceedings the House passed a proposition in which the words "by the United States" were omitted.[11] In the Senate, Howard of Michigan expressed the view that to lay such a prohibition upon the United States was not only unnecessary but positively vicious. This state of affairs would result from the universality of the substantive right which the prohibition was designed to protect. The right of the citizens of the United States to vote was, of course, a right attaching to citizens in the States as well as to citizens in the District of Columbia and the Territories. Accordingly, when the Amendment went on to provide that such right should not be denied by the United States, it prohibited the United States from denying the right to vote in the States as well as in the Territories. As the United States had never possessed the power to deny the right to vote in the States, the enactment of a prohibition in this regard was absolute surplusage. But,

[10] Cf. Globe, 39th Cong., 1st sess., pp. 353, 2767.
[11] House Journal, 40th Cong., 3d sess., p. 409.

Howard went on to argue, to deny to the United States the power to restrict the right of suffrage in the States on account of race, color, or previous condition, carried with it the unavoidable implication that the United States was invested with the power to deny the right to vote in the States on other grounds.[12]

This argument, however, is not convincing. The Amendment might have been more explicit if it had provided that the right to vote in the Territories and in the District of Columbia should not be abridged by the United States, and that the right to vote in each State should not be abridged by that State. But this is so clearly implied that it does not seem necessary to express it. Howard's argument would support equally well the contention that the Amendment authorized a State to prescribe qualifications for voting in another State or in a Territory. The Amendment does not disturb the line of demarcation between the respective voter-making powers of the United States and of the States, but merely qualifies the powers of these governments over the suffrage when operating within their respective spheres.

The grounds which the Amendment prohibits the United States and the States from setting up as disqualifications for voting are race, color, and previous condition of servitude. It might be inferred that the Amendment was designed to remedy existing evils supposed to arise from actual disqualification on these grounds. According to the constitutions and laws of sixteen States in 1869, negroes were excluded from the suffrage indirectly by the use of the word "white" as one of the qualifications of voters. Two of these States also expressly excluded negroes and mulattoes, and one expressly excluded Chinese.[13] There were, consequently, persons in some States who were excluded from the suffrage on account of race or color. There might have been some room for the supposition that exclusion on these accounts was merely a convenient and generally accurate means of differentiation between those

[12] Globe, 40th Cong., 3d sess., p. 1304.
[13] H. Rept. No. 3, 41st Cong., 2d sess., p. 91.

who were considered fit and those who were considered unfit to participate in the elective franchise, while the real basis and ground of exclusion was some less obvious but deeper-seated difference between persons than mere race or color.

However this might be, the Amendment as framed was founded upon a supposed distinction between races and colors of persons capable of being legally determined. The indefiniteness of these words as originally used in the Blaine amendment had not escaped the attention of Congress. The rather pertinent question had been asked, "What is a race of men?" It was pointed out that writers on the subject varied all the way from four or five up to nearly a thousand as the number of races of mankind. Neither was there any constitutional standard of color by which to test state laws upon the subject. The ethnological condition of things in this country prevented these words from having any very distinct meaning.[14]

When the same words in the Fifteenth Amendment came under consideration, Senator Fessenden questioned whether there was any such received division and enumeration of races or colors as that no doubt could be cast upon its meaning.[15] Some held the view that the ex-slaves were of no specific color and of no particular race, and that, consequently, the use of these words in the Amendment would furnish no protection to the slave class.[16] As to the application of these words to Anglo-Saxons and to the various nationalities of Europeans, there was no convergence of opinion.[17] The only classes of men to which it was generally understood that the words "race or color" applied were negroes, Chinese, and Indians.[18]

[14] Broomall of Pennsylvania, Cong. Globe, 39th Cong., 1st sess., p. 433.

[15] Globe, 40th Cong., 3d sess., p. 938.

[16] Boutwell of Massachusetts, Globe, 40th Cong., 3d sess., p. 1225.

[17] For opinions on this point, see Globe, 39th Cong., 1st sess., pp. 354, 433; ibid., 40th Cong., 3d sess., pp. 938, 1303, 1427; and editorial in New York World, March 7, 1869.

[18] Cf. National Intelligencer, March 4, 1869 (editorial). Thaddeus Stevens had admitted in 1866 that if the laws of California ex-

The bearing of the Amendment upon Chinese suffrage produced an imbroglio between the politicians, the humanitarians, and the local autonomists. From the standpoint of the politicians, the introduction of the Chinese issue was an entirely uncalled for complication. But the humanitarians could not consistently withdraw from their position merely because it involved the possible extension of suffrage to a few thousand Chinamen on the Pacific Coast. When, said Senator Trumbull of Illinois, we attempt to amend the Constitution so as to carry out the great principle of human rights, it seems very inconsistent "to declare that the Hottentots and cannibals from Africa shall have the right to vote" and at the same time to exclude the citizens of the oldest empire on earth.[19]

The local autonomists deprecated the imposition of the Chinese vote upon the people of the Pacific Coast without their consent on the ground that the latter were the best judges of their own local conditions and needs.[20] The senators from the Pacific Coast States were broad humanitarians as far as the negro was concerned, but, in the language of the New York Herald, "when all at once the Chinaman loomed up, they discovered a shade of color and a peculiarity of race they had hitherto entirely overlooked."[21] They declared that to deprive the Pacific Coast States of the power to withhold suffrage from Chinese would hand over that section of the country to political degradation and moral pollution.[22] As their votes, however, were not necessary to carry the Amendment through, no concession was made to them. The attitude of the House in regard to the Chinese imbroglio was indicated by the refusal of that body, by a vote of 42 to 106, to suspend the rules for the introduction of the following resolution: "Resolved, that in

cluded Chinese because they were Chinese, they would fall within the operation of the Blaine amendment. See Globe, 39th Cong., 1st sess., p. 376.

[19] Globe, 40th Cong., 3d sess., p. 1036.

[20] Hendricks of Indiana, Globe, 40th Cong., 3d sess., p. 990.

[21] February 10, 1869, p. 3.

[22] Williams and Corbett of Oregon, Globe, 40th Cong., 3d sess., pp. 901, 939-40, 1035.

passing the . . . Fifteenth Amendment . . . this House never intended that Chinese or Mongolians should become voters."[23]

The third ground of discrimination which is prohibited by the Amendment, viz., previous condition of servitude, was not intended to remedy a preexistent evil, for no case has been discovered in which any State had excluded persons from the suffrage on this ground. It was not included in the Blaine amendment because it was thought unnecessary. Thaddeus Stevens stated that there never was a court in the United States which would not have admitted that, if one held as a slave could prove himself to be white, he was that instant free. From this he drew the inference that any exclusion or discrimination on account of previous condition of servitude must be on account of race or color. Hence, the express inclusion of the phrase "previous condition of servitude" was entirely superfluous.[24]

The same view was held by Bingham of Ohio in respect to the Fifteenth Amendment. Servitude, he said, was embraced in the words "race or color," and the legal effect of the Amendment would not be changed by omitting direct reference to it.[25] The view that finally prevailed, however, was that since the ex-slaves were of various races and colors, direct reference must be made to servitude in order to prevent the States from providing by law that persons who had been held in slavery, or whose mothers had been slaves, should not vote.[26]

It will be noticed that the Amendment as adopted does not state specifically whether the race, color, and previous condition referred to are to be considered as attaching to the prospective voter, or to some other person or persons related to him by way of ancestry or otherwise. If these attributes are to be construed as belonging only to the prospective voter, there would seem to be nothing to prevent a

[23] Globe, 41st Cong., 1st sess., p. 202.
[24] Globe, 39th Cong., 1st sess., p. 537.
[25] Globe, 40th Cong., 3d sess., p. 1225.
[26] Ibid.

State from disfranchising a person on account of the race, color, or previous condition of his ancestors. It was doubtless in order to provide for this contingency that the House, at one stage of the proceedings, passed an amendment designed to prohibit discrimination on account of the race, color, or previous condition "of any citizen or class of citizens of the United States."[27] In the Senate these qualifying words were thought unnecessary, because the attributes named apply by implication both to the citizen himself and to the class of which he is a member.[28] But this construction, it was pointed out, was founded upon a misconception. The right to vote was a right which could not properly be predicated of masses of people, but only of the individual. Hence, a particular individual's right to vote could not be affected by the right of any other citizen or class of citizens.[29] The result is that, as actually adopted, the Amendment cannot be construed so as to include the attributes of a would-be voter's ancestors as well as his own without involving an incorrect theory of a legal right.

The form in which the Amendment was moulded gave rise to a widespread belief that it would be in large measure evaded. We have seen that, chiefly on account of the strength of the states' rights feeling, the framers were not able to embody in it an affirmative definition of electorship.[30] Had they been able to do so, it would of course have taken from the States the jurisdiction which they previously possessed over the qualifications of voters. Under the Amendment as actually passed, however, the power still remained with the States to prescribe all qualifications which they had previously been competent to prescribe, with the exception of the three named in the Amendment. It was known that the Southern States would avail themselves of any loophole in order to disfranchise the negroes.[31] Many feared that

[27] Globe, 40th Cong., 3d sess., p. 286; House Journal, 40th Cong., 3d sess., p. 237; above, p. 23.
[28] Stewart of Nevada, Globe, 40th Cong., 3d sess., p. 1000.
[29] Ibid.
[30] Above, Chapter II.
[31] Globe, 40th Cong., 3d sess., Appendix, p. 97.

the form and language of the Amendment would furnish them abundant opportunity to attain this object. This apprehension was based upon an interpretation of the Amendment according to the principle, "expressio unius est exclusio alterius." To provide in the Constitution that the States should not disfranchise for the three specified causes was impliedly to authorize them to disfranchise for all other conceivable causes. Thus the Amendment would operate as a virtual legalization of disfranchisement. Under it an aristocracy of property, of intellect, or of sect might be established.[32] Although the animus of the Amendment was a desire to protect and enfranchise the colored people, yet it was anticipated that under it nine tenths of them might be prevented from voting by the requirement on the part of the States of intelligence or property qualifications.[33] Senator Morton of Indiana was especially impressed with this defect. He predicted that the Amendment would be practically nullified in the Southern States by the imposition of property or educational tests which would debar forty-nine out of every fifty colored men. He was of opinion, further, that the whole provision might be dodged by providing that colored men should not vote on account of their alleged deficiency in natural intelligence, their incapacity for improvement, and their incompetency to take part in the administration of the government.[34]

Similarly, Williams of Oregon thought that if a State should pass disfranchising legislation not based on any of the three specified grounds it would be valid legislation as far as the Amendment was concerned. He pointed out that under many of the constitutions of the reconstructed States white men were disfranchised for some antecedent acts in their lives, and that the same device might be turned against the negroes. The white people of a State might decide that the negroes were disloyal, or were disturbers of the public peace, and on that account should not be allowed to vote.

[32] Bingham of Ohio, Globe, 40th Cong., 3d sess., p. 722.
[33] Ibid., p. 862.
[34] Ibid., p. 863.

They might provide by law that all persons supporting a certain measure or voting for a certain candidate should be disfranchised. While such a law would apply ostensibly to white and black alike, it might actually result in the disfranchisement of nearly all the colored citizens of the State, and there would be no remedy for that condition under the Amendment.[35]

Conkling of New York also considered the Amendment utterly inadequate and ineffective on account of its omissions. One obvious method by which it could be evaded, he said, was the full power which it allowed any State to provide by law that "disingenuousness of birth" should be deemed a disqualification to exercise the right to vote.[36] The fact that the family life of the Africans was still in a rudimentary state as compared with Anglo-Saxon standards would constitute a line of cleavage between the two races, and would afford an opportunity for the operation of a law applying literally to both but practically to only one. Such a law might be made especially severe by placing the onus probandi on the would-be voter, requiring him to prove his "genuousness" of birth.[37]

These opinions in regard to the inadequacy of the Amendment were apparently based upon the theory that it would be strictly and literally construed by the courts, and its effect confined within the narrowest possible limits. There were others, however, who appeared to base their conclusions as to the efficiency of the Amendment upon the opposite ground, that it would be construed in the light of its spirit and manifest purpose.

The same divergence of opinion had emerged in the interpretation of the language of the Blaine amendment. Those who construed that amendment strictly had supposed that if a State should pass a law excluding negroes for any other ostensible reason than race or color, and should accompany the act by a preamble declaring that such exclusion was not

[35] Globe, 40th Cong., 3d sess., p. 900.
[36] Ibid., p. 1316.
[37] Ibid.

on account of race or color, or even if no reason were given, the Amendment would be defeated.[38] It might also be circumvented, they declared, by a state enactment providing that a man should not vote unless he could read and write, and then making it a penal offense to teach negroes to read or write. Or, a State might make it a prerequisite for voting that a man have a settled occupation, and then declare that the negroes had no regular occupation.[39]

The broad constructionists, on the other hand, had declared that the instant a State said a man of a certain race should not vote because he was ignorant, but that a man of another race who was just as ignorant might vote, the exclusion would be on account of race merely.[40] On similar grounds, Thaddeus Stevens had intimated that if a State should provide by law that no negro could hold real estate, and should then prescribe the possession of an interest in land as a prerequisite for voting, it would be a disqualification of the negro on account of race or color.[41]

As opposed to the arguments of those who maintained that the Fifteenth Amendment would make the Constitution weaker, on account of the powers which it impliedly handed over to the States, Senator Edmunds denied emphatically that it would operate as a legalization of disfranchisement. It was, he declared, entirely inadmissible, from the standpoint of either law or logic, to say that because it is provided that the States shall not deny to anybody the right to vote for a particular reason, it is implied that they may deny it for all other reasons.[42] The attitude of the broad constructionists was illustrated by the answer given by Senator Stewart to the objection raised by Senator Conkling. "Disingenuousness of birth," he said, was clearly included in previous condition of servitude. It was a condition growing out of, and incidental to, slavery. Hence, under any

[38] Rogers of New Jersey, Globe, 39th Cong., 1st sess., p. 358; Ward of New York, ibid., p. 434.
[39] Farnsworth of Illinois, ibid., p. 383.
[40] Conkling of New York, ibid., p. 358.
[41] Globe, 39th Cong., 1st sess., p. 376.
[42] Globe, 40th Cong., 3d sess., p. 1305.

fair judicial construction, the prescription of such a qualification for voting would be nullified by the Amendment.[43]

An omission in the Amendment which received especial condemnation in the Senate was the fact that it did not undertake to protect the right to hold office as well as the right to vote. With this omission it would be a "lame and halting proposition, an outrage upon the good sense of the country, and the declaration of only half of an indivisible truth."[44] It would set up an aristocratic class of office-holders, and would give the negroes only the "husk and shell of the feast of political equality" to which they had been invited, while reserving the substance for the whites.[45] Senator Wilson of Massachusetts was afraid that this result would enable the enemies of negro suffrage to accuse the framers of the Amendment of being actuated not by a sense of justice, but by a love of power; of being willing that the negroes should vote for them, but not for members of their own race.[46]

On the other hand, the opinion was held that to include the right to hold office was entirely unnecessary, inasmuch as that right was undoubtedly a legal consequence of the right to vote.[47] It was regarded as certain that if the black population was elevated to the condition of voters and allowed in this way to participate in the enactment of laws and the regulation of the affairs of the State, they must necessarily be allowed the privilege of holding office, if fit for it in other respects.[48]

The second section of the Amendment, which is modelled on similar sections in the Thirteenth and Fourteenth Amendments, was included because it was thought that without it the power of Congress would not be sufficiently extensive to secure the due enforcement of the primary provision.[49]

[43] Globe, 40th Cong., 3d sess., p. 1317.
[44] Edmunds of Vermont, ibid., p. 1626.
[45] Ibid.
[46] Ibid., p. 1307.
[47] Boutwell and Butler of Massachusetts, ibid., p. 1426.
[48] Howard of Michigan, Globe, 40th Cong., 3d sess., p. 1302.
[49] According to the statement of Senator Reverdy Johnson, the enforcement section was inserted in the Thirteenth Amendment

Those, however, who were opposed to a suffrage amendment of any kind maintained that the inclusion of this section would give Congress complete control over all elections. The power to enforce was held necessarily to imply power over state elections. It would enable Congress to appoint judges of election and to send officers to secure order at the polls, to count the votes, and to decide the result.[50] Thus the second section would become the "last screw in the coffin of American liberty." It would take away from the States all power in regard to every election, federal and state, and consolidate the entire political power of the country in the hands of the general Government. Under it Congress might send "satraps" into every election district in the country, and relieve the States from all further attention to the subject.[51] Moreover, the Amendment contained no definition of "appropriate legislation," but left the meaning of these words to be determined by Congress itself.[52]

As opposed to the view that the second section would confer on Congress almost unlimited power over elections, the opinion was expressed that the Amendment was a simple declaratory resolution, because, although the power was given Congress to enforce it by appropriate legislation, such legislation would always be difficult of execution, and therefore inefficient.[53] It had been thought that the similar section in the Fourteenth Amendment would enable Congress, in case the States should enact laws in conflict with the principles of the Amendment, to correct that legislation by a formal enactment.[54] In reference to the Fifteenth Amendment, it was said that if the States should not feel called

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because the mere declaration of the abolition of slavery would not of itself have given Congress any legislative power in the premises. Globe, 39th Cong., 1st sess., p. 768.

[50] Doolittle of Wisconsin, Globe, 40th Cong., 3d sess., Appendix, p. 151.

[51] Woodward of Pennsylvania, Globe, 41st Cong., 2d sess., p. 255.

[52] Saulsbury of Delaware, Globe, 40th Cong., 3d sess., Appendix, p. 163.

[53] New York Nation, February 18, 1869, p. 124.

[54] Howard of Michigan, Globe, 39th Cong., 1st sess., p. 2768.

upon to carry the Amendment into effect by appropriate legislation, the door would then be open for calling the second section into operation.[55] This statement would seem to imply that, although the power of enforcing the Amendment was a concurrent power between Congress and the States, yet the power of Congress was to remain dormant as long as there existed proper state laws on the subject.

Attention was drawn by Senator Howard to the great defect of the Fifteenth Amendment, namely, that it did not confer upon the colored man the right to vote. He was of opinion, however, that this defect might be partly remedied by the action of Congress under the enforcement section. If any State should divest the colored man of his right to vote, Congress might take steps under this section to correct the error in the state law and restore the right. Thus the right to vote might be imparted to the colored man by direct congressional legislation.[56]

This view was expressed even more strongly by Bingham. The enforcement section, he said, would go far toward remedying the negative character of the Amendment. It would enable Congress to secure uniformity in the qualifications of electors in all the States, for whenever Congress is invested with the power to enforce the limitations of the Constitution, even upon the States, the exercise of the power will be as uniform as the exercise of any affirmative power could possibly be.[57] The idea, however, that the Amendment might be made affirmative in character by means of the enforcement section was not generally concurred in. Jenckes of Rhode Island was not convinced that any such result would be brought about, but thought that, by its negative character, the Amendment would only increase the difficulties in the way of settling the question of suffrage in the various States upon a uniform basis.[58]

The prohibitions of the Fourteenth Amendment are limi-

[55] Axtell of California, Globe, 41st Cong., 2d sess., p. 258.
[56] Globe, 40th Cong., 3d sess., p. 1625.
[57] Ibid., p. 727.
[58] Ibid., p. 728.

tations upon the state governments, while the first ten amendments are restrictions upon the power of the general Government.[59] The Fifteenth Amendment is both, and the enforcement section is operative against both. It was the purpose of the people in adopting the first ten amendments to reserve to themselves and to the States the power to secure the rights enumerated therein against the action of Congress.[60] But security against the action of Congress in contravening the right conferred by the Fifteenth Amendment is committed, by the enforcement section, to Congress itself. This incongruity was apparently not noticed at the time the Amendment was adopted. It was afterwards declared, however, that it would be an "aggravated solecism" to presume that Congress could with deliberation pass a law creating or continuing this prohibited distinction of race or color, and in the same or by some other law punish its officers for executing it.[61] But Congress might provide for the punishment of a subordinate executive officer of the United States who should make such a distinction in spite of the valid laws of Congress. A violation of the Amendment by Congress itself would, of course, be corrected by the courts. The only way in which Congress could enforce the prohibition against itself would be by repealing laws passed in conflict with the Amendment, and this it could of course do independently of the power granted in the enforcement section. The neglect of this phase of the subject in the congressional debates was due to the fact that the attention of both the supporters and the opponents of the measure was focused upon the limitation to be placed upon the power of the state governments.

Thus far in this chapter we have been mainly concerned with the congressional interpretation of particular parts of the Amendment. We shall now consider some of the positions taken in regard to the measure as a whole.

[59] Barron vs. Baltimore, 7 Pet. 243.
[60] United States vs. Hall, Fed. Cas. No. 15282.
[61] Hamilton of Maryland, Globe, 41st Cong., 2d sess., Appendix, p. 354.

An argument of a general character which was put forth against the Amendment was that the expediency of such a measure was not supported by the facts of the situation. In order to justify any amendment to the Constitution the burden of proof rested upon the promoters of the project to show (*a*) the necessity of its being made, arising from evils suffered from its not having been made; (*b*) the non-existence of these evils if the amendment should be made; and (*c*) the fact that these evils were greater than others that might result from the making of the amendment.[62] It was denied that there had been proof of evils resulting from negro disfranchisement, or that the policy of extending suffrage to negroes had been justified by the results. The governments established in some States under that policy were not so successful in protecting person and property, or in promoting the general peace and security of society, as to warrant a measure for making negro suffrage permanent in all the States.[63]

In spite of this condition of affairs, the opinion was expressed that the Amendment was not an experiment to be fairly tried and abandoned if found baneful. It was to be an institution.[64] It rested upon the assumption that negro suffrage was a demonstrated success, and might safely be fixed irreversibly in the Constitution. The trial of negro suffrage ought to be made under existing laws without closing the door against retreat. While the experiment was in progress the law should be left flexible enough for the redress of evils in proportion as they might be disclosed. The wholesale exercise by negroes of the right to vote might prove not very objectionable in some States and calamitous in others. If the Constitution were left as it was, negro suffrage might be abolished or qualified in States where experience did not sanction it, and be left undisturbed in States where it proved satisfactory. It was absurd to put

[62] Saulsbury of Delaware, Globe, 40th Cong., 3d sess., Appendix, p. 165.
[63] Hendricks of Indiana, Globe, 40th Cong., 3d sess., pp. 673, 989.
[64] National Intelligencer, March 4, 1869, p. 2.

the matter in such shape that partial evils could not be corrected without the overthrow of the whole system. To fix the matter irreversibly in the Constitution might cause an attempt in some quarters to counteract its mischiefs by rendering suffrage itself a nullity.[65]

The chief arguments put forth against the Amendment by the local autonomists were based upon the nature of the federal system of government, and the necessity of preventing one part of the system from encroaching upon the other. As a corollary from this general principle, the contention was made that the so-called amendment was beyond the amending power. The scope of this power was held to be limited to the correction of defects which might appear in the practical operations of the Government.[66] An amendment could not grant new powers to the general Government, but it must be incidental to powers already granted,[67] in order that the existing distribution of power between the general Government and the States might be preserved.[68] Any change that extended beyond these general limitations was not an amendment at all, but a revolution and a subversion of the form of government.

The particular feature of the Amendment which was most strongly objected to by the local autonomists was the fact that it applied to state as well as to federal elections. The Amendment was declared to rise far above any mere detail as to whether a negro or a Chinaman should vote. It was not a question as to who should vote, but as to who should make the voter.[69] A State could not maintain a republican form of government unless it had full power to determine who should vote in its own elections.[70] The Amendment ought at least to be confined to those elections in which the whole country in its united capacity was con-

[65] New York World, February 1–3, 1869 (editorials).
[66] Hendricks of Indiana, Globe, 40th Cong., 3d sess., p. 988.
[67] Saulsbury of Delaware, Globe, 40th Cong., 3d sess., Appendix, p. 161.
[68] Buckalew of Pennsylvania, Globe, 40th Cong., 3d sess., p. 1639; Davis of Kentucky, ibid., Appendix, p. 285.
[69] Dixon of Connecticut, ibid., p. 705.
[70] Doolittle of Wisconsin, ibid., Appendix, p. 151.

cerned.[71] Even such nationalists as Hamilton and Story had intimated that federal power over state elections might well be regarded as "an unwarrantable transposition of power and a premeditated engine for the destruction of the State governments."[72] The principle laid down by Marshall in McCulloch vs. Maryland, that "there is a plain repugnance in conferring on one government a power to control the constitutional measures of another," was as applicable to federal control over state elections as to state control over federal institutions.[73] There could be no self-government in a State if any power beyond its control could determine who should exercise the right of suffrage in it; for the power which determines who shall vote in a State indirectly governs the State.[74] Since, for all practical purposes, the voters or political people of a State constitute the State, the principle underlying the Amendment was that three fourths of the States, acting as distinct political communities by way of the amending power, could reach into a co-State and change it; could decree that those who governed it should govern it no longer, or that they should participate in the operation of the government with others against their will.[75] Thus an outside power would dictate not only who should be the voters in a State, but also who should be its lawmakers and what subjects its laws should operate upon. This result would consolidate all power in the central Government and reduce the States to the condition of subject provinces.[76]

The nationalists did not attempt to reply to the objection of the local autonomists that the Amendment applied to purely local elections, in which the general Government could have no concern. Even the Cincinnati Commercial, which was strongly in favor of a suffrage amendment, intimated

[71] Buckalew of Pennsylvania, ibid., p. 1286.
[72] The Federalist, No. 59; Story's Commentaries, sect. 817.
[73] Davis of Kentucky, Globe, 40th Cong., 3d sess., p. 988.
[74] Doolittle of Wisconsin, ibid., Appendix, p. 151.
[75] Buckalew of Pennsylvania, Globe, 40th Cong., 3d sess., p. 1639.
[76] Dixon of Connecticut, ibid., pp. 706–8; Bayard of Delaware, ibid., Appendix, p. 166.

that it would have been content if the Amendment had related only to federal elections.[77] The contention of the nationalists that the general Government ought to have the power to prescribe the qualifications of its own voters in order to be perfectly independent and self-sufficient was not broad enough to justify a federal amendment applying to purely state elections.

To the arguments of the local autonomists in regard to the limits of the amending power, however, the nationalists replied that there could be no question about the power to pass the Amendment, because the amending power was practically unlimited.[78] Inasmuch as the Amendment would leave the voter-making power in the States, modified only in certain particulars, it would not subvert the Government or radically change its form.[79] Ridicule was cast upon the argument that the Amendment would consolidate the Government and reduce the States to provinces. Such a cry of alarm, it was said, would not deceive the people, because the latter had the right to adopt the constitutional method of changing their form of government at will.[80]

The arguments against the Amendment were declared to be the same as those which had been put forth years before in favor of secession. They ignored the fact that the United States was a nation.[81] The bane of the Government in the past had been not centralization, but disintegration.[82] To allow the States unlimited control over the suffrage would endanger the autonomic character of the general Government. The Amendment was in fact a measure of wise consolidation. It trenched upon no right of which a State could justly be jealous. The first essential of a popular national government was the equality of

[77] February 1, 1869 (editorial).
[78] Ward of New York, Globe, 40th Cong., 3d sess., p. 724; Warner of Alabama, ibid., p. 988.
[79] Frelinghuysen of New Jersey, ibid., p. 978.
[80] Cincinnati Commercial, February 1, 1869.
[81] Morton of Indiana, Globe, 40th Cong., 3d sess., p. 990.
[82] Abbott of North Carolina, ibid., p. 981; Ross of Kansas, ibid., p. 984.

its citizens equally secured. No nation could be truly republican which denied to any portion of its citizens equal laws and equal rights. The adoption of the Amendment would be a declaration of the people that they perceived the legitimate conditions of a truly national union.[83]

[83] Harper's Weekly, February 13, 1869, p. 99.

CHAPTER IV.

The Amendment Before the States.

On February 27, 1869, the Amendment was certified to the States, and was immediately ratified by a number of them. Several of these rather precipitately attempted to ratify upon telegraphic information without waiting for the official copy.

The copy which was ratified by the Nevada legislature on March 1[1] was correct, but those ratified by Kansas on February 27[2] and by Missouri on March 1[3] were defective. In the latter State, the duly attested copy was not received until March 8, and the copy which the legislature had ratified contained only the first section. Both these ratifications were therefore void through informality, and these States did not finally ratify until the following year.

On March 4 North Carolina ratified.[4] Governor Holden, in recommending such action to the legislature, said: "By the proposed Amendment the right to vote will be secured to every citizen and will not depend on the will of the States . . . This right should be as lasting as the Constitution itself. Every type of man who is a citizen of the United States is presumed to be capable of self-government. . . . The gift of freedom to the colored race would be worse than worthless if not accompanied by the right to vote. The adoption of the Amendment will place the right of full citizenship where no future change or convulsion can destroy it."[5]

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[1] Nevada Assembly Journal, 1869, p. 243. Vote: 23 to 9.

[2] Kansas House Journal, 1869, p. 913. Vote: Senate, unanimously, House, 64 to 7. New York Tribune, March 1, 1869.

[3] Missouri Senate Journal, 1869, p. 434. Vote: 23 to 9. House Journal, p. 605. Vote: 79 to 30.

[4] North Carolina Senate Journal, 1869, p. 402. Vote: 25 to 6. House Journal, p. 348. Vote: 63 to 13.

[5] North Carolina House Journal, 1869, pp. 343–5.

Illinois ratified on March 5.[6] Governor Palmer of that State recommended the ratification of the Amendment as "the crowning act of justice and statesmanship, which closes the greatest and noblest struggle the world has known, and will make Liberty and Union one and inseparable now and forever."[7]

On the same day ratification was effected by Michigan.[8] In the House, the minority of the Committee on Federal Relations made the following adverse report: "The proposed Amendment is an encroachment upon the rights of the States and of the people . . . and tends to weaken and destroy the checks and balances wisely framed by the fathers of the Republic, and designed by them for all time to protect the people of the Union in the enjoyment of their social and political rights, and the blessing of a free government."[9]

A protest against the ratification signed by twenty-two members of the Michigan House was as follows: "The ratification of the proposed Amendment will take from our people the right to impose an educational electoral qualification. . . . We neither admit nor deny that the Amendment is one in the cause of humanity, but we protest that this is but the entering wedge to still further encroachments upon the rights of the people of the several States. . . . Other measures will follow until the consolidation of power in the general government will be complete and the States shorn of their right to legislate for their own internal welfare and interests.

"If Congress legislates under the second section of the Amendment, we shall probably see registry laws and laws regulating elections at our doors, enacted by a power we cannot reach or control. Officers under the pay of the general government, and only amenable to that government,

[6] Illinois Senate Journal, 1869, Vol. II, p. 262. Vote: 18 to 7. House Journal, Vol. II, p. 741. Vote: 54 to 28.
[7] Illinois House Journal, Vol. II, p. 733.
[8] Michigan House Journal, 1869, p. 1104. Vote: 68 to 24. Senate Journal, p. 739. Vote: 25 to 5.
[9] Michigan House Journal, 1869, p. 1098.

will arbitrarily decide who may register and vote in all elections, our elections will be under the control of men not chosen by us, and by these means we may suffer the evils of those States called re-constructed, while by increase of officers, official corruption will increase, and our debt will ultimately bankrupt us as a nation, and reduce us to the alternatives of anarchy or despotism."[10]

In South Carolina, where the negroes were not only voting but governing, the Amendment was ratified on March 11 with little opposition.[11] The three members in the House who voted against gave as their reason that it was contrary to the spirit of the "federal compact" for Congress to interfere with the subject of suffrage. They admitted that the Amendment would not have any positive effect in South Carolina, but feared that its negative influence would be very important as tending toward centralization and an aristocratic government.[12]

One of the most spirited contests that took place over the ratification of the Amendment was in the legislature of Pennsylvania. In that body, the Amendment was referred to the Committee on Federal Relations, which returned majority and minority reports. The minority report did not discuss the merits of the Amendment itself, but took the stand that the legislature had no moral right either to ratify or to reject. A technical reading of the Federal Constitution gave it this power, but power over the suffrage was lodged in neither the federal nor the state government, but was reserved to the people. The regulations on this subject had been fixed by the people in the state constitution, in order that the legislature might not control them. Since the legislature was entirely subordinate to, and limited by, the state constitution, it would be a usurpation of authority and a revolution for it to assume to change, even with the concurrence of the other States, the regulations

[10] Michigan House Journal, 1869, pp. 1099–1103.
[11] South Carolina House Journal, 1869, p. 517. Vote: 88 to 3. Senate Journal, p. 418. Vote: 18 to 1.
[12] South Carolina House Journal, 1869, p. 517.

of the state constitution on the fundamental subject of suffrage. The duty of the legislature, therefore, was to submit the proposition to the people, in whom alone resided the power to change the state constitution. The matter to be determined was not whether the Amendment should be ratified, but the far graver question, Shall the people be deprived of their right to pass upon the question of its ratification or rejection?[13]

The majority of the Committee on Federal Relations recommended ratification on the ground that it was an act of simple justice, of the highest expediency, and of the most considerate statesmanship. It was anomalous that the black man had been freed without being at the same time enfranchised. The adoption of the Amendment would merely make uniform over the whole country the conditions of suffrage which already existed in the South. The negroes in the North were few and educated, but in the South many and ignorant. Should it be said that "we asked the South to drain the cup, while we found one drop too bitter?" The negro must eventually vote. Why not make him a voter at once, and thus remove from the politics of the State a question which, as long as it remained unsettled, must be a source of vexatious agitation?[14]

When these reports were submitted to the legislature, a lengthy debate ensued. Those who opposed the Amendment characterized it as a monstrous political crime against the sovereignty and majesty of the people. It would sap the very foundations of the liberties of the people and surrender them to a centralized despotism. Suffrage was a matter belonging properly to domestic state regulation, and the legislature had no right to transfer the regulation of the subject to any power outside the State.[15] If the Amendment should be adopted and the State should refuse to admit the right of the negro to vote, then Congress would have power to compel the inhabitants and legal voters of Penn-

[13] Pennsylvania Legislative Record, March 10, 1869, p. 540.
[14] Pennsylvania Legislative Record, 1869, p. 540.
[15] Ibid., pp. 954–9.

sylvania to admit the negro to the polls.[16] The controlling power of Congress would enable the officers of the Federal Government to usurp all power and tyrannize over the localities. The result of the adoption of the Amendment would be to extend to the Northern States the same kind of despotism that Congress had been practising in the South. Confusion and anarchy would be the result and there would remain but one step to monarchy.[17] The nation had more to dread from extending than from restricting the suffrage. Already the confidence of thinking men in the republican system of government was shaken, owing to the corruptions at elections. The adoption of the Amendment would only increase these evils, and make complete the mockery of popular government.[18]

In opposition to these views, it was declared that the adoption of the Amendment would be the completion and realization of the ideal government, whose broad foundation was laid in the Declaration of Independence. The power of the government would then be derived from the consent, not of a part of, but of all the governed.[19] The Amendment was not revolutionary, but was conservative of the spirit and genius of our institutions.

The statement was made that there were only two arguments against the Amendment entitled to consideration, (*a*) the negro was unfit for self-government, and (*b*) the Federal Constitution was not the proper place to regulate the suffrage. As to the first, the negro had the capacity to learn self-government, and the danger of admitting him to the suffrage was less than the danger of class government. The second argument resolved itself into the question whether the States or the nation was sovereign. If the latter, the Federal Constitution was exactly the place to regulate the suffrage. If the States were allowed the unlimited right to control the suffrage, any State might abolish a

[16] Ibid., p. 925.
[17] Ibid., p. 663.
[18] Ibid., p. 895.
[19] Ibid., p. 864.

republican form of government and establish an oligarchy. The question of suffrage was of national importance, and it should be rendered uniform in all the States by federal amendment.[20]

Those who favored the Amendment voted down all proposals made by the minority to submit its ratification or rejection to the decision of the people at the next general election, and on March 25, 1869, Pennsylvania finally ratified.[21]

In Arkansas the sentiment in favor of the Amendment was so strong in the legislature that it was ratified almost unanimously.[22] There was little need for argument, but it was stated as a ground for the action of the legislature that the Amendment did not propose to alienate a single right enjoyed by any class of people. It only aimed to make national what had hitherto been sectional. It denied the assertion so often made that negro suffrage had been forced upon the Southern people as a punishment, but recognized it as a matter of national justice.[23]

In Indiana a special session of the legislature was called for the purpose of considering the Amendment. The violent controversy which took place when it assembled had but slight relation to the merits or defects of the Amendment itself. The minority attacked it as a concentration of power in the hands of the general Government, and as a subversion of the principles of government established by the founders of the republic.[24] The majority upheld it as a measure without which the country could not attain the acme of its development. Since the negro had received citizenship, it was absurd to deny him that absolute protection which could be guaranteed only by the ballot. The

[20] Pennsylvania Legislative Record, 1869, p. 957.
[21] Pennsylvania Senate Journal, 1869, p. 570. Vote: 18 to 15. House Journal, 1869, p. 767. Vote: 61 to 38.
[22] Arkansas Senate Journal, 1869, p. 563. Vote: 19 to 2. House Journal, 1869, p. 658. Vote: 52 to 0.
[23] Arkansas Senate Journal, 1869, p. 563.
[24] Brevier (Ind.) Legislative Reports, Vol. XI, special sess., 1869, p. 289.

Amendment was one of the great reformatory movements of the age.[25]

The greatest amount of discussion, however, was as to the question of submitting the Amendment to the people. This the majority refused to do, and the minority endeavored to block action by resigning their seats. The constitution of the State required two thirds of the legislature as a quorum. In the House the resignation of the minority members left less than a quorum. But those who were left were more than a majority, and the speaker ruled that while two thirds was necessary for ordinary legislation, the constitution did not define what number more than a majority was necessary to ratify a proposed amendment to the Federal Constitution. Under this ruling the Amendment was then ratified.[26]

In his annual message to the Connecticut legislature on May 5, 1869, Governor Jewell, in recommending the ratification of the Amendment, said, "When this proposed Amendment becomes a part of the Constitution, a troublesome political question will have been settled, and justice will have been done a race, both of which results are called for by every consideration of sound public policy."[27] The Amendment was then promptly ratified by both houses.[28]

On June 8 the Florida legislature assembled in special session to consider the Amendment. Governor Reed, in recommending its ratification, said: "As a result of the War, the principle of free government and equal rights has become the acknowledged policy throughout the Union, and it is now proposed to put it forever at rest by making it a part of the Constitution. The adoption of the Amendment will render the States homogeneous, and will remove all occasion for further sectional controversy."[29]

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[25] Ibid., p. 301.
[26] Indiana House Journal, 1869, p. 602. Senate Journal, 1869, p. 475.
[27] Connecticut Legislative Documents, 1869, Doc. No. 2, p. 12.
[28] Connecticut Senate Journal, 1869, p. 51. House Journal, 1869, p. 36.
[29] Florida Senate Journal, extra session, 1869, p. 12.

This message was referred in both houses to the Committee on the Judiciary. In the Senate the minority of the committee reported adversely on the following ground: The power of regulating the right of suffrage affected the organization of the State itself, prescribing its relation to its own citizens. By this power alone could it safely control the choice of its own lawmakers and officers, and this power was essential to the very existence of the State, hence the Amendment was a direct step toward centralization, and a virtual overthrow of representative republican government in the States.[30]

In the Assembly the minority of the committee in its adverse report conceded that the Amendment would not affect the question of suffrage in Florida, but argued that in proposing it Congress had requested the States favorable thereto to put upon those opposed to it that which the framers of the Constitution had never intended should be imposed by even a constitutional number of States upon the others. There was nothing in the Constitution to justify one or many States in prescribing suffrage regulations for another. Suffrage was properly a local matter, to be regulated by each State for itself. The Amendment was antagonistic to the principles upon which the government was founded, and was subversive of the liberties of the people.[31] In spite of these arguments, however, both the Senate and the Assembly ratified the Amendment without delay.[32]

On October 20, 1869, Vermont ratified.[33] Governor Washburn, in his message transmitting the Amendment to the legislature, said: "The adoption of the Amendment will, for the first time in the history of the nation, give reality in fact to the truth enunciated in the Declaration of Independence, and incorporated in the Constitution of Vermont, that all men are created equal. It is a measure demanded alike by justice, good faith, and common humanity."[34]

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[30] Florida Senate Journal, extra session, 1869, p. 29.
[31] Florida Assembly Journal, extra session, 1869, pp. 17–19.
[32] Senate Journal, p. 33. Assembly Journal, p. 23.
[33] Vermont House Journal, 1869, p. 48. Senate Journal, 1869, p. 41.
[34] Vermont Legislative Documents, 1869, Doc. No. 1, p. 14.

The attempted ratification of Kansas, on February 27, 1869, having been deemed void by the secretary of state,[35] Governor Harvey, in his annual message of January 11, 1870, recommended that it be re-ratified. He thought that the adoption of the Amendment would relieve judges of election of the responsible duty of inquests as to the existence of a visible admixture of the blood of any proscribed race.[36] The Amendment was ratified in due form by the legislature.[37] A protest by one member of the minority was entered as follows: "My constituents are opposed to this Amendment not because it gives the right of suffrage to the negro, but because by its adoption the State, under the operation of the second section, will surrender to the central Government the power to determine who shall be qualified electors in the State. The interests of the working people of the United States require the rejection of the Amendment, for, if it is adopted, the hundreds of thousands of Chinese being imported into this country by capitalists for the purpose of obtaining cheap labor, will be controlled by their employers and their power as electors used to oppress the toiling millions of America."[38]

On May 4, 1869, Ohio rejected the Amendment. Another legislature was then elected, with a slight change in its political complexion. When this legislature assembled on January 3, 1870, Governor Hayes sent in a message recommending the ratification of the Amendment. He said: "The great body of that part of the people of Ohio who sustain the laws for the reconstruction of the States lately in rebellion believe that the Amendment is just and wise. Many other citizens who would not support the Amendment if it was presented as the inauguration of a new policy, in view of the fact that impartial suffrage is already established in the States most largely interested in the question, now regard the Amendment as the best mode of getting rid

[35] Report of Kansas Secretary of State, 1869, p. 11.
[36] Governor's Message, 1870, p. 9.
[37] Kansas House Journal, 1870, p. 135.
[38] Kansas House Journal, 1870, p. 137.

of a controversy which ought no longer to remain unsettled. Believing that the measure is right and that the people of Ohio approve it, I earnestly recommend its ratification."[39] The legislature then ratified the Amendment by the closest vote given by any State, there being but a margin of one vote in the Senate and of two in the House.[40]

The same procedure of rejection and subsequent ratification took place in Georgia. On March 10, 1869, Governor Bullock's message on the subject was read in both houses. "Were there any doubt," he said, "as to the sufficiency of this Amendment to confer equal political privileges without regard to race or color, or were it urged that the right to vote did not necessarily include the right to hold office, it would certainly be dissipated and answered by the arguments advanced in the debates in Congress on the passage of the joint resolution proposing the Amendment, as well as by the expressed opinions of the soundest lawyers of the Nation. . . . If we ratify this Amendment, to be consistent we must at once voluntarily yield to colored citizens the right to have their voices heard in your halls. . . . Its adoption by the Nation will be the consummation of the progress of the last eight years towards perfect accord between the theory of republicanism and its practical enforcement."[41]

Governor Bullock thus publicly recommended ratification, but he was accused of privately opposing it.[42] On the day after his message was read, the House passed a resolution of ratification.[43] The opposing members protested that the Amendment destroyed the rights exercised by the States since the foundation of the Government. It was a concession on the part of the people North and South that they had no right to determine the question of suffrage. It was a concession by Congress that the reconstruction acts were unconstitutional. It invested Congress with the power to

[39] Ohio Executive Documents, 1869, Part I, p. 339.
[40] Ohio Senate Journal, 1870, p. 44. House Journal, 1870, p. 88.
[41] Georgia House Journal, 1869, p. 577.
[42] The New Era (Atlanta), March 26, 1869.
[43] Georgia House Journal, 1869, p. 602.

confer suffrage on all men in the States irrespective of race.[44]

In the Senate the resolution ratifying the Amendment was rejected by a curious combination. Thirteen members voted in favor of ratification, of whom eight were Republicans and five Democrats. Sixteen members voted against it, of whom seven were Republicans and nine Democrats. There were eight Republicans absent and dodging a vote. Thus the Amendment was slaughtered in a Republican Senate after its passage by a Democratic House.[45]

The Nebraska legislature ratified the Amendment without debate on February 17, 1870.[46] Governor Butler, in his annual message, had urged this action on the ground that the right to vote could be secured to the freedmen only by embodying it in the Federal Constitution, where it would be forever placed beyond and above the changes which might occur in the public opinion of particular localities.[47]

When news of the passage of the Amendment reached Minnesota, but before any official information had been received, a resolution was introduced into the House declaring that by the adoption of the Amendment the States would indicate their willingness to surrender to the United States and to Congress the dearest and most essential element of their sovereignty and to reduce themselves to the condition of mere provinces of a centralized government, contrary to the principles, intent, and letter of the Constitution.[48] An attempt was made to induce the legislature to ratify on mere telegraphic information, but it adjourned without having done so. The following year, however, it ratified immediately upon assembling, at the suggestion of Governor Marshall, who characterized the Amendment as the "crowning Act of Reconstruction."[49]

[44] Atlanta dispatch to New York Herald, March 12, 1869, p. 7.
[45] New York Herald, March 20, 1869, p. 7. Georgia did not finally ratify until the following year. House Journal, 1870, p. 76. Senate Journal, 1870, p. 71.
[46] Nebraska Senate Journal, 1870, p. 18. House Journal, 1870, p. 21.
[47] Nebraska House Journal, 1870, p. 11.
[48] Minnesota House Journal, 1869, p. 134.
[49] Minnesota Senate Journal, 1870, pp. 9, 21. House Journal, 1870, p. 29.

The Amendment was rejected by those States having a considerable population which would be enfranchised in the first instance by the operation of the Amendment. These States were the border States of Delaware, Maryland, Kentucky, and Tennessee, and the Pacific Coast States of California and Oregon.

The legislatures of Delaware and Kentucky rejected the Amendment almost immediately after its proposal. In Delaware this action was taken on the ground that its adoption would subvert the Constitution and Government of the United States; would have a tendency to destroy the rights of the States in their sovereign capacity as States; and would deprive them of the right to regulate their own affairs and to establish the laws regulating the suffrage of their own citizens for their own offices.[50]

The Kentucky legislature rejected the Amendment by an overwhelming majority.[51] The reasons for this action were stated to be that the effect of the proposed change would be to subvert the structure of the federative system of government under which the country had been so signally blessed. It would obliterate the division between the delegated powers vested in the Government of the United States and those vested in the States. Its purpose was to annihilate the state governments. It would take from them powers expressly vested and reserved, and by abrogating the partition between the federal and state governments, would utterly destroy the equilibrium of the entire system. The result would necessarily be a consolidated central government with the States as mere abject appendages. The Amendment would destroy and supersede the original sovereign power of the several States by depriving them of rights essential to their preservation as States. It would elevate the Federal Government to the absolute and supreme authority in the federal system, and would endanger the

[50] Delaware Session Laws, Vol. XIII, Chap. 555. The House rejected by a vote of 19 to 0 (House Journal, 1869, p. 556). Senate rejected by 6 to 2 (Senate Journal, 1869, p. 410).

[51] Kentucky House Journal, 1869, p. 776. Senate Journal, 1869, p. 628. Vote: House, 80 to 5; Senate, 27 to 6.

very existence of the state governments, by destroying powers which the States had reserved to themselves as self-protecting checks upon federal usurpation.[52]

The minority, who voted against rejection, based their action upon the following grounds: (*a*) if the Amendment was not adopted, Kentucky's representation in Congress and in the Electoral College would be cut down; (*b*) colored citizens would never be allowed to enjoy their civil rights so long as the right to vote was denied them; and (*c*) state regulation of the suffrage, producing great inequality in the different States, would cause trouble if allowed to continue.[53]

In his message of October 13, 1869, Governor Senter of Tennessee urged the legislature to ratify the Amendment on the ground that its purpose was not to confer special immunities upon the negroes, but to prevent them from being deprived of their privileges, and to afford them the rights of citizenship and equality before the law in every part of the land. On grounds of expediency, he argued, if the objections to colored suffrage were founded in truth, might not those who were immediately charged with the interests of States where it existed, rationally protest against concentration of the evil upon them to the exemption of States where it did not exist?[54]

In spite of the governor's arguments, both houses rejected the Amendment.[55] In the House the majority of the Committee on Federal Relations, to whom the governor's message had been referred, made a report recommending rejection on the following grounds:—

(*a*) There was no necessity for it. The States were fully empowered by the Constitution as it stood to extend the suffrage to any and all.

(*b*) The Amendment had been passed and submitted at a time when the public mind was not in a condition to weigh

[52] Kentucky House Journal, 1869, p. 746.
[53] Kentucky Senate Journal, 1869, p. 624.
[54] Tennessee Senate Journal, 1869–70, Appendix, pp. 8–16.
[55] Tennessee House Journal, 1869–70, p. 193. Senate Journal, 1869–70, p. 443.

and consider it with the calmness and deliberation that its importance required.

(*c*) Its adoption was sought by the least popular method known to the Constitution, while it was designed to accomplish a great and radical change in the nature and principles of our form of government.

(*d*) It was class legislation of the most odious character. It singled out the colored race as its special wards and favorites.

(*e*) It was inexpedient because it would become a bone of contention for all future time, and the subject of ceaseless agitation in the halls of Congress and before the people. One Congress would think one mode of legislation appropriate to enforce it and another a different mode, and the result would be unlimited confusion.

(*f*) The Amendment would lead inevitably to a concession of all sovereign power to the legislative branch of the Federal Government, and was consequently destructive of states' rights and conducive to consolidation and despotism.[56]

The minority of the Committee on Federal Relations recommended ratification on the ground that the right of suffrage ought not to be left to the whim and caprice of local legislation. It should be secured and regulated by the supreme law of the republic, where it would not be disturbed by local prejudices and popular agitation. The Amendment would accomplish this object and would be a great stride in the inevitable tendency of the times toward universal manhood suffrage.[57]

In his annual message of 1870 to the Maryland legislature Governor Bowie declared that the Amendment was a usurpation of power on the part of Congress, since not all the States had had a voice in proposing it. The great evil of the Amendment, he said, was that it abridged the power of the States over a matter the control of which was necessary to their proper organization and efficiency. It might be found necessary, in order to protect from unjust taxa-

[56] Tennessee House Journal, 1869, pp. 185–6.
[57] Ibid., pp. 186–8.

tion a given description of property located chiefly or exclusively in one district of a State, so to limit the suffrage as to prevent those who inhabited a different section of the same State and did not possess the same description of property from taxing it unduly. But how was this to be accomplished without that full control over the right of suffrage then enjoyed by the States, which the Amendment proposed to take from them? The control of the suffrage lay at the foundation of all those powers that constituted state sovereignty. It was practically the sovereign power of the State, for without it no State could exercise those powers of local government that the framers of the Constitution intended it to exercise. For these reasons, he recommended the rejection of the Amendment.[58] The legislature then rejected it by a unanimous vote in both houses.[59]

The legislature of Oregon did not consider the Amendment until late in 1870, but then rejected it by substantial majorities in both houses.[60] In the Senate the following resolution of rejection was passed: "Whereas, the State of Oregon by admittance into the Federal Union was invested with the right to declare what persons should be entitled to vote within her boundaries, and until she, by her voluntary act surrenders that right, Congress has no authority to interfere with the conditions of suffrage within her boundaries: Resolved, that the Fifteenth Amendment is an infringement upon popular right, and a direct falsification of the pledges made to the State of Oregon by the Federal Government."[61]

In California the elections of 1869 for governor and members of the legislature were largely carried on the issue of the rejection or ratification of the Amendment. The Democratic convention met June 29, and adopted a platform

[58] Documents of the Maryland House of Delegates, 1870, Doc. A, pp. 61–70.
[59] Maryland Senate Journal, 1870, p. 291. House Journal, 1870, p. 268.
[60] Oregon House Journal, 1870, p. 512. Senate Journal, 1870, p. 654.
[61] Oregon Senate Journal, 1870, p. 654.

of which the leading plank was as follows: "Resolved, that we are opposed to the adoption of the proposed Fifteenth Amendment . . . believing the same to be designed and if adopted, certain to degrade the right of suffrage, to ruin the laboring white man, by bringing untold hordes of pagan slaves . . . into direct competition with him; to build up an aristocratic class of oligarchs in our midst, created and maintained by Chinese votes; to give the negro and Chinaman the right to vote and hold office; and that its passage would be inimical to the best interests of our country; in direct opposition to the teachings of Washington, Adams, and Jefferson; in flagrant violation of the plainest principles upon which the superstructure of our liberties was raised; subversive of the dearest rights of the different States, and a direct step toward anarchy and its natural sequence, the erection of an empire upon the ruins of constitutional liberty."[62]

The corresponding plank in the Republican platform declared that the negro question had ceased to be an element in American politics, and that the adoption of the Amendment ought to be followed by an act of universal amnesty.[63] In the elections which followed the Democrats secured the governor and a substantial majority in both houses of the legislature. This result caused the leading Republican newspaper in the State to express the hope that the Republicans in Congress would drop the race question.[64]

When the new legislature assembled early in 1870, both houses promptly rejected the Amendment.[65] Governor Haight, in his message recommending this action, said: "It is well to understand, at the outset, that the issue is not, what classes ought or ought not to be entrusted with the elective franchise, or whether, under any circumstances, race should or should not debar any from the exercise of

[62] McPherson, History of Reconstruction, p. 479.
[63] Ibid., p. 478.
[64] San Francisco Morning Bulletin, February 18, 1870, p. 4.
[65] California Assembly Journal, 1870, p. 295. Senate Journal, 1870, p. 245.

this privilege. All this is a proper subject for consideration and settlement by the people of a State when they frame their organic law, but is not necessarily involved in considering the proposition submitted by Congress, which is to restrict the people of the several States from exercising their own independent judgment upon the subject. Whether, therefore, Chinese and Indian suffrage is expedient is not directly an issue at present, but the question is, whether the Federal Constitution ought to be so amended as, on the one hand, to prevent the people of each State from excluding either of these races from the ballot box if in their judgment such exclusion is necessary, and on the other, to give Congress the power to place other restrictions upon the exercise of suffrage without the assent of the State legislatures; in other words, whether suffrage should be controlled and regulated by each State for itself or controlled, enlarged and restricted by Congress alone.

"Keeping, therefore, the issue separate from collateral ones, two questions are presented in the proposition. The first is a question of power, and the second one of policy. If it is not in the power of Congress, in conjunction with three-fourths of the States, to take from any State without its consent a right reserved at the formation of the Constitution; in other words, if to deprive a State of a distinct right, originally reserved, is not within the purview of the clause relating to amendments, then of course the proposed Amendment must be rejected. And if it is in conflict with sound policy, the same result ought to follow.

"The very idea of amendment involves the pre-existence of something to be amended and in this case, the proposition is to amend the powers originally delegated by depriving the States of a right reserved . . . It was clearly understood that a reserved right was one entirely withdrawn from the operation of any and every clause of the Federal Constitution, including the amending clause. It seems clear, then, that if the proposed amendment went through the forms of adoption it would be a mere *brutum fulmen,* destitute of any validity whatever. Aside, however, from the legal questions

involved, the objections to the proposition on the score of public policy seem unanswerable. To say that the people of California should tie their hands upon this subject, is to charge upon them either incompetency to comprehend what is expedient and just to those within her jurisdiction, or unwillingness to be governed by justice and sound policy. It would require some boldness for any one to come before the people of this State with such a charge and if the people are competent to determine whether any, and what, restrictions should be placed upon the elective franchise, it is difficult to discover any plausible reason why they should surrender the power of determination to a Congress of which they elect but five members in both Houses. It is fair to presume that the people of this State understand their duties and interests in reference to this subject quite as well as they are understood by the people of the States east of the mountains.

"If this Amendment is adopted, the most degraded Digger Indian within our borders becomes at once an elector and, so far, a ruler. His vote would count for as much as that of the most intelligent white man in the State. In this event, also, by a slight amendment to the naturalization laws, the Chinese population could be made electors."

The declaration in the Amendment that certain specified restrictions should not be placed upon the elective franchise by the United States was thought by Governor Haight to leave the inference open that any other restriction might be so placed. The restriction of the United States to act in one direction recognized their right to act in any other, and would place, therefore, the whole subject under congressional control. Whatever might have been the motive for selecting the phraseology, the danger was apparent that an implication would be founded upon it to take from the States all power to resist federal interference with suffrage.

"There is," Governor Haight continued, "no plausible argument, therefore, in favor of this Amendment which can be addressed to the people of this State. On the contrary, every consideration of legal right and public policy makes

against it. Nothing could be more loose and objectionable than the clause which authorizes Congress to enforce the restraint upon the States by appropriate legislation. Who is to judge of what is appropriate? Under this phraseology, Congress is made the exclusive judge; and if it declares any particular measure enacted by that body to be appropriate, it would claim that, upon rules of construction, no tribunal would have the right to revise its discretion. Congress, then, under the guise of professedly appropriate legislation, could enact almost anything which a fertile imagination might suggest."[66]

On March 30, 1870, the secretary of state issued a proclamation announcing that the requisite number of States had ratified the Amendment and that it had become a part of the Constitution.[67] Three of the States that he named as having ratified—Virginia, Mississippi, and Texas—were required to do so as a condition precedent to readmission to representation in Congress.[68] Since they ratified under duress, some question might be raised as to the validity of their ratifications. The question, however, is an entirely unpractical one, for no court of law would undertake to pass upon it.

The final adoption of the Amendment was brought to the attention of Congress and the country by President Grant in a special message. "A measure," he declared, "which makes at once four millions of people voters (sic), who were heretofore declared by the highest tribunal in the land not citizens of the United States . . . is indeed a measure of grander importance than any other one act of the kind from the foundation of our free government to the present day . . . It completes the greatest civil change, and constitutes the most important event that has occurred since the nation came into life."[69]

[66] California Senate Journal, 1869–70, pp. 144–52. It was pointed out that the governor's theory of the amending power was one upon which no amendment at all would be possible. See San Francisco Morning Bulletin, January 8, 1870, p. 4.

[67] Documentary History of the Constitution, Vol. II, p. 893.

[68] 16 Stat. at Large, 41.

[69] Richardson, Messages and Papers, Vol. VII, p. 55.

CHAPTER V.

Enforcement Legislation.

In addition to the debates in Congress at the time the Amendment was proposed to the States, another obvious medium of congressional interpretation is found in the legislation passed to enforce it. As we have seen, the first section of the Amendment was, in one respect, a compromise between the nationalistic and the local autonomic principles. The real character of that compromise was to be determined by the practical interpretation to be placed upon the second section, for upon the actual operation of that section depended to a large extent the question whether the Amendment should become almost wholly nationalistic in tendency, or should leave the matter of suffrage almost entirely with the States.

The second section was thus preeminently the uncertain element in the Amendment, and in regard to the amount of power conferred by it upon Congress opinions differed almost as widely as the poles. The strict constructionists held that this section conferred upon Congress no power of affirmative legislation.[1] The Amendment, they said, was self-executory, or, in other words, the courts would enforce it. The Constitution was the supreme law of the land, and the judges in every State were bound thereby. Even by the most liberal construction appropriate legislation for the enforcement of the Amendment would consist in merely declaring what acts should be considered void for conflict, and in providing the proper judicial machinery by which cases involving the Amendment might be instituted in the federal courts.[2] Even this power, it was held, was

[1] Hamilton of Maryland, Globe, 41st Cong., 2d sess., Appendix, p. 353.

[2] Thurman of Ohio, Globe, 41st Cong., 2d sess., p. 3663; Davis of Kentucky, Globe, 42d Cong., 1st sess., p. 648; Casserly of California, Globe, 41st Cong., 2d sess., Appendix, p. 472.

not an isolated, independent power to be exercised at will, but was only a secondary power to be used in reference to the contingency contemplated by the primary provision. It was a latent power and must forever remain so, in a constitutional sense, until warmed into activity by hostile acts. Hence, until the Amendment should be violated, Congress could not exercise the power conferred upon it.[3] It was denied, moreover, that the express grant of power to Congress gave that body more power than it would have had without such grant, either because it was a mere repetition of the power already granted in the "sweeping clause" of the Constitution,[4] or because the general Government was necessarily invested with power to correct infractions of the provisions of the Constitution.[5]

The words "shall not be denied" in the Amendment might be construed retroactively so as to repeal all state laws or constitutional provisions containing such denial that were in existence at the time the Amendment was adopted, but, grammatically, the words did not necessitate such an interpretation, and might plausibly be held to relate only to future acts of denial. The theory was even put forth in certain quarters that, as long as the constitution of a State remained formally unchanged, it was to be enforced in all its provisions by the state officers until they should receive official notification from proper authority that they were to disregard it. In other words, the Amendment was not to be considered as having effect in any State until the legislature should make the laws of the State conform to it, or until Congress should pass laws to enforce it. This contention was, of course, not admitted, but it was referred to as one reason why Congress should pass enforcement legislation.[6] Moreover, it was feared that, on account of the well-known hostility of the people and of the courts in some of the States to the Amendment, it would not execute itself

[3] Vickers of Maryland, Globe, 41st Cong., 3d sess., p. 1635.
[4] Thurman of Ohio, Globe, 41st Cong., 2d sess., p. 3663.
[5] Vickers of Maryland, Globe, 41st Cong., 3d sess., p. 1636; cf. Prigg vs. Commonwealth of Pennsylvania, 16 Pet. 539.
[6] Sherman of Ohio, Globe, 41st Cong., 2d sess., p. 3568.

without ancillary legislation. The express authorization given Congress to enforce indicated that the framers had contemplated that without such legislation it would not have the full force and sanction of law.[7]

In opposition to the view that a mere judicial remedy for violation of the Amendment would be sufficient, the broad constructionists declared that the mere right of appeal from the state to the federal courts would be a very imperfect remedy, because the plaintiff might often be unable to pursue it. The framers of the Amendment had not intended to leave the injured person to that roundabout and costly process. Even if the victim should take an appeal and the state statute under color of which he was injured should be declared unconstitutional, the perpetrator would go unpunished. The right secured by the Amendment could be adequately protected only by penal enactments, and it was the intention of the framers that it should be so protected.[8] Under this interpretation of the enforcement section Congress might not only provide that cases arising under the provisions of the Amendment might be carried up on appeal from the state tribunals to the federal courts, where conflicting state laws would be declared unconstitutional, but might also provide for the punishment of all persons who should invade the right secured by the Amendment.[9] In general, the view of the broad constructionists was that appropriate legislation was any legislation adequate to meet the difficulties encountered, to redress the wrongs existing, to furnish remedies and inflict penalties adequate to the suppression of all infringements of the right secured by the Amendment. They went to the farthest extreme when they declared that Congress itself must be the sole judge of what was necessary and proper to enforce the Amendment.[10]

Whether the majority in Congress took the view of the

[7] Globe, 41st Cong., 2d sess., p. 3568.

[8] Morton of Indiana, Cong. Record, 43d Cong., 1st sess., Appendix, p. 360.

[9] Garfield of Ohio, Globe, 42d Cong., 1st sess., Appendix, p. 153.

[10] Wilson of Indiana, Globe, 42d Cong., 1st sess., p. 483; Davis of New York, Globe, 41st Cong., 2d sess., p. 3882.

broad constructionists or that of the strict constructionists is clearly indicated by the legislation actually passed by that body. The first and only act passed for the direct purpose of enforcing the Fifteenth Amendment was that of May 31, 1870. A bill, however, designed to effect the same object had passed the House on May 16 by a vote of 131 to 43.[11]

This bill was entitled "A bill to enforce the right of citizens of the United States to vote in the several States . . . who have hitherto been denied that right on account of race, color, or previous condition of servitude." The first section subjected to fine and imprisonment any officer of the United States or of any State, Territory, county, municipality or ward, who should deny or abridge, by any official act or by failure to perform any official duty, whether under color of any state constitution or law or of any local or municipal ordinance, the right of any citizen of the United States to vote, on account of race, color, or previous condition of servitude, at any federal, state, county, or municipal election.

The second section declared that all colored citizens of the United States resident in the several States should be entitled to vote at all elections in the State, county, town, or ward of their residence, subject only to the same conditions required to qualify white citizens to vote therein. It also subjected to fine or imprisonment any person who should prevent from voting, by force, fraud, intimidation, or other unlawful means, any colored citizen possessing the qualifications, except in respect of color, requisite to enable a white citizen to vote.

The third, fourth, fifth and sixth sections provided that, in case the constitution or law of any State should require the assessment or payment of a tax as a qualification of an elector, no discrimination should be made against colored citizens by any assessor authorized by the laws of the State to make such assessment, or by any member of any levy court authorized by state law to correct assessments or levy taxes, or by any clerk required by state law to record or

[11] House Journal, 41st Cong., 2d sess., p. 798.

transcribe lists of persons assessed, or by any tax collector, elected or appointed under the laws of any State. Every such officer who should thus discriminate against colored citizens was made liable to pay heavy damages to any person who should sue for the same, and was also made subject to fine and imprisonment.

The seventh and eighth sections prohibited, under pain of forfeiture, fine, and imprisonment, discrimination against any colored person (on account of his race, color, or previous condition of servitude) having the qualifications of a white citizen, on the part of any inspector or judge of election authorized to receive votes, or of any registration officer authorized to make lists of persons entitled to vote, or of any member of any board authorized to admit persons to the elector's oath or to the privileges of an elector.

The last section provided that the circuit courts of the United States should have jurisdiction of civil cases and the circuit and district courts of criminal cases arising under the act.[12]

When this bill reached the Senate, after having passed the House, it became the subject of controversy, not only between the two parties, but also between the different factions of the dominant party. The minority were opposed to the passage of any bill on the subject, but, knowing that some bill would be passed, they were inclined to support the House bill as the least objectionable that could be obtained. They intimated that the first section of that bill was all that it was expedient or necessary to pass. If it were amended by inserting a few words to include the case of a refusal to register or to place upon the poll list, or to assess or allow payment of a tax, whenever required before voting, it would contain all that could properly be claimed as within the power of Congress under the Fifteenth Amendment.[13]

Objection was made to the House bill by Senator Stockton of New Jersey on the ground that, with the exception

[12] Text of House bill in Globe, 41st Cong., 2d sess., pp. 3503–4.

[13] Casserly of California, Globe, 41st Cong., 2d sess., Appendix, p. 474.

of the first section, it provided for the protection of colored citizens only. It left unpunished the man who interfered with the rights of the white citizen, thus making a distinction against the white man on account of his race or color. The Fifteenth Amendment, he held, provided not only for the protection of the colored people, but also forbade Congress to protect the colored man to the exclusion of the white man. Hence, he concluded, the bill would not enforce but would violate the Amendment.[14] In general, however, the minority were inclined to concede that, with more careful wording in certain particulars, the bill would conform substantially to the provisions of the Amendment.[15]

The bill was also unsatisfactory to certain members of the majority in the Senate. Williams of Oregon pointed out that this legislation undertook to occupy a new field, which had not hitherto been entered by Congress. The laws of a large number of States were to be modified, or perhaps repealed, by this legislation. It therefore behooved Congress to do only what the actual necessities of the case required. The House bill went as far as it was safe or prudent to go at that time. It provided remedies for all existing evils, and if experience should demonstrate that it was in any respect defective, if any state legislature should devise any scheme to avoid its provisions, it could be amended so as to meet the new emergency.[16]

This view, however, did not commend itself to the majority in the Senate. The House bill, they held, was entirely inadequate to cope with the situation. It was an excellent recipe for pretending to do something without accomplishing anything of importance.[17] In the first place, it did not forbid mobs from interfering with colored voters going to register. If they were thus prevented from registering, there was no remedy under the bill, and their votes would

[14] Globe, 41st Cong., 2d sess., p. 3567.
[15] Hamilton of Maryland, Globe, 41st Cong., 2d sess., Appendix, p. 361.
[16] Globe, 41st Cong., 2d sess., pp. 3656–7.
[17] Carpenter of Wisconsin, ibid., p. 3563.

be lost. In the second place, it provided only for the two cases in which registration or the payment of taxes should be required before voting. A hundred other prerequisites which the bill did not cover might be invented by the States. In the third place, it merely made certain offenses punishable in the United States District Courts. But who was to be the prosecutor? There was only one such court and one marshal in a State. The bill did not undertake to increase the number of prosecuting officers, or to provide any adequate machinery for its enforcement.[18]

With these defects, the belief was expressed that the bill, if it became a law, could not possibly succeed. In some States it would have to go into effect against hostile public opinion, and against the opinion of a large majority of the judges and jurymen. It was said that the situation of political affairs at the South showed conclusively that some stringent law was necessary to neutralize the deep-seated hostility of the white race to negro suffrage.[19] In order to accomplish the end in view of securing to the colored people their constitutional rights, it would have to be a law that would, so to speak, stand special demurrers, and reach to every possible method of evasion that might be invented.[20]

A bill that was believed to meet these requirements was reported by the Senate Judiciary Committee on April 25, 1870; after being amended in certain respects, it passed the Senate on May 20 by a strict party vote of 43 to 8.[21] The House refused to concur in the action of the Senate, and a conference committee was appointed to adjust the difference between the two bodies. This committee rejected the House bill entirely, and made a report recommending the passage of the Senate bill with a few slight modifications.[22] This report was agreed to by the Senate on May 25 by a vote of 48 to 11,[23] and two days later by the House, the vote

[18] Stewart of Nevada, ibid., p. 3658.
[19] Townsend of Pennsylvania, ibid., Appendix, p. 392.
[20] Edmunds of Vermont, Globe, 41st Cong., 2d sess., p. 3519.
[21] Senate Journal, 41st Cong., 2d sess., p. 685.
[22] Globe, 41st Cong., 2d sess., p. 3752.
[23] Senate Journal, 41st Cong., 2d sess., p. 704.

being 133 to 58.[24] On May 31 the bill, in the form reported by the Conference Committee, became a law, as far as Congress and the President could make it such.

This law was entitled "An Act to enforce the right of citizens of the United States to vote in the several States of the Union, and for other purposes." The first section declared that all citizens of the United States, otherwise qualified by law to vote at any election in any State, Territory, county, school district, or municipality, should be entitled and allowed to vote at all such elections without distinction of race, color, or previous condition of servitude, any constitution, law, custom, or regulation of any State or Territory to the contrary notwithstanding.[25] This section was merely the declaration of a right, without the addition of any penalty for its violation.

The second section of the Act provided that if, under the constitution or laws of any State or Territory, any act is required to be done as a prerequisite for voting, and, by such constitution or laws, persons or officers are charged with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite, it should be the duty of every such person and officer to give to all citizens of the United States an equal opportunity to perform such prerequisite without distinction of race, color, or previous condition of servitude. It further provided that if any such person or officer should refuse or knowingly omit to give full effect to this section, he should be liable to forfeit heavy damages to the person aggrieved thereby, and should also be subject to fine and imprisonment.

The third section provided that whenever, under the constitution or laws of any State or Territory, any act is required to be done by any citizen as a prerequisite to entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid should, if it fail to be carried into execution by reason of the wrongful act or omission aforesaid of the person or officer charged with the

[24] House Journal, 41st Cong., 2d sess., p. 869.
[25] 16 Stat. at Large, 140.

duty of receiving or permitting such performance or offer to perform, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and being otherwise qualified, should be entitled to vote in the same manner as if he had indeed performed such act. It provided also that any election officer whose duty it should be to give effect to the vote of any such citizen, who should wrongfully refuse or omit to do so upon the presentation by him of his affidavit stating the circumstances of such offer and that he was wrongfully prevented by such person or officer from performing such act, should for every such offense forfeit five hundred dollars to the person aggrieved thereby, with full costs and such allowance for counsel fees as the court should deem just, and should also be subject to heavy fine and imprisonment.[26]

The second section was designed to provide not only for the two prerequisites that had been mentioned in the House bill, but also for all others that might be evolved by the ingenuity of the States. But in making it broad enough to include so much, the language became so vague that members of both parties thought it too indefinite to found an indictment upon.[27] It was held that the offense made punishable by the section was not defined with sufficient clearness. In particular, the intent required in the commission of every crime was only remotely indicated. The words in the Amendment "on account of race," et cetera, constituted the intent of the offense, so that when a person should be indicted for violating the Amendment, there must be an act with an intent proved to the satisfaction of the jury before he could be convicted. It must be proved, first, that he refused to register the applicant, if that should be required as a prerequisite to vote, or that he refused him his right to vote; and secondly, it must be proved that the refusal was because of the character, in the respects specified in the Amendment, of the person offering to vote. The second

[26] 16 Stat. at Large, 140–1.

[27] Sherman of Ohio and Williams of Oregon, Republicans, Globe, 41st Cong., 2d sess., pp. 3579, 3656.

section of the act was held not to meet these requirements.[28]

As to the meaning of the third section, there was no unanimity of opinion among the members of either party. It was a disputed question whether it applied to all persons, or exclusively to colored persons. Some thought that it placed under the jurisdiction of the United States the act of every citizen who might approach a register or judge of election. Those in charge of the bill, however, declared that the word "aforesaid" referred back to the act of discrimination mentioned in the second section. In order that it might be more clearly indicated that the third section referred only to such discrimination, an amendment was offered to make the affidavit state that the affiant was "wrongfully prevented by such person or officer on account of race, color, or previous condition of servitude," but the amendment was rejected,[29] and this point was left in comparative doubt.

It was openly declared by men of both parties that the third section would to a considerable extent set aside the registry laws in nearly all the States. It was thought by some that the right protected by the Amendment was not the right to be registered under any system of state registration, or to be taxed preparatory to voting under state laws, but only the naked right to vote without distinction of race or color. If so, the second and third sections were entirely unconstitutional.[30] Others held that, even though the right to be registered might reasonably be implied in the right to vote, it was inexpedient to set aside state regulations on the subject. In many States there were laws which provided ways and means by which persons might secure the right to vote in case they were prevented from being registered. But all these would be entirely swept away by the provision that the applicant's affidavit should be conclusive evidence that he had been wrongfully rejected.[31]

A criticism that was advanced against both the second

[28] Hamilton of Maryland, Globe, 41st Cong., 2d sess., Appendix, pp. 357–8.
[29] Globe, 41st Cong., 2d sess., p. 3688.
[30] Kerr of Indiana, ibid., p. 3872.
[31] Williams of Oregon, ibid., p. 3657.

and third sections was that in them Congress undertook to regulate and enforce the powers, duties, and functions of officers created under state authority, deriving their sole commission to act from the State, and responsible solely to the State by which they were chosen or appointed.[32] The decision of the Supreme Court in the case of Prigg vs. Pennsylvania[33] was cited as showing that there was a well-defined separation between federal and state officers and a thorough independence on the part of each in the discharge of their respective duties under their several governments.[34] It was denied that a provision in a federal statute declaring the non-execution of state laws by state officers to be a penal offense would authorize such penalties to be inflicted by the federal courts. In the Amendment there was no warrant authorizing Congress to pass a law requiring the officers of a State to execute the laws of that State under the penalty of punishment inflicted by Congress.[35]

To this contention it was replied that Congress could undoubtedly require state officers to discharge duties imposed upon them as such officers by the Federal Constitution, and might punish under federal law the state officer who violated a duty laid upon him by the Constitution. The federal courts were said to have repeatedly held that they could require municipal and county officers to perform the duties imposed upon them by state laws in levying taxes when such taxes became necessary to collect a judgment in their courts against such city or county, although all the powers and authority of such officers were derived from state laws. Could not Congress, it was queried, go as far in requiring state or county officers to perform those official duties, or at least those ministerial acts, which protect a citizen in the enjoyment of his constitutional rights, as it can in compelling the discharge of those which merely secure the enforcement of a legal obligation? Since the

[32] Thurman of Ohio, ibid., p. 3485.
[33] 16 Pet. 539.
[34] Hamilton of Maryland, Globe, 41st Cong., 3d sess., Appendix, p. 210.
[35] Davis of Kentucky, Globe, 41st Cong., 2d sess., p. 3667.

violation of a constitutional prohibition by a State could be consummated only by the officers through whom the State acts, there could be no more appropriate legislation for enforcing the prohibition than to compel state officers to observe it.[36]

Although the argument against imposing duties on state officers by federal law was based ostensibly on constitutional grounds, the real objection to it was that it was inexpedient. If it were once admitted that Congress could punish the violation of a law, it would seem to be an unavoidable consequence that Congress itself could pass that law. The principle once conceded, there would seem to be no barrier between Congress and the complete regulation and control of the entire machinery of elections in the States.

The third section of the act was a legal fiction, inasmuch as it was intended to secure the right to vote to those who were not actually registered. A still more audacious legal fiction was contained in the twenty-third, or contested election, section. It provided that whenever any person should be defeated or deprived of his election to any office, except elector of president or vice-president, representative in Congress, or member of a state legislature, by reason of the denial to any citizen who should offer to vote of the right to vote, on account of race, color, or previous condition of servitude, his right to hold and enjoy such office and the emoluments thereof should not be impaired by such denial; and such person might, in order to recover possession of such office, bring suit in the federal circuit or district courts, which were, in such cases, to have concurrent jurisdiction with the state courts.[37]

By the operation of this section a contesting candidate might be seated and declared elected by means of votes which had never been cast. Its effect would be to secure an office to one person by means of the intention of another

[36] Burchard of Illinois, Globe, 42d Cong., 1st sess., Appendix, p. 314. Cf. Ex parte Siebold, 100 U. S. 371.

[37] 16 Stat. at Large, 146.

person to perform an act which, in fact, he had never performed. In this respect it was a novelty in the history of American legislation.

That technical objection might be made to this section was admitted, but it was maintained that it was designed to enforce and secure not merely the observance of the letter, but the accomplishment of the spirit and object of the Fifteenth Amendment. That article of the Constitution clothed Congress with ample power to secure the end to be accomplished. If it gave Congress any authority to legislate on the subject at all, such legislative power must, by necessary implication, be sufficiently extensive to authorize the passage of a law effectuating the purpose in view, namely, securing to the colored man the right to vote, and the right to have the man for whom he votes hold the office, provided he should have received a majority of all the votes cast if the colored man had been permitted to cast his vote. It would not be enough merely to punish the man who denies the colored man the right to vote after the offense has been committed. That would not carry the object of the Amendment into execution. In order to effect the full purpose of the Amendment, the colored man must be given not only the right to vote, but the right to have his vote counted and made effective.[38]

This section, however, found few supporters, many members of the dominant party considering it both inexpedient and unconstitutional. It was pointed out that in practically all the States some statutory provision was made for determining the right of an incumbent to the office of which he has possession. Never before had the claim been made that Congress had any authority to interfere with these universally practiced state remedies.[39] But the strongest objection to the section was that there was no constitutional basis for it. The Amendment provided for protecting persons in the right to vote, but not for deciding contested

[38] Carpenter of Wisconsin, Globe, 41st Cong., 2d sess., pp. 3563, 3680.

[39] Howard of Michigan, ibid., p. 3654.

elections. To secure to A B his right to vote by proper remedies was doubtless a legitimate exercise of the power invested in Congress by the Amendment. But to secure to C D the indirect benefits to be derived from the constructive exercise by A B of his right to vote was not warranted by the Amendment, and was trenching on dangerous and uncertain ground.[40]

The substantive provisions of the Act that were expected to prove most effective in securing to the colored man the actual exercise of his right to vote were those contained in the fourth, fifth, sixth and seventh sections.

The fourth section provided that if any person or combination of persons, by force, bribery, or threats, should delay any citizen in doing any act required to be done to qualify him to vote or should prevent him from voting at any election, such person or persons should be subject to forfeiture, fine, and imprisonment.

The fifth section provided that if any person should attempt to hinder, control, or intimidate any other person to whom the right of suffrage was secured or guaranteed by the Fifteenth Amendment from or in exercising that right by means of bribery, or threats of depriving such person of employment, or of ejecting such person from house or land, or by threats of refusing to renew labor contracts, or by threats of violence to himself or family, the person so offending should be subject to fine or imprisonment.

The sixth section provided that if two or more persons should conspire together, or should go in disguise upon the public highway or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen for the purpose of hindering his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons should be held guilty of felony and be subject to heavy fine and imprisonment.

[40] Morton of Indiana, Globe, 41st Cong., 2d sess., p. 3681; Trumbull of Illinois, ibid., p. 3570.

The seventh section provided that if, in the act of violating any provision in the two preceding sections, any other crime should be committed, the offender should be visited with such punishments as were attached to such crimes by state law.[41] Sections from the eighth to the thirteenth, which were borrowed from the Civil Rights Act of 1866, provided the federal executive and judicial machinery for carrying into effect the substantive provisions of the act.

These sections, as a whole, were obviously designed to put down mob violence shown in preventing persons from exercising the right to vote and from being registered. They were aimed especially at the operations of the Ku Klux Klan, and were included in the act because it was thought that the measure would be largely ineffective unless it provided against conspiracies and combinations of men organized for the purpose of contravening the right conferred by the Amendment.[42]

The action of Congress in incorporating into the act the sections designed to prevent the interference of private individuals with the exercise of the right to vote was the most important canon of interpretation placed by that body upon the Amendment. It was this interpretation which especially aroused the opposition of the minority. The latter held that, if the limitations of a written constitution were of any binding force, the power of Congress to legislate in execution of constitutional provisions could not be so exercised as to enlarge the scope and meaning of those provisions. The Amendment operated upon the States in their corporate capacity. It was based upon the implication that the States had full control, except as limited by the Amendment, in fixing the qualifications of voters. If a State should fix the prohibited qualifications, the only proper mode of redress would be for the law making such requirements to be declared unconstitutional by the courts, for the contention would hardly be made that Congress

[41] 16 Stat. at Large, 141.
[42] Pool of North Carolina, Globe, 41st Cong., 2d sess., pp. 3611–12.

could punish state legislators for exceeding their powers.[43]

The prohibition upon the States contained in the Amendment was declared to be similar in character and in legal effect to other restrictions upon the States found in the Constitution. The States, for example, were forbidden to enter into agreements with foreign powers, or to keep ships of war in time of peace; but this did not prevent private persons from building war-ships and making contracts with foreign States. The denial to the States of the power to coin money did not prevent persons having no official relation to the States from coining money, and did not authorize Congress to punish counterfeiters of the current coin of the United States. Hence, by parity of reasoning, the denial to the States of the power to abridge the right to vote on the specified accounts did not apply to private individuals, and did not authorize Congress to punish such individuals for interfering with voters.[44]

In regard to the coining of money, the framers of the Constitution had indicated their belief that the prohibition upon the States did not give Congress the power of affirmative legislation to punish counterfeiters by inserting the grant of this power in another clause of the Constitution. This express grant, however, could not be said to correspond, in the mode of its operation, with the enforcement section of the Amendment. There was a necessary difference in character between legislation by Congress to execute an express power exclusive in itself, and legislation to enforce a limitation of a general power exclusive in the States. In the former case Congress might claim a liberal construction in aid of its express exclusive power. In the latter case the State had a right to restrict Congress to the very terms of the prohibition.[45]

It was admitted that a State could act only through its officers or agents, and that Congress might require such

[43] Hamilton of Maryland, Globe, 41st Cong., 2d sess., Appendix, pp. 354–5.

[44] Thurman of Ohio, Globe, 41st Cong., 2d sess., pp. 3661–2.

[45] Casserly of California, Globe, 41st Cong., 2d sess., Appendix, p. 473.

persons to conform in their official actions to the provisions of the Amendment. But this was the farthest limit to which the operation of the Amendment and the power of Congress under it could possibly be extended. It was ridiculous to treat as the act of the State the act of any mere ruffian or breaker of the peace, acting on his own motion, who interfered with voters. A State did not act through its isolated and straggling citizens. There were always state laws for punishing in the state courts any person who should intimidate voters or interfere with the proper conduct of elections. Such persons, far from representing the State, were really acting in direct violation of the will of the State.[46]

In answer to the above objections the broad constructionists argued that, in order to ascertain the meaning and full scope of the Amendment, it must be interpreted in the light of the history of the times and of the social and political conditions that gave it birth.[47] The spirit and true intent of the Amendment, as indicated by the debates in Congress at the time of its passage by that body, and as understood by the country at large, was that the colored man should be placed upon the same level in regard to voting as the white man, and that Congress should have the power to secure him in the full enjoyment of that right. The attainment of this object necessarily involved the exertion of the power of Congress upon individuals.[48] It was admitted that the Amendment did not in terms relate to the conduct of mere individuals, and that some state courts might give it a strict and narrow construction by refusing to apply its real principles to the case of an individual, not acting under the authority of a State, who should undertake to deny to a colored man the exercise of his right of suffrage. But the protest was made that this construction would defeat the object in view in adopting the Amendment, would thwart the intention of its framers, and would strip it in large degree of that

[46] Ibid.
[47] Pratt of Indiana, Globe, 42d Cong., 1st sess., p. 505.
[48] Morton of Indiana, Globe, 41st Cong., 2d sess., pp. 3670–1.

remedial and protective justice which was in the minds of its authors when it was under discussion in Congress.[49]

In proposing the Amendment to the States, Congress had not intended to confine its operation to the prohibition of state legislation. Such an interpretation would nullify the enforcement section. That section was intended to enable Congress to take every step that might be necessary or proper to secure the colored man in the peaceful and free exercise of his right to vote. If the legislation of Congress was to apply only to States, it would be unnecessary, because the federal courts would hold hostile state enactments void. Congress could not indict a state officer as an officer, or pass a criminal law applicable to a State. But whenever the Constitution guaranteed a right it gave also the means of protecting it. Hence, in order to give any adequate force and meaning to the second section of the Amendment, it must be construed as applying to individuals, whether they were acting under the authority of a State, or on their own responsibility.[50]

In regard to the analogous prohibition upon States in the Fourteenth Amendment, the position was taken that the argument that acts of violence by private individuals were not state acts was more specious than real. Constitutional provisions were made for practical operation and effect, and must be understood as tending to accomplish the objects sought. If a State had no law upon its statute books obnoxious to objection under the Amendment, but nevertheless permitted the rights of citizens to be systematically trampled upon without color of law, of what avail was the Constitution to the citizen? The argument led to the absurdity that while the Amendment prohibited all deprivation of rights by means of state laws, yet all rights might be subverted and denied, without color of law, and the Federal Government would have no power to interfere. Nothing could be more evident than that, taking the prohi-

[49] Howard of Michigan, Globe, 41st Cong., 2d sess., p. 3655.
[50] Pool of North Carolina, Globe, 41st Cong., 2d sess., pp. 3611–13; Morton of Indiana, Globe, 42d Cong., 1st sess., Appendix, p. 251.

bition on the States together with the enforcement section, the intention was to enable Congress to secure to citizens the actual enjoyment of the right guaranteed.[51]

Affirmative legislation was not the only method of denial of a right by a State. This might be done as effectually by not executing as by not passing laws. If a State made proper laws and had proper officials to execute them, and an outsider undertook to step in and clog justice by preventing the state authorities from carrying out the constitutional provision, Congress had the right to make such interference an offense against the United States.[52] A systematic failure to make arrests, to put on trial, to convict or to punish offenders against the right of citizens, constituted a denial of such rights by the State. Whenever unlawful combinations to impair rights secured by the Constitution set at defiance the constituted authorities in any State, or when the authorities were in complicity with the offenders and failed to ask aid of the Federal Government in putting down the outlawry, such dereliction was a denial by the State of constitutional rights.[53] In general, a State which, having the power to prevent the violation of rights, omitted to secure them, did in fact deny those rights.[54] The Federal Government must remedy acts of omission on the part of the States, must fill in the gaps in the execution of state laws, and by its own laws and by its own courts must go into the States for the purpose of giving the Amendment practical vitality.[55]

The arguments thus advanced by the broad constructionists were based upon two ideas, (*a*) the Amendment is to be construed as prohibiting individuals acting suo motu from infringing the right thereby conferred, (*b*) the de-

[51] Lowe of Kansas, Globe, 42d Cong., 1st sess., p. 375.
[52] Poland of Vermont, ibid., p. 514.
[53] Colburn of Indiana, ibid., p. 459.
[54] Lawrence of Ohio, Cong. Record, 43d Cong., 1st sess., p. 412.
[55] Pool of North Carolina, Globe, 41st Cong., 2d sess., p. 3611. The doctrine that the failure of a State to protect rights guaranteed by the Constitution amounts to a denial of them was expressly incorporated into the Act of April 20, 1871, section 3. 17 Stat. at Large, 14.

linquency of a State in not protecting this right constitutes a virtual denial of it. Although, in the minds of many, these two ideas were probably considered as mutually dependent, yet the first idea was apparently put forward by some as a distinct proposition. It is doubtful, however, whether there had been any intention on the part of Congress in passing the Amendment that it should cover the acts of private individuals. Congress had undoubtedly intended it to secure the equal right of the colored man to vote, but had apparently expected that this object would be attained by laying a prohibition upon the States against infringing it. When, in the course of events, it became evident that this was not sufficient to effect the object of the framers, the doctrine then sprang up that the Amendment must be expanded so as to cover the new state of affairs. This doctrine was the result of the reaction of circumstances upon theories, and it possessed both the advantages and the drawbacks of such a basis.

The Act of 1870 belonged, on the whole, to that class of legislation which its friends call progressive and its enemies revolutionary. It was upheld, in general, as a means toward setting into motion some of the powers of Congress for the protection of voters, and asserting something of the authority and dignity of the nation.[56] It was based upon the idea that until the colored man should have reached the point at which he could compete evenly with the white man, his undeveloped powers must be reinforced by a system of protection applied to man such as had been applied to manufactures, its principle being government support in the struggle for existence as long as needed. But the prediction was made that, although this was theoretically an excellent idea, it would prove unworkable in practice on account of the laissez faire trend of thought and the prevalent detestation of paternalism.[57] Those who regarded the act as revolutionary based their contention upon its alleged lack of constitutional warrant, and upon the far-reaching results

[56] Stewart of Nevada, Globe, 41st Cong., 2d sess., p. 3807.
[57] New York Nation, February 18, 1869, p. 124.

that would flow from it. The Amendment had not been intended by its framers, or by the people, to deprive the States of the general control over elections, or to clothe Congress with the power to dictate in what manner they should be conducted.[58] Yet the act was declared to assert boldly the doctrine that Congress had been invested with the complete regulation and control of the entire machinery of elections in the States.[59] Such a result would tend to consolidate all power in a centralized despotism, and reduce the States to simple atoms in an empire.[60]

We may advert briefly, before concluding this chapter, to the subsequent career of the legislation passed by Congress to enforce the Amendment. The substantive provisions of the Act of 1870 relating to the Amendment became, with some changes in phraseology, sections 2004 to 2010 inclusive and sections 5506 to 5509 inclusive of the Revised Statutes. Of these, sections 2005 to 2010 inclusive and section 5506 were repealed by the Act of February 8, 1894,[61] and sections 5507 and 5508 have been declared not to be appropriate legislation for the enforcement of the Amendment.[62] Hence there remain only sections 2004 and 5509, being sections 1 and 7 respectively of the Act of 1870. Section 2004 is the declaration of a right, but provides no penalty for its violation. Section 5509 does not create a distinct offense, but merely provides for the punishment of crimes committed in connection with the offenses prohibited in the two preceding sections. The net result, therefore, is that the bulk of the enforcement legislation has been rendered inoperative, and what still remains in force possesses little vitality.

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[58] Kerr of Indiana, Globe, 41st Cong., 2d sess., p. 3872.
[59] Thurman of Ohio, ibid., p. 3662.
[60] Hamilton of Maryland, ibid., Appendix, pp. 355, 360.
[61] 28 Stat. at Large, 36.
[62] James vs. Bowman, 190 U. S. 127; Karem vs. United States, 121 Fed. 250.

CHAPTER VI.

Judicial Interpretation.

The final determination of the actual meaning and effect of the Amendment rests neither with Congress nor with the state legislatures, but with the courts. When the Amendment became a part of the Federal Constitution, all conflicting provisions in the constitution or laws of any State became inoperative, because the courts, both federal and state, would be bound to declare them void when called upon in the due course of legal proceedings. Hence, to this extent the Amendment was effective without the aid of legislation. But though the inherent force of the Amendment may reach far enough to invalidate conflicting laws and, under some circumstances, to restrain the acts of administrative officers, yet it cannot inflict penalties for the violation of the right conferred.[1] Hence, subsidiary legislation was necessary in order to give the Amendment full vitality. Thus the totality of force emanating from the Amendment is twofold: that which it has ex proprio vigore, and that which it exerts through ancillary legislation. The amount of force operating through each of these channels depends to a considerable extent upon the strictness or liberality of the construction placed upon each by the courts.

No case involving the Amendment was decided by the Supreme Court until six years after its adoption. During this interval a number of cases came up in the state and lower federal courts, and a certain amount of divergence was shown in the general attitude displayed toward the Amendment by these two sets of courts.

On April 5, 1870, a week after the proclamation by the secretary of state of the adoption of the Amendment, but before any legislation had been passed to enforce it, a mayor-

[1] Cf. United States vs. Hudson, 7 Cr. 32.

alty election was held at Leavenworth, Kansas, out of which grew the contested election case of Anthony vs. Halderman.[2] Anthony brought quo warranto proceedings in the Supreme Court of the State to oust Halderman, who had been seated, alleging that a number of negroes, sufficient to change the result of the election, had been wrongfully denied registration. The counsel for the defendant put forth an argument which, if it had been sustained, would have almost paralyzed the Amendment. He contended that it ought to be construed according to its language, and not in accordance with any supposed intent not shown on its face. The Amendment, he declared, did not purport to confer any right, but in effect merely prohibited the national or state governments from depriving, for any of the reasons therein mentioned, any citizen, on whom the right to vote had been or might afterwards be conferred, of his right to exercise such franchise by future legislation. There was nothing in the Amendment which purported to affect any legislation passed and in operation before it took effect. If a State should voluntarily amend its constitution so as to permit negroes to vote, such right could not afterwards be taken from them; but further than this the Amendment was not operative.[3]

The case was decided in favor of the contestee on the ground that the negroes who had been refused registration did not have the necessary residence qualification. Justice Brewer, later of the Supreme Bench, in delivering the opinion of the court, negatived the contention of counsel for the contestee, intimating that the Amendment applied to laws or constitutional provisions enacted before its adoption. Yet, speaking of the Amendment, he said: "It operates no further than to strike the word 'white' from the State constitution. Its object and effect were to place the colored man in the matter of suffrage on the same basis with the white. It does not give him the right to vote independent

[2] 7 Kan. 50.

[3] This argument was later urged with much plausibility by Judge Albion W. Tourgee. See the Forum for March, 1890, pp. 78–91.

of the restrictions and qualifications imposed by the State constitution upon the white man."

The same attitude toward the Amendment was taken by the Supreme Court of Oregon in the contested election case of Wood vs. Fitzgerald,[4] which arose out of an election held in that State on June 6, 1870, for a representative in Congress and for state officers. One of the questions involved was whether the votes of two negroes should remain as cast. It was argued that they should be thrown out because the state constitution confined voting to white men. The court held, however, that the effect of the Amendment was to deprive of all legal force and efficacy the provisions of the state constitution restricting the exercise of the suffrage to white persons, thus leaving the negroes free to exercise the franchise upon the same conditions as white men.

Another case growing out of the same election was that of McKay vs. Campbell,[5] which arose under the second section of the Act of May 31, 1870, and was decided in September of that year by the United States Circuit Court for the District of Oregon. McKay, who was a half-breed Indian, offered to register, but Campbell, the registrar, refused to allow him to do so. McKay filed a complaint to this effect, but did not allege that the refusal of the registrar was on account of his race or color. Campbell demurred, alleging that the bill did not sustain a sufficient cause of action. The court, in sustaining the demurrer, said: "The Amendment does not take away the power of the several States to deny the right of citizens to vote on any other account than those mentioned therein. Notwithstanding the Amendment, any State may deny that right on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civic duties, crime, etc."[6] After pointing out that the complaint was silent as to the reason of the defendant's refusal to register the plaintiff, the court con-

[4] 3 Ore. 568.
[5] 1 Saw. 374.
[6] The same doctrine was laid down by the Supreme Court of California in the case of Van Valkenburg vs. Brown, 43 Cal. 43.

tinued, "It may have been for some other reason than on account of his race, etc., and then the plaintiff's remedy, if any, would be found under the State law and in the State tribunals." To sum up, the court held that, in order to maintain the action, it was necessary to prove on trial (*a*) that the plaintiff was otherwise qualified to vote, (*b*) that the defendant refused to furnish the plaintiff an opportunity to become qualified to vote, and (*c*) that such refusal was on account of the race, color, or previous condition of the plaintiff.

The above cases, decided, with one exception, in the state courts, exhibit a comparatively strict construction of the Amendment. They show no disposition to construe that article as depriving the States of any more of their former control over the suffrage than the letter of the Amendment rendered necessary. The two leading principles which they lay down are (*a*) the Amendment does not confer the right to vote upon any one, which right, as far as that article is concerned, is still derived from the States, and (*b*) in order to secure a conviction for a violation of the Amendment, it must be shown with a reasonable degree of certainty that the act of discrimination complained of was on account of the race, color, or previous condition of the person discriminated against. In these respects they foreshadow positions later assumed by the Supreme Court of the United States.

In contrast to the above were a number of cases decided in the lower federal courts between 1870 and 1876. Typical among these was the case of United States vs. Given,[7] decided in 1873 in the Circuit Court for the District of Delaware. Under the laws of that State, the names of those who had paid certain taxes were furnished to the judges of election, and no one was allowed to vote whose name was not on the list. Given, a state tax collector, was indicted and convicted in the Circuit Court under the second section of the Act of May 31, 1870, for having failed to return the names of certain negroes as having paid their taxes, and thus prevented them from voting.

[7] Fed. Cas. Nos. 15210 and 15211.

In its opinion the court took the position that the prohibition in the Constitution against the denial of a right by the States at the same time conceded the grant of the right; for such prohibition would be an absurdity if the grant were not admitted, since otherwise there would be no subject-matter for the denial or prohibition to work upon.

In upholding the section of the Act under which the indictment was framed, the court said: "Of what value is the constitutional provision unless it means that Congress may interfere when a State passes no unfriendly act, but neglects to impose penalties upon its election officers for making discriminations on account of race or color? If by failure to pass such laws as harmonize with and aid in making available and secure to all citizens the right to vote, a practical denial or abridgement of that right is effected, Congress . . . has full power under the Amendment to remove this evil and to select such means as it may deem appropriate to that end."

A step further was taken by the court when, in construing the first and second sections of the Amendment together, it declared that to consider the second section merely as a safeguard against national or state enactments, or as a protection against ministerial or judicial acts of state governments or of state officers acting in the line of their duty prescribed by a State, was to make superfluous and unmeaning all that was accomplished by the first section. If the enjoyment of the right secured by the Amendment was endangered from any other cause than a denial or abridgement by the general Government or by the several States, that danger was a proper subject-matter for Congress to legislate against. The Amendment was manifestly intended to secure the right guaranteed by it against infringement from any quarter, whether from the acts of private persons or of ministerial officers.

The position taken by the court in the Given case in regard to the sufficiency of the Amendment to cover the acts of private individuals was entirely obiter, but this point was

directly presented for adjudication in the case of United States vs. Crosby et al.,[8] decided in 1871 in the Circuit Court for the District of South Carolina. Crosby and others were indicted and convicted for forming, on their private responsibility and contrary to section six of the Act of 1870, a conspiracy to intimidate negroes from voting. In its opinion the court said, "Congress may have found it difficult to devise a method by which to punish a State which by law made a distinction on account of race or color, and may have thought that legislation most likely to secure the end in view which punished the individual citizen who acted by virtue of a State law or upon his individual responsibility."

The same position was taken by Justice Bradley in the case of United States vs. Cruikshank et al.,[9] which came up in 1874 in the Circuit Court for the District of Louisiana. Cruikshank and one hundred others were indicted for a conspiracy contrary to section six of the Act of 1870. In two of the counts the intent charged was to put the parties named in great fear of bodily harm because they had voted at divers elections held in the State of Louisiana. There was nothing to show, however, that the elections voted at were any other than state elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. A motion was entered for arrest of judgment, and Justice Bradley, in delivering the opinion in favor of the motion, among other things said: "The real difficulty in the present case is to determine whether the Amendment has given Congress any power to legislate except to furnish redress in cases where the States violate the Amendment. Considering that the Amendment, notwithstanding its negative form, substantially guarantees the equal right to vote to citizens of every race and color, I am inclined to the opinion that Congress has the power to secure that right not only as against the unfriendly operation of State laws, but against outrage, violence, and combinations on the part of individuals irrespective of State laws."

[8] 1 Hughes, 448.
[9] 1 Woods, 308.

Although the parties indicted in this case were acting on their individual responsibility without color of state authority, yet the case is not a precedent for the proposition that the Amendment applies to the wrongful acts of private individuals.[10] The weight of this dictum is due to the learning of the judge delivering it. The point upon which the case really turned, and the ground of Bradley's opinion in favor of the motion, was that the indictment was defective in all its counts because it did not allege that the acts complained of were done on account of the race of the complainants. The law on the subject he conceived to be that when any atrocity was committed, by private combinations, or even by private outrage or intimidation, which was due to the race of the party injured, it might be punished by the laws and in the courts of the United States; but that any outrages, whether against the colored race or the white race, which did not flow from this cause, were within the sole jurisdiction of the States.

The order arresting the judgment in conformity with the opinion of Justice Bradley was affirmed by the Federal Supreme Court,[11] where the case was carried on writ of error and certificate of division. The Supreme Court neither affirmed nor denied Bradley's opinion that the Amendment inhibits the acts of private individuals, nor did it go so far as to say that any outrage, if committed on account of the race of the person injured, came within the jurisdiction of the United States. But it did base its decision, in affirmance of that of Bradley, on the ground that it had not been shown that the outrages in question had been committed on account of race. "As it does not appear in the counts," said Waite, C. J., "that the intent was to prevent these parties from exercising their right to vote on account of their race, etc., it does not appear that there was an intent to interfere with any right granted or secured by the Constitution of the United States."

[10] Although it has been used as such in United States vs. Lackey, 99 Fed. 952.

[11] In United States vs. Cruikshank, 92 U. S. 542.

Summarizing the results of the decisions up to this point, we find that the principle first laid down in McKay vs. Campbell, to the effect that an essential ingredient in the offense prohibited by the Amendment is discrimination on account of race, etc., has not been denied in any case, and has been explicitly upheld in others. In the second place, the doctrine embodied in the early cases, that the Amendment does not confer the right to vote upon any one, though not absolutely denied, has been qualified to the extent of holding that the prohibition of the denial of the right is a virtual grant of the right. The third principle thus far established, partly as a corollary from the qualification introduced into the second, is that the power of Congress under the Amendment reaches to the punishment of private individuals who infringe the right secured by the Amendment.

The last named principle rested, up to this point, on at least one direct decision[12] and several more or less weighty dicta, and had not been explicitly denied by any litigated case. In the cases in which this principle was laid down the indictments were framed under sections in the Act of Congress which placed this interpretation upon the Amendment, and hence the courts were forced either to accept this interpretation or to declare the Act of Congress to that extent not to be appropriate legislation under the Amendment. Yet the animus of these opinions does not appear to have been solely a desire to avoid setting aside the Act of Congress, for, had such been the case, unnecessary dicta would not have been uttered. Furthermore, although in the Given case[13] it was implied that the failure of a State to pass laws which would secure the free exercise of the right conferred by the Amendment constitutes a virtual denial of that right by the State, yet even this does not seem to have been the ground upon which these opinions were rendered. It would be unreasonable to presume that these courts considered the isolated act of a private individual as the act of the State, unless it were as a sort of legal fiction to give a color of

[12] United States vs. Crosby, 1 Hughes, 448.
[13] Above, p. 100.

support to their position. But the real reason for their position was practical rather than legal. It was admitted that in its outward form the Amendment laid a prohibition upon the acts of the national and state governments, and not upon those of private individuals. But substance must not be sacrificed to form. The spirit and manifest purpose of the Amendment, as indicated by the history of the times in which it was proposed and adopted, was to secure to the negro the right to vote upon an equal basis with the white man. If the courts were impotent to construe it in the light of this purpose, and to protect the right against infringement from any quarter, then the right would become incapable of enjoyment, and the national will as expressed in the Amendment would be entirely frustrated. Moreover, the enforcement section must be construed as conveying some effective power, and since the only efficient means of enforcing the Amendment would be by punishing individuals, whether acting under state authority or suo motu, for violating the right secured thereby, Congress must be construed to have the power of selecting this means. These were the considerations, based primarily upon practical grounds and secondarily upon a broad construction of the implied powers vested by the Constitution in the National Government, which induced the lower federal courts to expand the Amendment beyond the scope which its letter and prima facie meaning would seem to warrant.

Thus matters stood when, in 1876, the Supreme Court was for the first time called upon to place an authoritative interpretation upon the Amendment. That court had already laid down in the case of Minor vs. Happersett[14] the doctrine that the Constitution does not confer the right of suffrage upon any one, and that the United States has no voters of its own creation in the States. This declaration was too broad if intended to apply to all the provisions of the Constitution,[15] but, as regards the Fifteenth Amendment, it has never been modified. It foreshadowed the position taken

[14] 21 Wall. 162.
[15] See Ex parte Yarbrough, 110 U. S. 651.

by the court in the case of United States vs. Reese,[16] which is the leading case upon the interpretation of the Amendment.

Reese was one of the inspectors of a municipal election held in the State of Kentucky, and was indicted under sections three and four of the Act of May 31, 1870, for refusing to receive and count at such election the vote of one Garner, a citizen of the United States of African descent. The case came to the Supreme Court on certificate of division between the judges of the Circuit Court for the District of Kentucky. In the Supreme Court, the United States expressly waived the consideration of all claims not arising out of the Fifteenth Amendment and the act passed for its enforcement. In delivering the opinion of the court, Waite, C. J., said: "The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, etc. Before its adoption, this could be done. . . . Now it cannot. If citizens of one race having certain qualifications are permitted to vote, those of another having the same qualifications must be. . . . It follows that the Amendment has invested the citizen of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude."

The question then arose whether, in the light of these distinctions, the right claimed to have been acquired under the Enforcement Act was within the constitutional power of Congress, under the Amendment, to protect by penal enactments. In considering this question, the court said: "The power of Congress to legislate at all upon the subject of voting at State elections rests upon this Amendment. It cannot be contended that the Amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at State elections. It is only

[16] 92 U. S. 214.

when the wrongful refusal at such an election is on account of race, etc., that Congress can interfere and provide for its punishment."

Applying this principle to the sections of the act under which the indictment was framed, the court expressed the opinion that these sections were broad enough to provide generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise, and were not confined in their operation to unlawful discrimination on account of race, etc. For this reason, the court decided that these sections were beyond the authority conferred on Congress by the Amendment, and hence an indictment under them could not be sustained.

In deciding this case the court was evidently animated with the desire to preserve a just balance between the federal and state governments, and to annul any encroachments which may have been made by one upon the other. In marking off the proper sphere of each, the court intimated that, as far as the Amendment was concerned, the right to vote was still derived from, and within the protection of, the States. This view was even more emphatically stated by the court in the Cruikshank case[17] in the following language: "The right of suffrage is not a necessary attribute of national citizenship; but exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

The Reese case is important, not so much for establishing new doctrines as for placing the authoritative approval of the Supreme Court upon doctrines already in process of becoming established. It reaffirmed two of the principles which had emerged with more or less distinctness from previous decisions, namely, (*a*) that the Amendment does

[17] 92 U. S. 542, decided the same day as the Reese case.

not confer the right to vote upon any one, and (*b*) that the discrimination prohibited by the Amendment is that which is due solely to race, etc.

The third principle which had received support in the lower federal courts, viz., that the Amendment inhibits the wrongful acts of private individuals as well as of the national and state governments, was neither affirmed nor denied in the Reese case. Since the defendant in this case was an officer of the State, and the acts complained of were performed in his official capacity, the question of the sufficiency of the Amendment to cover the acts of private individuals was not before the court, and the decision did not involve that point.[18] In this particular, therefore, the law remained to all intents and purposes as it had been laid down in the United States vs. Crosby.

In the case of ex parte Yarbrough,[19] decided in 1884, the principle laid down in the Reese case that the Amendment does not confer the right of suffrage upon any one was apparently somewhat qualified. In the Yarbrough case the court denied a petition for a writ of habeas corpus for the release of several prisoners convicted for conspiracy to prevent a person of African descent from voting at an election for a member of Congress. Justice Miller, delivering the opinion of the court, said: "While it is true, as said in the Reese case, that the Fifteenth Amendment gave no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slaveholding States had not removed from their constitutions the words 'white man' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, it

[18] The intimation by Justice Brewer in James vs. Bowman, 190 U. S. 127, that the Reese case is a precedent for the position that the Amendment does not apply to private individuals is therefore unwarranted.

[19] 110 U. S. 651.

annulled the discriminating word white, and thus left him in the enjoyment of the same rights as white persons.[20] In such cases the Amendment does, proprio vigore, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right."

This result, however, does not arise from the essential nature of the Amendment, but from its operation upon an adventitious set of circumstances. The investment of the negroes with the suffrage was not the necessary effect of the elimination of the discriminating word " white " from a state constitution, because the negroes would not then have been entitled to vote unless they had been able to measure up to the other qualifications required by the State in the case of white men. And even had they been able to do so, they would have derived the right to vote from the state law as modified by the Amendment.[21] As far as the Amendment is concerned, the States might abolish the suffrage altogether. It remains fundamentally true, therefore, that the Amendment does not confer the right to vote upon any one.

Although, in the Yarbrough case, the persons who had been convicted for conspiring to prevent negroes from voting were acting without color of state authority, yet it does not follow that the court held in this case that the Amendment prohibits wrongful acts of private individuals. It is important to note that the election at which the negro in question was alleged to have been prevented from voting was an election for a member of Congress. The court expressed the view that the right to vote at such an election was a right derived from the Federal Constitution, and hence Congress might punish combinations of private persons who should prevent lawful voters from voting at such an election on account of their race, etc. The power

[20] Following Neal vs. Delaware, 103 U. S. 370.

[21] Except in congressional elections, when the right to vote would have been derived from the old constitution. In McPherson vs. Blacker, 146 U. S. 37, it was held that the Amendment does not secure the right to vote for presidential electors.

of Congress in this particular, however, would not be derived from the enforcement section of the Fifteenth Amendment,[22] but from the general control of the national legislature over congressional elections, and from the implied power of the National Government to safeguard any right derived from the Constitution, the exercise of which is essential to its existence and healthy organization.

In the case of the United States vs. Amsden[23] it was for the first time directly decided that the Amendment does not lay a prohibition upon private individuals. Amsden, a private citizen, was indicted under section 5507, R. S.,[24] for preventing a colored man, by threats of violence, from voting at a purely state election. No law of the State was complained of, and no state officer was charged with wrongdoing. The court sustained the motion to quash the indictment on the ground that the section under which it was framed was not warranted by the Amendment for two reasons: (*a*) it undertook to restrain the acts of private individuals; and (*b*) it was not confined to the prohibition of discrimination on account of race, etc.

In the cases of United States vs. Harris[25] and Logan vs. United States[26] casual intimations were thrown out by the Supreme Court that the Amendment does not lay a prohibition upon private persons. But in neither of these was the Amendment directly before the court for adjudication. Strictly speaking, therefore, the law upon this point remained in the somewhat doubtful condition in which it had been left by the Amsden case, which was the only direct decision in conflict with the previous doctrine of the Crosby case and with the dicta in the Given and Cruikshank cases.[27] This condition of affairs continued until 1900, and was the theoretical justification for the decision in the case of

[22] Per contra, see 1 Foster on the Constitution, 330.
[23] 6 Fed. 819. Decided in 1881, in the United States District Court, District of Indiana.
[24] Corresponding to section 5 of Act of 1870.
[25] 106 U. S. 629.
[26] 144 U. S. 263.
[27] Above, pp. 101, 102.

United States vs. Lackey,[28] handed down in that year by the Federal District Court for the District of Kentucky.

Lackey was indicted under section 5507, R. S., for preventing certain persons of the African race from voting at an election at which state officers only were chosen. It was charged that the alleged offense was committed on account of the race of the negroes, but it was not charged that it was done under color of any state law or state authority. The court held that, as a matter of fact, the Amendment did confer on the negro the right to vote, and that Congress could enforce that right against the hostile acts of individuals, whether acting under state authority, or on their own responsibility. Section 5507 was adapted to this end, and was therefore appropriate legislation for the enforcement of the Amendment. In taking this position, the court relied on the dictum of Bradley in the Cruikshank case,[29] and refused to follow the Amsden case on the ground that it did not appear to have been ruled according to the views of the Supreme Court in the Yarbrough and Reese cases. "Indeed," said the court, "if the views expressed in the Amsden case are to prevail, the Fifteenth Amendment is far less important and far less adapted to the objects its framers had in view, than might have been inferred from the tremendous struggle for its adoption, and the matter had probably as well have been left with the States altogether."

The decision in the Lackey case was ruled more in accordance with what were conceived to be the ends of justice than with the weight of persuasive, if not imperative, authority. Even apart from the Amsden case, light upon the construction of the Fifteenth Amendment might have been drawn from the decisions of the courts in regard to the analogous prohibitions of the Fourteenth Amendment. In a long line of cases it had been held that these prohibitions operate as restraints upon the action of States

[28] 99 Fed. 952.
[29] Above, p. 103.

and not of private individuals,[30] and it was reasonable to suppose that these decisions must control the construction of the Fifteenth Amendment.

The case of United States vs. Lackey was immediately overruled by the Circuit Court of Appeals in the case of Lackey vs. United States.[31] In this the court followed the Amsden case, and declared section 5507, R. S., unconstitutional, because it was so broad in its terms as to make punishable an act of a private person committed at a purely state election, if committed against a negro voter, although it had no relation to the race, etc., of such voter.

In the case of Karem vs. United States[32] the two principles were clearly laid down that the Amendment relates (*a*) solely to state action, and (*b*) solely to discrimination on account of race, etc. It follows from these principles that appropriate legislation for enforcing the Amendment must be directed to state action in some form, by which otherwise qualified voters are denied the elective franchise on account of race, etc. Legislation directed to the mere lawless acts of individuals at state elections, even though such acts be based on race or color, would enter the domain of the police power of the State. The power of Congress under the Amendment is limited to legislation anticipatory or corrective of the discriminatory conduct of those exercising state authority. This power is sufficiently ample to provide for the punishment of state officers who, even at purely state elections, refuse to receive and count the votes of otherwise qualified voters on account of their race, etc.

The controversy as to the sufficiency of the Amendment to inhibit the acts of private persons was finally set at rest by the Supreme Court in the case of James vs. Bowman,[33]

[30] See, e. g., United States vs. Harris, 106 U. S. 629; Civil Rights Cases, 109 U. S. 3; Logan vs. United States, 144 U. S. 263; Virginia vs. Rives, 100 U. S. 313; Le Grand vs. United States, 12 Fed. 577.

[31] 107 Fed. 114.

[32] 121 Fed. 250. Decided in 1903 by the Circuit Court of Appeals for the Sixth Circuit.

[33] 190 U. S. 127.

decided in 1903. This was the first case in which that court directly decided that such an extension of the Amendment cannot be sustained.

The case came up on appeal from the District Court for one of the Kentucky districts. Bowman, a private citizen, had been indicted under section 5507, R. S., for having prevented certain negroes, by means of bribery, from voting at an election for a member of Congress. The indictment charged no wrong done by any one acting under the authority of the State of Kentucky, nor that the bribery was on account of race, etc. Bowman sued out a writ of habeas corpus on the ground of the unconstitutionality of section 5507. The district judge granted the writ, following reluctantly the decision in Lackey vs. United States. From this judgment the Government appealed, in the name of James, the district marshal. The Supreme Court affirmed the judgment of the District Court, holding section 5507 not to be appropriate legislation for the enforcement of the Amendment, because (*a*) it was not confined to the interdiction of state action, and (*b*) it did not relate solely to wrongful discrimination on account of race, etc. Justice Brewer, delivering the opinion of the court, held that the principles of interpretation applicable to the first section of the Fourteenth Amendment are equally applicable to the construction of the Fifteenth Amendment. The latter article, he said, "relates solely to action by the United States or by any State and does not contemplate wrongful individual acts." Hence, "a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress to prevent action by the State through some one or more of its official representatives."[34]

[34] The court admitted that Congress had general power over congressional elections, but declared that the statute in question was not enacted in pursuance of such power, but was an attempt to exercise power supposed to be conferred by the Fifteenth Amendment in respect to all elections, state and federal.

The final determination of the question involved in this phase of the Amendment was delayed, not because of the difficulty of the law upon the subject, but because some courts apprehended that unless the Amendment were extended so as to cover individual acts, it would be largely shorn of its efficiency in securing the right of the negro to vote. As a mere question of law, such an extension is unwarranted, even apart from the explicit language of the Amendment. No agencies except the state and federal governments are capable of denying the right to vote, because they alone have the power to confer it. Private individuals can interfere with the enjoyment or exercise of the right to vote, but are impotent to take away the right itself.

Having established the principle that the Amendment can be violated only by the State or by the United States, the further question remains as to when any particular discrimination is imputable to these agencies. This question has not been worked out with any fullness in the decisions on the Fifteenth Amendment, and this leaves the matter open to theorization, except in so far as its determination is controlled by decisions in analogous cases. We need consider only two cases, which will be seen to be merely two phases of the same case, viz., (*a*) when the law under which a state officer commits a discriminatory act is in conflict with the Amendment, and (*b*) when such act is committed by a state officer without color of authority from any state law.

It has been held that the issuance of a warrant by a state officer under a state law which authorized him to do so, but which, in this respect, was void for conflict with the Fourteenth Amendment, was an act of the State.[35] The state act was not the enactment of the void law, but the issuance of the warrant. According to the theory of an unconstitutional law, such a supposed law is not a law at all, has no validity or efficacy whatever, and hence can confer no authority upon any one. What a state legislature cannot constitutionally do, in contemplation of the law it has not done.[36]

[35] In re Lee Tong, 18 Fed. 255.
[36] Poindexter vs. Greenhow, 114 U. S. 270.

A State, therefore, cannot by law authorize any of its officers to violate the Amendment. The act of violating the Amendment on the part of the State does not take place when the legislature assumes to pass an act in conflict with the Amendment, but when an officer of the State undertakes to enforce such a void law.

Furthermore, if a state court, acting within its jurisdiction, holds valid an act of the state legislature which conflicts with the Amendment, or interprets a valid act erroneously so as to conflict therewith, such ruling, in contemplation of law, is to be viewed as a void law, i. e., not as an act of the State and therefore not in violation of the Amendment.[37] But if an officer of the State undertakes to execute the judgment of the state court under the supposed authorization given by its erroneous decision, his act is the act of the State and violates the constitutional prohibition. Hence the Amendment is not violated either by the unconstitutional laws of a state legislature or by the erroneous rulings of the state courts, but only by the actual enforcement by a state officer of such unauthorized laws or rulings.

It might be supposed, by parity of reasoning, that if an executive officer of a State acts ultra vires, either under the supposed authorization of a void law or of an erroneous decision, or without color of law, his act is not to be considered the act of the State, and hence not a violation of the Amendment.[38] Some color also is given to such a position by a ruling of the Supreme Court to the effect that a state executive officer acting under the supposed authorization of an unconstitutional law is stripped of his official char-

[37] Cf. Arrowsmith vs. Harmoning, 118 U. S. 194; but see, per contra, Scott vs. McNeal, 154 U. S. 34.

[38] It must not be overlooked that state officers sometimes exercise both judicial and executive functions. Thus a judge of election passes on a voter's qualifications and then decides to receive or to reject his vote. But this is merely a case where a subordinate tribunal executes its own decisions. The actual coalescence of two functions in one person does not prevent their separation in principle. The voter is not injured by an erroneous decision of the election judge, but by the conduct of the judge in pursuance of his decision.

acter, and acts in his private capacity.[39] If such a position could be maintained in regard to the Fifteenth Amendment, that article would indeed be rendered a mere brutum fulmen, for, if our reasoning is valid, it could not then be violated by either the legislative, the judicial, or the executive branch of a state government. But at this point the doctrine of ultra vires, as far as it is applicable to the Amendment, breaks down. In as far as that article is concerned, the theory of an unconstitutional law cannot properly be extended so as to apply to the unauthorized act of an administrative officer. The Amendment has built around every citizen of the United States a legal exemption from the prohibited discrimination on the part of all state instrumentalities officially employed in the execution of the law at the point where the individual rights of the citizen are touched.[40] Inspectors of election exercise the whole power of the State in creating its actual government by the reception of votes and the declaration of the results of the votes. If they receive illegal votes or reject legal ones, the act is in each case the act of the State, and the result must be abided by until and unless corrected by the courts. By such acts the State invades the domain of political liberty built around the citizen by the Amendment. In general, individual rights are not affected by the laws on the statute books or by the decisions of the courts unless and until they are enforced. But when an administrative officer of a State, acting by virtue of public position under that State, undertakes to enforce a void law or an erroneous decision, or discriminates without color of law against a lawful voter on the prohibited grounds, his act is the act of the State, and violates the right secured to the citizen by the Amendment.[41]

[39] Poindexter vs. Greenhow, 114 U. S. 270, and see separate opinion of Field and Clifford, JJ., in Virginia vs. Rives, 100 U. S. 313. But compare, per contra, Ex parte Virginia, 100 U. S. 339; C. B. & Q. R. R. Co. vs. Chicago, 166 U. S. 226; and Pacific Imp. Co. vs. Ellert, 64 Fed. 430.

[40] Cf. N. C. & St. L. Ry. vs. Taylor et al., 86 Fed. 184.

[41] Unless such administrative acts can be and are fully corrected by the state courts. Cf. Virginia vs. Rives, 100 U. S. 313.

The principle which, by the decision of the Supreme Court in James vs. Bowman,[42] became an orthodox canon of the interpretation of the Amendment, viz., that that article lays a prohibition upon state action in some form and not upon the action of private individuals, has become less important since 1890. That date may be adopted for convenience as marking the division between the era of violence and private intimidation and the era of legal disfranchisement. The feature of the Amendment which is now perhaps of more importance than any other is that the discrimination which is thereby prohibited is that which is due solely to race, etc. This doctrine, as we have seen, was early recognized by the courts as one of the leading principles in the interpretation of the Amendment. The principle itself is settled practically beyond doubt, but, in applying it to concrete cases, the question arises as to when any particular discrimination is on account of race, etc. This question has not yet been fully worked out by the courts.

In the early case of McKay vs. Campbell,[43] the court, after laying down the general principle, said: "It may be said with much probability that disingenuous judges of elections who are . . . prejudiced against the Amendment . . . may refuse to allow a citizen to qualify himself to vote, ostensibly for some reason not within the purview of the Act, but really and in fact on account of his race. But this is a question of fact, and, if the evidence is sufficient, the jury will be bound to disregard the pretences of the defendant and find according to what appears to have been the fact. Besides," the court added, "to prevent a failure of justice on this account it may be necessary and proper to hold in this class of cases . . . that slight proof on the part of the plaintiff as to the reason of the defendant's refusal is sufficient to throw the burden of proof in this respect upon the latter."

In the case of United States vs. Cruikshank,[44] in which negroes had been prevented by violence from voting, Waite,

[42] 190 U. S. 127.
[43] 1 Saw. 374.
[44] 92 U. S. 542.

C. J., said: "We may suspect that race was the cause of the hostility, but it is not so averred. This is material to a description of the substance of the offense, and cannot be supplied by implication. Everything essential must be charged positively and not inferentially. The defect here is not in form, but in substance."

In both of these cases the lack of proof that race was the cause of the discrimination was the ground upon which the decision directly turned. The difficulty which will doubtless be experienced by the courts in determining the amount of proof necessary to convict for violation of the Amendment, involving an act of discrimination complained of on account of race, etc., will arise in part from the conflict of two considerations. The first is the common-law principle that a criminal statute must be construed strictly. The second is the consideration that, on account of the difficulty of proving the motive in such cases, the benefit of doubt is to be given to the injured party. Whether these conflicting considerations shall become fully harmonized or not, the general principle holds good that the Amendment is not violated unless discrimination on the specified accounts is shown to the satisfaction of the court. Unless this is shown the discrimination is presumably based on other grounds, and hence remains within the sole jurisdiction of the State.

The inference is sometimes made that when persons are prevented from voting and those persons are negroes, therefore the exclusion is on account of race, etc. For example, Mr. J. C. Rose adduces the fact that in 1900 there were in South Carolina and Mississippi 350,000 adult male negroes, and that the aggregate number of votes returned in both States for the Roosevelt and Fairbanks electoral ticket was only about 5000. From these facts he deduces this conclusion: "It is clear, therefore, that it has in fact been possible for the white inhabitants of some of the States . . . so to abridge the right of suffrage *on the ground of race and color* as to deny that right substantially to all negroes."[45]

[45] "Negro Suffrage: The Constitutional Point of View." American Political Science Review. Vol. 1, p. 20. Italics my own.

As a matter of fact that may be true, but as a legal proposition it is a non sequitur. It is not only unwarranted to presume that because certain persons are excluded from the suffrage and those persons are negroes, therefore such exclusion is on the ground of race and color, but such a state of facts may, with equal plausibility, be explained on another hypothesis. It is hardly probable that any qualification that a State may set up will bear equally on both races. If there should be any qualification that all the whites could reach but no negro could, and that qualification did not involve some characteristic unmistakably distinguishing, or inseparable from, either race, then the negroes would not be excluded on account of their race. Now Mr. Rose's argument is based upon two conflicting assumptions, (*a*) that there is no qualification that would admit practically all the whites and exclude practically all the blacks that would not be based on race or color, and (*b*) that no negroes at the time and place mentioned voted the Democratic ticket and practically no white men voted the Republican ticket. It is in the mutual repugnance of these two assumptions that his argument, viewed as a legal proposition, breaks down. If we accept his second assumption as a working hypothesis, then the respective party proclivities of white and black men in the State constitute a line of cleavage between them almost, if not quite, as distinct as that of race or color. That a discrimination against negroes may as a matter of fact be based on such a consideration has been recognized by the courts.

In the case of United States vs. Cruikshank,[46] Bradley, J., sitting on circuit, said: "There may be a conspiracy to prevent persons from voting having no reference to discrimination on account of race or color. It may include whites as well as blacks, or may be confined altogether to the latter. It may have reference to the particular politics of the latter. All such conspiracies are amenable to the State law alone. To bring them within the Amendment, they must have for

[46] 1 Woods, 308.

motive the race, etc., of the party whose right is assailed."[47]

This opinion of the learned justice, which was not a casual remark, but was an appreciable influence in the decision of the case, is based upon a proposition which is the opposite of Mr. Rose's first assumption, viz., that there may be a qualification or ground of discrimination among potential voters, not based on race or color, which would admit all the whites and exclude all the blacks. Hence, according to this view, his first assumption is untenable, and the Amendment is not necessarily violated, even though none but negroes are discriminated against. It is true that if the discrimination is on account of some inseparable characteristic of the negro race, which distinguishes that race unmistakably from the white race, such discrimination is on account of race. But propensity to vote the ticket of a particular party is not such a characteristic. Hence, according to the hypothesis which we are now pursuing, if practically all the negroes and practically no white men in a particular State are prevented from voting, the presumption may be quite as strong that the basis of discrimination is party proclivity as that it is race, color, or previous condition of servitude. If such is the case, the right secured to the citizen by the Amendment is not infringed.

The chief application at the present time of the principle that the discrimination prohibited by the Amendment is that which is due solely to race, etc., is in connection with the so-called disfranchising constitutions which have been put into operation by several Southern States, beginning with Mississippi in 1890. The first case that reached the Supreme Court, however, arose in 1895 out of the attempt of South Carolina to provide for calling a convention to revise the constitution. The law under which the registration preliminary to the election of delegates to the convention was held was so drawn as to exclude ignorant, roving, and improvident persons. Mills, a negro, tried to register under

[47] In James vs. Bowman, 190 U. S. 127, the court intimated that the negroes prevented from voting were so prevented, not because they were colored men, but because they were voters.

this system, but was rejected by Green, the registrar. He brought suit against Green, and secured an injunction from the Federal Circuit Court forbidding him to perform the acts complained of. The injunction was issued upon the ground that the sole intention of the legislators in passing the law was to disfranchise as many Africans as possible, and at the same time to interfere with as few white voters as possible. The court held that this infringed the constitutional right of the complainant.[48]

The case was immediately carried to the Circuit Court of Appeals, where the injunction was dissolved. Fuller, C. J., ordered that the bill be dismissed on the ground that equity has no jurisdiction in matters of a political nature.[49] Justice Hughes, concurring, rested his opinion upon "the impolicy of interference by the courts in questions which will result in dragging them constantly into the arena of party politics."[50] The case was thereupon carried up on appeal to the Supreme Court. But in the meantime the election had been held, the convention had met, and had entered upon the discharge of its duties. Consequently the Supreme Court dismissed the appeal on the ground that no relief within the scope of the bill could then be granted, there being no subject-matter upon which the judgment of the court could operate.[51] In this way the court avoided passing upon the merits of the law.

In 1890 Mississippi adopted a constitution by which it was required that all voters should have resided one year in the election district, should never have been convicted of certain specified crimes, and should have paid all taxes for two years back, and be able to produce satisfactory evidence of having done so.[52] Beginning with 1892, in addition to the foregoing requirements each voter must be able to read any section of the Constitution, or to understand the same when read to him, or to give a reasonable interpretation thereof.[53]

[48] Mills vs. Green, 67 Fed. 818.
[49] Green vs. Mills, 69 Fed. 852.
[50] Ibid.
[51] 159 U. S. 651.
[52] Section No. 241.
[53] Section No. 244.

There is nothing on the face of these provisions which discriminates against negroes as such. The only objection that could be raised is the wide discretion conferred upon election officers in administering the understanding clause.

In 1898 this constitution came before the Federal Supreme Court for adjudication.[54] Williams, a negro, was indicted for murder in a lower court by a grand jury composed entirely of white men. He moved to quash the indictment on the ground that the law under which the jury was organized was unconstitutional. The trial court denied the motion, and on appeal to the Supreme Court of the State the judgment was affirmed. The case was then carried up on writ of error to the Federal Supreme Court. The plaintiff in error contended that the laws of Mississippi required that in order to be a juror one must be an elector, and that the franchise provisions of the constitution were a scheme on the part of the white people to discriminate against negroes on account of their race. He claimed, however, not that either the constitution or the laws of the State discriminated in terms against the negro race, but that such discrimination was effected by the powers vested in administrative officers. But the Supreme Court refused to interfere, holding that the state constitution and laws did not on their face discriminate between the races, and that "it had not been shown that their actual administration was evil, only that evil was possible under them."

This disposition of the case seems at first sight to conflict with rules of interpretation laid down by the court in Henderson vs. Mayor of New York[55] and in Yick Wo vs. Hopkins.[56] In the latter case, however, it was shown to the satisfaction of the court that the ordinances complained of were not only unconstitutional on their face but were also administered so as to discriminate unjustly between citizens. In the Williams case this was not shown. Williams merely alleged as a general proposition that these provisions had

[54] Williams vs. Mississippi, 170 U. S. 213.
[55] 92 U. S. 259.
[56] 118 U. S. 356.

been used to discriminate against negroes. He did not adduce any particular act of discrimination that occurred at a definite time and place. Hence the allegation was insufficient, and the decision was clearly correct, since, in general, courts will not undertake to redress evils unless actual evils are shown.

In 1901 Virginia framed a new constitution which temporarily confined the suffrage to veterans and their sons, taxpayers, and those who were able to read and explain, or to understand and give a reasonable explanation of, any section of the Constitution.[57] Under this system an election was held the following year for members of Congress. Actions were then commenced in the Federal Circuit Court for a writ of prohibition and for an injunction to restrain the State Board of Canvassers from canvassing the votes cast at this election. The court dismissed both the bill and the petition, and the cases were then carried up to the Supreme Court on appeal and writ of error. In the meantime the canvass was made, certificates of election were issued, and the persons elected were admitted to the House of Representatives. The Supreme Court, therefore, following Mills vs. Green,[58] dismissed both causes on the ground that the thing sought to be prohibited had been done, and could not be undone by any order of the court.[59] The court intimated, without actually saying it, that the most feasible means of correcting such elections, if illegal, would be through the power of the House of Representatives to judge of the qualifications of its members.

Of the constitutions recently put into operation in the South which have thus far been brought to the notice of the Supreme Court, that of Alabama remains to be considered. By the provisions of this constitution, prior to 1903, the right to register was confined to veterans and their descendants, and to persons who were of good character and under-

[57] Art. II, sect. 19.
[58] 159 U. S. 651.
[59] Jones vs. Montague, 194 U. S. 147; Selden vs. Montague, 194 U. S. 154.

stood the duties and obligations of citizenship under a republican form of government.[60] After that date, literary and property requirements came into play, but those who had registered under the temporary plan were entitled to vote for life.[61]

Giles, a negro, was refused registration by the Board of Registrars of Montgomery County. He brought action against the board, both in the state courts and in the Federal Circuit Court. In the state court he petitioned for a writ of mandamus to compel the board to register him, and also sought to recover damages for their refusal to do so. He alleged that the provision of the constitution creating the board and defining their duties was void as repugnant to the Fourteenth and Fifteenth Amendments, and that the board had arbitrarily refused to register him for no other reason than his race or color. The Supreme Court of the State held that the complaint was demurrable, on the ground that if the constitutional provision was void, as plaintiff alleged, the board was without authority to register him, and hence a mandamus would not lie to compel them to do so, nor could their refusal be made a predicate for the recovery of damages.[62]

Giles then carried the case up on writ of error to the Federal Supreme Court. But that court, though expressing its sense of the "gravity of the statements of the complainant charging violation of a constitutional amendment which is part of the supreme law of the land," yet dismissed the writ on the ground that no federal right had been denied by the state court in such wise as to give the Supreme Court the right of review.[63]

Meanwhile Giles had brought a bill in equity in the Federal Circuit Court, alleging that he was entitled to vote under the state constitution, but had been arbitrarily refused registration on account of his color, and praying that the

[60] Art. VIII, sect. 180.
[61] Art. VIII, sect. 187.
[62] Giles vs. Teasley, 136 Ala. 164.
[63] Giles vs. Teasley, 193 U. S. 146.

franchise provisions of the constitution be declared void, and that the Board of Registrars be required to enroll his name upon the voting lists. The Circuit Court dismissed the bill for want of jurisdiction and want of equity, and an appeal was taken to the Supreme Court.[64] The single question certified to the Supreme Court was as to the jurisdiction of the lower court. As it did not appear upon the record that threatened damage was averred exceeding the required jurisdictional amount of two thousand dollars,[65] it was clearly a case which the Supreme Court should have remanded to the court below without going into its merits.[66] The court, however, waived this consideration, and assumed jurisdiction to go into the question as to whether equitable relief could be furnished in the premises on the ground of the unconstitutionality of the franchise provision. The court decided that such relief could not be granted for three reasons: (*a*) the enforcement of political rights does not come within the cognizance of equity; (*b*) the ground of the complaint involved the illegality of the franchise provisions under which the plaintiff asked to be registered, and to add his name to the lists would make the court a party to an unlawful scheme; and (*c*) the court could not secure an undiscriminating administration of the franchise provisions without directly supervising the election machinery in the State, and this it was not prepared to do. "Apart from damages to the individual," the court added, "relief from a great political wrong, if done . . . by the people of a State and the State itself, must be given by them or by the legislative and political department of the Government of the United States."

The significant points in this case are (*a*) the willingness evinced by the court to go into the merits of the case, when it might, with better law, have avoided doing so, and (*b*) the apparent desire to shift the duty of redressing such wrongs upon the political department of the Government.

[64] Giles vs. Harris, 189 U. S. 475.
[65] 25 Stat. at Large, 433.
[66] See dissenting opinion of Justice Harlan.

So far as Congress has given any indication of its attitude upon the subject, it has intimated that the matter is one for judicial settlement.[67] But the absence of congressional legislation would in any case hamper the efficiency of the courts in securing the practical enforcement of the Amendment. The real reason behind the attitude of both Congress and the courts is the apathetic tone of public opinion, which is the final arbiter of the question. In the technical sense, the Amendment is still a part of the supreme law of the land. But as a phenomenon of the social consciousness, a rule of conduct, no matter how authoritatively promulgated by the nation, if not supported by the force of public opinion, is already in process of repeal.

[67] See H. Rept. No. 1740, 58th Cong., 2d sess., p. 3.

ENGLAND AND THE FRENCH REVOLUTION

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ENGLAND
AND THE
FRENCH REVOLUTION
1789—1797

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PREFACE.

This study was originally undertaken with the purpose of showing to what extent the English social and political life of the period contemporaneous with the French Revolution was influenced by that event, or, in other words, whether the popular agitations in England, which attracted the attention of the English government at this time, owed their origin to the revolution taking place in France. In the course of investigating the subject it became apparent that these agitations were due to conditions existing in England itself rather than to outside influences, and consequently the policies and methods of William Pitt became the primary themes of the study. However, in spite of this change of view, it has seemed best to adhere to the original plan of presentation, and to regard the English social organization as a whole, discussing its economic, political, and religious aspects, but stressing the administration of the government and the measures of those at its head.

It is easy to forget, more than a century after the event, that the French Revolution presented a constantly changing aspect to those watching it from England, and one must give due weight to the fact that until the Tories and Whigs definitely took opposite sides of the questions supposed to be at issue in France, the views which Englishmen held varied according to the characters of the individuals themselves. Moreover, it is so difficult to classify such indidivual views, expressions of opinion, or private actions, or to draw from them any generalizations of value, that no attempt has been made to do so here, but the discussion has been confined to those influences only which took the definite form of word, deed, or movement the evidence for which clearly appears in the documents of the period. It is mani-

festly impossible to ascertain the effect on people in general of isolated pamphlets or speeches unless the evidence proves that in consequence of them a considerable body of men meditated taking action or unless some collective expression of opinion or collective action resulted therefrom.

This investigation covers the period from 1789 to the spring of 1797 when a change appeared in the attitude of the English ministers toward the war with France. The author regrets that he has been unable to examine all of those records preserved in the Public Record Office bearing on the subjects which are discussed in this monograph and are to be treated more fully in a larger work now in course of preparation. Though in consequence of this fact some of the conclusions regarding the diplomacy of the period are in a measure tentative, yet they seem to represent the most reasonable interpretation of the evidence at hand and are not invalidated by anything found in the work of those who have hitherto examined the materials in the Public Record Office.

The author acknowledges with appreciation the assistance of Professor John M. Vincent, at whose suggestion this inquiry was undertaken, and of Professor Charles M. Andrews, who has also given helpful advice. Finally, he acknowledges the many courtesies shown him by the library staff of the British Museum, of the Library of Congress, and of the Peabody Institute of Baltimore.

ENGLAND AND THE FRENCH REVOLUTION.

CHAPTER I.

Preliminary Skirmishes.

When, in the summer of 1789, it became evident that a new régime was about to be inaugurated in France, the general attitude of the English public, if we may accept the expression of the writers for the press as typical, was one of approbation. The people were ready to welcome France as a free nation. Sometimes it was suggested that Louis XVI was merely receiving what his interference in the American war had merited.[1] It was said also that the prospective change of affairs in France would not result in an ultimate advantage to England, since France, possessing freedom, would become a more formidable rival than she had hitherto been.[2] Yet few doubts were expressed that the final disposition of the affair would be beneficial to France.

In all of these discussions, however, the writers maintained the attitude of disinterested spectators, and no one had yet imagined that England would be directly concerned. The events which were taking place in France were regarded as merely wonderful phenomena, and therefore proper subjects for speculation. Not until 1791 was the French Revolution to become a party question in England. Previous to that time, the newspapers which represented the views of the party in power were fully as extravagant in their praise of the progress of affairs in France as those

[1] Morning Post, July 8, 17, 1789. The Oracle, July 2, 1789.

[2] The Oracle, July 4, 1789; August 25, 1789. Morning Post, July 24, 1789. Whitehall Evening Post, August 20–22, 1789. Public Advertiser, December 27, 1789.

which were the organs of the aristocratic Whigs. Both alike deprecated the excesses of the populace, and approved only of the underlying purpose which was supposed to give rise to them. The means were to be justified by the end.[8]

By the close of the year 1791 no question in English politics received greater attention than did the French Revolution. The first thing that requires explanation in this discussion, therefore, is the process by which the domestic affairs of France became in so short a time the vital question on which the political parties in England were divided. Several events which took place in the latter part of 1789, in 1790, and in the early months of 1791 prepared the way for the introduction of this troublesome question into the party politics of Great Britain. Chief among these events was the publication of three pamphlets. It is not likely that any one of these productions had the effect which its author anticipated. Probably no one of them, if left alone, would have exerted any considerable influence on the English people. Their importance lies in the subsequent events to which they had been a necessary prelude, and we cannot understand these events without some knowledge of the nature of the pamphlets and the circumstances which attended their publication.

The first of these pamphlets to make its appearance was that of Dr. Richard Price, a nonconformist minister, entitled "A Discourse on the Love of Country," an address delivered by its author, November 4, 1789, before the

[8] For such expressions of opinion see: St. James Chronicle, July 30–August 1, 1789; August 4–6, 1789; September 12–15, 1789; October 27–29, 1789; November 26–28, 1789; December 18–20, 1790. Bristol Journal, July 11, 1789. The Gazetteer; and New Daily Advertiser, January 27, 1790. The Oracle, July 23, 25, 31, 1789; August 8, 12, 13, 14, 15, 1789; September 22, 26, 1789. Public Advertiser, July 25, 1789; September 7, 12, 1789; December 3, 1789; April 9, 1790; May 24, 26, 27, 28, 1790; June 30, 1790; July 14, 1790; August 21, 1790. Morning Post, July 22, 1789; August 31, 1789; September 1, 4, 12, 24, 1789; October 2, 17, 27, 1789; December 23, 1789. The Diary; or, Woodfall's Register, August 7, 1789. Whitehall Evening Post, July 30–August 1, August 20–22, 1789; September 10–12, 1789; May 27–29, 1790; June 24–26, June 29–July 1, 1790. The World, February 11, 18, 1790; June 1, 1790; July 22, 1790; September 13, 1790.

Society for the Commemoration of the Revolution in Great Britain, and immediately published. This society was composed of a considerable body of men who had been accustomed for a number of years to meet on the anniversary of the Revolution of 1688 to partake of a dinner and listen to a sermon. Naturally, a majority of the members of the society were Dissenters, but some members of the established church were included, among whom were several peers and members of Parliament. The previous year had been the centennial of the revolution, and naturally the enthusiasm which had attended the celebration of that event had not entirely subsided by November, 1789. Lord Stanhope presided at the dinner, which was held at the London tavern. These enthusiastic English patriots declared themselves pleased at the turn which affairs had taken in France, and sent a congratulatory address to the National Assembly. This communication did no more than express to the body to which it was presented the felicitations of those who drafted it on the prospect of constitutional government in France, and up to this time there was nothing which could justify a suspicion that the members of this English society had any desire to imitate those who were making trouble across the Channel.[4]

Dr. Price's sermon was chiefly a concise statement of his political philosophy, from the point of view of the English constitution.[5] The only specific reference to the French Revolution was in the peroration, which was a somewhat exaggerated exultation at what had taken place and an exhortation to friends of liberty to persevere in their efforts. It is impossible to see in it more than the enthusiasm of an orator who was influenced by the spirit of the occasion.[6]

[4] For accounts of this meeting and copies of the resolutions, etc., see: An Abstract of the History and Proceedings of the Revolution Society in London, etc., 1789. The Diary; or, Woodfall's Register, November 6, 1789.

[5] Price, Discourse on the Love of Country.

[6] The following is the paragraph in question:—

"What an eventful period is this! I am thankful that I have lived to see it; and I could almost say, *Lord, now lettest thou thy servant depart in peace, for mine eyes have seen thy salvation.* I

This is not the place to appraise the correctness of the conclusions which the preacher reached with regard to government. However, since Burke's "Reflections on the French Revolution" were intended chiefly as a reply to this pamphlet, it is necessary to describe briefly the character of these conclusions, which were not new and, for the most part, had been expressed before by the same author. The latter, after defining a country as a community of inhabitants rather than an area of territory, declared that man's highest obligation was one of benevolence toward all countries; but to his own country, because of his residence in it rather than because of any superiority it possessed over other countries, he owed a peculiar devotion, which should cause him to seek to make the three "chief blessings of human nature," truth, virtue, and liberty, universal in his community. Here lay the first duty of a citizen. Virtue and truth, the preacher argued, should increase coordinately, since "virtue without knowledge makes enthusiasts and knowledge without virtue makes devils; but both united

have lived to see a diffusion of knowledge, which has undermined superstition and error—I have lived to see the rights of men better understood than ever; and nations panting for liberty, which seemed to have lost the idea of it.—I have lived to see thirty millions of people, indignant and resolute, spurning at slavery, and demanding liberty with an irresistible voice; their king led in triumph, and an arbitrary monarch surrendering himself to his subjects.—After sharing in the benefits of one Revolution, I have been spared to be a witness to two other Revolutions, both glorious.—And now methinks I see the ardour for liberty catching and spreading; a general amendment beginning in human affairs; the dominion of kings changed for the dominion of laws, and the dominion of priests giving way to the dominion of reason and conscience.

"Be encouraged, all ye friends of freedom, and writers in its defence! The times are auspicious. Your labours have not been in vain. Behold kingdoms, admonished by you, starting from sleep, breaking their fetters, and claiming justice from their oppressors! Behold the light you have struck out, after setting America free, reflected in France, and there kindled into a blaze that lays despotism in ashes, and warms and illuminates Europe!

"Tremble all ye oppressors of the world! Take warning all ye supporters of slavish governments; and slavish hierarchies! Call no more (absurdly and wickedly) reformation innovation. You cannot now hold the world in darkness. Struggle no longer against increasing light and liberality. Restore to mankind their rights; and consent to the correction of abuses, before they and you are destroyed together."

elevates [sic] to the top of human dignity and perfection." Last of all he would have liberty, but he contended that it ought to follow and not precede virtue and knowledge, since it might otherwise become mere license.

The preacher next undertook to point out, in order to comment on them more specifically, some of the more important duties which a man owes his country. The first of these was the obligation of a citizen to obey the laws and magistrates of the community in which he resides. Civil government he defined as "an institution of human prudence for guarding our persons, our property, and our good name, against invasion; and for securing to the members of a community that liberty to which all have an equal right, as far as they do not by any overt act use it to injure the liberty of others." Civil laws he described as "regulations agreed upon by the community for gaining these ends;" civil magistrates as "officers appointed by the community for executing these laws." From these premises he argued that obedience to the laws and magistrates was a "necessary expression of our regard to the community," without which anarchy would result, and therefore it was the office rather than the person of the magistrate that deserved to be honored. In advancing this argument the author took occasion to declare that the king of England was "almost the only lawful King in the world, because the only one who owes his crown to the choice of his people."

This remark naturally led to a discussion of the Revolution of 1688. Dr. Price announced that the three chief principles contended for in that revolution were, "The right to liberty of conscience in religious matters; The right to resist power when abused; and, The right to chuse our own governors; to cashier them for misconduct; and to frame a government for ourselves." After discussing these principles, he went on to remind his audience that there remained other abuses which would have to be removed before the ends striven for in the revolution could be said to have been attained. This reference was, of course, to the Test

Act and Penal Laws and to the existing state of representation in the House of Commons.

It is not probable that this pamphlet would have received any more attention than would naturally have been bestowed on a work by a man of the eminence of Dr. Price if it had been left without any further advertisement than the replies of minor writers such as any publication was sure to call forth in this period. Such was its fate indeed until October 31, 1790, when Burke published his Reflections. Within little more than a month after that date ten new editions were sold.[7]

The reply that Burke made to Dr. Price's discourse has become a classic among political pamphlets. But as Morley has pointed out, half of the "impressive formulæ and inspiring declamation," of which the work is largely composed, were "irrelevant to the occasion which called them forth, and exercised for the hour an influence that was purely mischievous."[8] We have no desire here either to criticize or to analyze Burke's political philosophy, but in order to estimate correctly the influence of this particular work on the events that followed, it is necessary to determine as far as possible the methods by which the author reached his conclusions and his intentions in presenting them to the world. A series of curiously unrelated elements seems to have entered into the composition of the Reflections and the result was a literary hodgepodge which compelled attention because of the eminence of its author, the general interest in the subject which was supposed to be discussed, and the hyperbolical language in which it was set forth.

Perhaps it is not necessary to observe that in writing this pamphlet Burke was not primarily concerned with the French Revolution. One of his ambitions was, as he put it, to "illustrate" himself and his family.[9] A man who covets such honors is naturally ready to defend the institu-

[7] Public Advertiser, December 7, 1790.
[8] Morley, Burke, 153.
[9] Fitzwilliam, Correspondence of Burke III, 389.

tions which favor his ambitions and to resent any criticisms which are aimed at the objects of his desire. Probably Burke was sincere in his belief that a titled aristocracy is a beneficial and almost a necessary element in a state, and it is not to be inferred that he was consciously influenced by his ambitions in reaching this opinion. Yet these ambitions are a factor that cannot be disregarded by a student of his career.

Assuming that monarchy was a logical if not a necessary accompaniment of nobility, Burke was bound to become a strong supporter of the rightness of kingly rule. Not that he accepted the doctrine of divine right; on the contrary, he specifically disclaimed it; but his theory seems to have been that whatever is has a divine sanction, provided it be the result of an historical process and bear the marks of time. He profoundly distrusted popular government and had a horror of radical reforms. He accepted the philosophy of Hamlet, preferring to bear existing ills rather than hazard a remedy which might call for change. He never would believe, he said, that because people had lived under an absolute monarchy, with all its inconveniences and grievances, they had a right to ruin their country on the chance of regenerating it in some other way.[10] He would have had the French go backward and revive their old States General with its historical limitations, and he even suggested that they might modify it slightly to meet the exigencies of the crisis which confronted them at that time. But he could not bring himself to admit the validity of an institution which did not have the approval of centuries; he would not agree that a time could ever come when it would be proper to disregard precedents.

One element which influenced the writing of the Reflections was the temperament of the author. Two years after the pamphlet was published Fanny Burney noted in her diary that it was not permissible to discuss political questions with him in polite society on account of his terrible

[10] Fitzwilliam, Correspondence of Burke III, 176.

irritability. To approach a subject of that character, she said, gave his face the "expression of a man who is going to defend himself from murderers."[11] Apparently, he placed such a high estimate on his own perspicacity that it was difficult for him to consider a thing from any other point of view than that which he had already attained.[12] He seems to have been encouraged in this vanity by his son, for whose sake a title was chiefly desired, and who needs to be considered in any discussion of his father's course with regard to the French Revolution.[13]

We have already remarked that Burke in his Reflections was not primarily concerned with the French Revolution.

[11] Barrett, Diary and Letters of Madame D'Arblay V, 92.

[12] Fitzwilliam, Correspondence of Burke III, 130, 139. In February, 1790, Burke submitted a proof of the Reflections to his friend Sir Philip Francis, who criticized the work frankly and severely. Among other things he wrote to Burke, "In my opinion, all that you say of the queen is pure foppery." Burke's reply to this criticism is the only illustration that there is space to give of his infatuation with his own prepossessions: "I tell you again,—that the recollection of the manner in which I saw the queen of France, in the year 1774, and the contrast between that brilliancy, splendour, and beauty, with the prostrate homage of a nation to her,—and the abominable scene of 1789, which I was describing,—*did* draw tears from me and wetted my paper. These tears came again into my eyes, almost as often as I looked at the description;—they may again. You do not believe this fact, nor that these are my real feelings; but that the whole is affected, or, as you express it, downright foppery. My friend,—I tell you it is truth; and that it is true, and will be truth when you and I are no more; and will exist as long as men with natural feelings shall exist. I shall say no more on this foppery of mine."

This conceit which Burke had of his own opinions makes it easier to understand his strong resentment when Fox and his friends ridiculed the Reflections.

[13] Fitzwilliam, Correspondence of Burke III, 133. Richard Burke wrote to Sir Philip Francis after his father had received his friend's letter criticising the Reflections. The son requested Francis not to oppose any more of his father's opinions. He went on to say: "There is one thing, however, of which I must inform you, and which I know from an intimate experience of many years. It is, that my father's opinions are never hastily adopted, and that even those ideas which have often appeared to me only the effect of momentary heat, or casual impression, I have afterwards found, beyond a possibility of doubt, to be the result of systematic meditation, perhaps of years; or else, if adopted on the spur of the occasion, yet formed upon the conclusions of long and philosophical experience, and supported by no trifling depth of thought. . . . Do I not know my father at this time of day? I tell you, his folly is wiser than the wisdom of the common herd of able men."

To understand his real purpose we must review briefly several circumstances which preceded its composition. In the debate on the Regency question, arising from the temporary insanity of the king in the winter of 1788 and 1789, many differences of opinion on the constitutional points at issue were expressed, some believing that if the Prince of Wales should be allowed to assume the government with all the rights which pertained to his father, he would immediately dismiss the existing administration and summon another composed of his Whig friends. Burke endeavored to persuade his party associates that since the crown was hereditary, the prince became regent automatically during the period of his father's incapacity, without the necessity of the intervention of Parliament. He therefore strongly urged that the prince be allowed to take the initiative and communicate with Parliament without waiting for the action of the existing administration.[14] Fox, however, who was the leader of the party, was too good a Whig and estimated too highly the rights of Parliament to advocate such a step, even though it would have advanced his own interests. He contended that although the prince had a right to the Regency, it would be better for him to await a formal notification from Parliament before assuming the reins of government. But Pitt and his party, whose offices were at stake, had no intention of adopting the views of either Burke or Fox. They contended that while it might be expedient for Parliament to select the prince and to define his powers, in reality the latter had no more right to the position than any other Briton.[15] The effect of such assertions on a man of Burke's opinions is easy to understand. They were to him nothing short of revolutionary and almost treasonable. It was at this time, he tells us himself, that he formulated the theory of the English monarchy which he presented in the Reflections.[16]

[14] Fitzwilliam, Correspondence of Burke III, 90.
[15] For the debates on the Regency see: Hansard, Parliamentary History XXVII, 653–1160.
[16] Fitzwilliam, Correspondence of Burke III, 399.

As early as October, 1789, Burke had conceived for the French Revolution an intense dislike founded largely on the theory that the revolution was a result of the agitations of unscrupulous leaders who were actuated by selfish motives.[17] A development of this idea led him to the conclusion, expressed in detail in the Reflections, that the confiscation of the church lands was the result of the combined efforts of a literary cabal and the French monied interests. The purpose of the men of letters was to discredit the Christian religion by weakening the church; that of the capitalists, who held government loans as a part of their newly acquired wealth and were also envious of the position of the nobility, was to reimburse themselves for their loans to the government and to strike a blow at the nobility who controlled the patronage of the churches.[18]

It is manifest from what has been said that when Burke came to London in the late autumn or early winter of 1789 he had already formulated his opinions with regard both to the French Revolution and to the English constitution. The only thing lacking was some reason for giving them publicity. According to the account which he himself gave of it, the missing element was supplied in the following manner. Acting in accordance with Burke's own advice, Fox had been endeavoring to conciliate the Dissenters, who had not been disposed hitherto to give him a very cordial support,[19] since their liberal views made them rather inclined to agree with Pitt's course on the Regency question. On the day that Burke reached town he met a prominent Dissenter at a dinner, and engaged him in a discussion of the

[17] Fitzwilliam, Correspondence of Burke III, 115. For a more explicit statement of the same view, see his letter to Francis, November 19, 1790, in the same work III, 176:—

"I charge all these disorders, not on the mob, but on the Duke of Orleans, and Mirabeau, and Barnave, and Bailly, and Lameth, and La Fayette, and the rest of that faction, who, I conceive, spent immense sums of money, and used innumerable arts to instigate the populace throughout France to the enormities they committed; and that the mobs do not disgrace them, but that they throw an odium upon the populace, which, in comparison, is innocent."

[18] Burke, Reflections on the French Revolution, 161–170.

[19] Russell, Memorials and Correspondence of Fox II, 359.

reasons why his coreligionists were not favorably disposed toward the Whigs. This gentleman gave Burke the impression that the Dissenters withheld their support because of the supposed private immorality of Fox. Burke warmly defended his friend and party associate. On the same night, after he reached home, he read for the first time Dr. Price's sermon, which contained a veiled reproof of Fox for his failure to be as virtuous in his private as in his public conduct. This paragraph naturally tended to confirm the notion which Burke had got from the discussion earlier in the evening as to the attitude of the Dissenters. Price's views on the constitution differed widely from those which Burke himself held, and, as the latter thought, from those held by Fox also. The introduction of the French Revolution into the peroration of the sermon gave further food to Burke's vivid imagination, and led him to conclude that Dr. Price was one of a cabal plotting to effect a similar revolution in England.[20] He immediately began to prepare a reply. By the middle of February, 1790,[21] the manuscript of this reply was in the hands of the printer.

Burke's primary intention was that his pamphlet should contain a confutation of the views held by Dr. Price, Lord Lansdowne (Lord Shelburne), and others with regard to the principles on which the English government was based. In a letter to Sir Philip Francis he wrote: "I intend no controversy with Dr. Price, Lord Shelburne, or any other of their set. I mean to set in full view the danger from their wicked principles and their black hearts. I intend to state the true principles of our constitution in church and state, upon grounds opposite to theirs. If any one be better for the example made of them, and for this exposition, well and good. I mean to do my best to expose them to the hatred, ridicule, and contempt of the whole world; as I always shall expose such calumniators, hypocrites, sowers of sedition, and approvers of murder and all its triumphs."[22]

[20] Burke, Reflections on the French Revolution, 13.
[21] Fitzwilliam, Correspondence of Burke III, 394–398.
[22] Fitzwilliam, Correspondence of Burke III, 140.

An examination of the Reflections will show that the author has here clearly expressed his purpose in writing the pamphlet. He desired to discredit the opinions of Price and others concerning the English constitution; to show that in expressing their admiration for the French Revolution and for the new constitution which was then in the process of incubation they had approved of conceptions of government which differed radically from the views which were accepted as orthodox in England; to prove that the proposed French constitution was not only wrong in theory but could not possibly work in practice, and that for Englishmen to engage in the pursuit of this political will-o'-the-wisp was both foolish and dangerous.

There was no possible chance of reconciling the opinions of the two authors. Their differences were fundamental. Price contended that government derives its proper sanction from an explicit or implied compact of the governed. He believed that since the Revolution at least, the English government had had the authority of such a compact. Burke denied that the authority of the English government could be referred to such a compact. He looked to history for civil sanctions, and was not concerned about origins. His argument, perhaps not without weight, was that the continuation of an institution or custom for centuries was prima facie evidence that it was suited to the needs which it was supposed to supply. He professed to desire laws and institutions which would promote justice and the public welfare. He merely denied that the popular will was a proper criterion by which to determine what these laws and institutions were. And he denied that the English constitution looked to this criterion as a final arbiter.

Burke believed that he was a representative of the aristocratic party, and that when his pamphlet was published it would at once receive the approval of his associates, since the nobility had been one of the first objects of attack in France. He believed that if the principles of those who admired the French Revolution were permitted to spread

unopposed in England, one inevitable consequence would be an attack on the English nobility, and that therefore he deserved the thanks of his aristocratic friends for coming to their defense. Again, he argued that since French revolutionists, while adhering to the monarchy, had repudiated any rights which the king might claim as inherent, and had made him the mere executive head of the nation, it was important for the interests of Fox, who could scarcely hope for the favor of George III, that the rights which the Prince of Wales had as the heir of his father should be defended and kept secure. He saw in the principles on which the new French monarchy was to be established, and of which Dr. Price approved, a menace to the doctrine that the kingship of England was necessarily inheritable, and he believed that he was serving both Fox and the prince in attempting to prove that even in times of revolutionary stress the principle of heredity had been adhered to in the selection of those who should occupy the English throne.[23] As a logical result of this argument he was obliged to deny categorically that Dr. Price had been correct in his statement that by the Revolution of 1688 the English people had established their right to frame their own government, to choose their own governors, and to cashier them for misconduct. Indeed, Burke ridiculed such a notion as without the shadow of a foundation.

The distinguished author soon found that his opinions were not shared by all of his party associates. In the discussion of the army estimates, February 5, 1790, Fox casually remarked that "the example of a neighbouring nation had proved, that former imputations on armies were unfounded calumnies; and it was now universally known throughout all Europe, that a man by becoming a soldier did not cease to be a citizen."[24] This led Burke, a few days later, to give the first public expression of his views on the French Revolution and his fears of its effect on England. Fox replied in a conciliatory speech, repaying in kind the

[23] Fitzwilliam, Correspondence of Burke III, 387–407.
[24] Hansard, Parliamentary History XXVIII, 330.

complimentary remarks which Burke had made with respect to him personally, but carefully refraining from giving explicit utterance to his opinions concerning the French Revolution. Sheridan, however, insisted on declaring his disagreement with the views that Burke had stated, and the latter rejoined that as a consequence they two must henceforth travel different political roads.[25] At the time no one dreamed that this debate marked the beginning of a permanent separation between the two political leaders. On the contrary, it was popularly supposed that Sheridan would virtually if not formally withdraw from the party.[26]

Burke seems to have thought that this debate clearly demonstrated the need for his pamphlet. A few days later he submitted the proofs to Sir Philip Francis, who, as has been intimated, advised strongly against publication.[27] So the matter rested for several months. But in the meantime another discussion was in progress which emphasized still more the difference of opinion between Burke and Fox and furnished the occasion for the first introduction of the French Revolution into English politics.

In 1787, and again in 1789, Beaufoy had moved in the House of Commons the repeal of the Corporation and Test Acts.[28] In the latter year the motion had been defeated by a majority of only twenty votes, and Fox had been persuaded to renew it in 1790, with the hope that under his championship the measure might be carried. There was the usual wealth of pamphlet discussion on both sides,[29] supplemented by local meetings and newspaper comments.[30]

[25] Hansard, Parliamentary History XXVIII, 323–374.

[26] The World, February 11, 12, 1790. Public Advertiser, February 12, 1790.

[27] Fitzwilliam, Correspondence of Burke III, 128. Burke gave the proofs to Francis on February 17. They were returned with the criticism the next day.

[28] Hansard, Parliamentary History XXVI, 780–832; XXVIII, 1–41.

[29] For titles of many of these pamphlets see the appended bibliography.

[30] For typical newspaper comment, see: St. James Chronicle, August 8–11, 1789; September 8–10, 1789. Public Advertiser, January 14, 1790; February 1, 5, 6, 10, 16, 18, 22, 23, 25, 1790; March 1, 1790. The Gazetteer; or, New Daily Advertiser, January 20, 1790. The Diary; or, Woodfall's Register, January 16, 1790.

Of course, the bulk of the discussion, since it came from the aggressive party, was in favor of the repeal. On February 4, 1790, less than one month before the motion was to be made, an administration newspaper announced that the government would have to take some stand on the question "unless the friends of the established church exert themselves more than they have hitherto done."[31] Thereupon meetings of the clergy were held, petitions circulated, and instructions sent, even to members of Parliament who favored the repeal, requesting them to vote against it.[32] Naturally, in the discussions which attended this agitation, attention was called to the fact that prominent Dissenters had expressed their admiration for the French Revolution; and it was equally natural that they should be accused of having the same attitude toward the established church in England that the revolutionists had manifested toward the Roman Catholic Church in France. The agitation was terminated for the time by the debate in the House of Commons on March 2, 1790. Pitt did not appear at his best in the speech in which he opposed the repeal, since, as was well known, his motives were political rather than the result of any real conviction with regard to the subject. Fox and Burke appeared on different sides of the question, the latter using Price's sermon, to which he had already prepared his reply, as the chief basis of his argument. The two Whig orators, however, took care to make it evident in their speeches that they were acting as was their custom concerning parliamentary reform and similar questions, and had agreed to disagree with regard to the particular topic which was being discussed. The combined administration and ecclesiastical interests easily defeated the motion by a vote of 105 to 294.[33] But this agitation portended more than

[31] Public Advertiser, February 4, 1790.

[32] St. James Chronicle, February 4–6, 1790. Public Advertiser, February 5, 1790. The World, January 16, 1790; February 23, 1790. The Diary; or, Woodfall's Register, January 21, 26, 29, 1790; February 3, 6, 9, 18, 19, 23, 24, 1790; March 1, 1790. General Evening Post, February 18–20, 1790; February 27–March 2, 1790.

[33] Hansard, Parliamentary History XXVIII, 387–451.

was realized at the time. The sinister specter of the French Revolution had appeared for the first time in English politics, and it had been openly charged that there was a party in England who wished to imitate its worst examples. To complicate matters still further, Burke and Fox had again appeared on opposite sides of the question.

Although it was now generally known that he was preparing a work on the French Revolution, Burke had as yet refrained from giving his pamphlet to the public. On July 14, 1790, the first anniversary of the fall of the Bastille was celebrated by a dinner at the Crown and Anchor tavern. Several prominent Whigs attended and took a conspicuous part in the exercises.[34] This fact and some attendant circumstances caused Burke to hesitate no longer, and the Reflections made their appearance on October 31.[35] The character of the work has been made apparent in the account which has preceded. It was a defense and a justification of the monarchy, the nobility, and the established church as they existed in England, and a condemnation of the French Revolution as involving principles which, if accepted, would result in the downfall of these institutions. The author viewed the English constitution as the product of an historical development, and in no sense designed to secure the people in the possession of any innate or natural rights. Privileges possessed by the people as well as the institutions of government were, in his opinion, inherited from antiquity. "We have," he said, "an inheritable Crown; an inheritable peerage; and a House of Commons and a people inheriting privileges, franchises, and liberties from a long line of ancestors." Even the reformations which had been made hitherto "proceeded on the principle of reference to antiquity." "From Magna Charta to the Declaration of Rights," he continued, "it has been the uniform policy of our constitution to claim and assert our liberties as an *entailed inheritance,* derived to us from our forefathers, and transmitted to our posterity; as an estate specially belonging to

[34] Public Advertiser, July 16, 1790. The World, July 16, 1790.
[35] Fitzwilliam, Correspondence of Burke III, 398.

the people of this Kingdom, without any reference whatever to any other more general or prior right." Even the revolution had been made "to preserve *ancient* indisputable laws and liberties, and that ancient constitution which is our only security for law and liberty."

Since Burke had long been prominent in public life, since the subject which he had discussed was one which had excited the curiosity of the people, and since it was known that the views which he held were radically different from those of most people at that time, it was only natural that the Reflections should be widely read, and should give rise to many replies. A majority of these replies had no other effect than to afford employment for contemporary publishers and reviewers, and to serve as topics for conversation. But among them appeared, in the early months of 1791, a pamphlet worthy of notice because of a certain influence that has been attributed to it.

Thomas Paine, the author of this pamphlet, "The Rights of Man," the first part of which appeared at this time, was a republican whose egotistical, undisciplined mind led him to estimate far too highly his own common sense. However, he seems to have had the merit of believing in himself, and to have been actuated by a desire to change society into what he considered to be a more desirable state. When comparing his opinions with those of Burke, we must remember that the two men looked at the questions at issue from opposite points of view. Burke accepted things as they were, and believed that they were in the main good, because they were results of a long period of development. Paine, with little respect for antiquity, conceived of things as he believed they ought to be, and considered it his duty to effect their transformation. "It is out of the question," he said, "to say how long what is called the English constitution has lasted, and to argue from that how long it is to last."

Before many months had passed after the publication of the Rights of Man, it had become a favorite ruse of both Burke and Pitt to class with the supporters of Fox the

imaginary disciples of Paine. We must therefore understand at the outset the character of the doctrines propounded by the "trans-Atlantic republican." Certainly he did not attempt to disguise his opinions. He boldly affirmed that "civil government" was synonymous with "republican government." He ridiculed Burke's arguments, and developed at even greater length the ideas which he had formerely advanced in Common Sense. We need not detail his theories here. They were based on the doctrine of the social contract that pervaded the political writings of the time. He was, however, explicit in his opposition both to the monarchy and to the nobility. He could find no justification for either, and did not hesitate to conclude that "the romantic and barbarous distinctions of men into kings and subjects, though it may suit the conditions of courtiers, cannot that of citizens; and it is exploded by the principle upon which governments are now founded. Every citizen is a member of the sovereignty, and, as such, can acknowledge no personal subjection; and his obedience can only be to the laws."

This pamphlet was widely read, the notoriety of the author and the subject insuring a hearing. It received further advertisement at the hands of both Burke and Pitt, but its doctrines were far too sweeping to receive the approval of any considerable number even of the most radical reformers who were active in England during this period.

These preliminary discussions and differences had not yet occasioned the division of the English people into two parties with the French Revolution as, ostensibly, the chief point at issue. They were merely the first of a series of events which, in the exigencies of politics, were to lead to that result. It will appear in the next chapter how the condition which had been thus brought about was utilized by a minister who, to extricate himself from an unpleasant situation, and apparently for the purpose of preserving his own political fortunes, plunged incontinently into a discussion of this foreign issue.

CHAPTER II.

The First Attacks.

In October, 1790, Burke and Fox were apparently bound by permanent ties of amity as members of a great party whose chief excuse for existence was to oppose the political measures of William Pitt. Within less than a year from that date Burke and Pitt were working together, either tacitly or by specific agreement, to compass the disruption of the party of which Fox was still the leader. The object of Pitt was perfectly clear: he desired as nearly as possible to control personally every department of the English government. Of Burke's motives it will be necessary to say something hereafter; they are not so easy to understand.

Let us recall for the moment a few familiar facts. The party in power, the Tories, was at this time composed of two elements: one, which was representative of the commercial and financial interests, was dominated by Pitt; the other, a less numerous body of men, including the Duke of Leeds, secretary of state for foreign affairs, and the lord chancellor, Lord Thurlow, supported the king. The Whigs, as the opposition party termed themselves, were composed of the more prominent members of the nobility under the nominal leadership of the Duke of Portland, but really looking for political guidance to Fox, who with Burke and Sheridan made up their great triumvirate of orators. There was also a younger element (of which Charles, afterwards Lord, Grey was a type) which was inclined to support reforms and to hold different views from the majority of the party with which they were connected. It is essential to note these facts, since, as was said by a contemporary journal, this was a period when the majority of English people took their opinions from leaders or prominent men,

and did not question seriously the authority of their accepted oracles.[1]

A man of Pitt's character naturally looked askance at those of his party associates who did not submit to his leadership. Therefore he only waited for a provocation to rid his cabinet of several members who were friends of the king rather than of the minister, holding himself ready to take advantage of the occasion when it should offer itself. As far as mere numbers were concerned, he had assured himself of ample support in the House of Lords by the process of creating new peers. But, in matters that required oratorical or managerial ability, he had hitherto been obliged to depend on Thurlow, who was somewhat weakly assisted by Lord Hawkesbury. Such a state of affairs was not satisfactory to the minister, particularly as he and the lord chancellor frequently disagreed.[2] In order to remedy this difficulty, and to prepare for a withdrawal of Thurlow's support, he requested the king, in November, 1790, to elevate to the peerage his relative, William Grenville, the younger brother of the Marquis of Buckingham.[3] This step, which was taken without the advice of the rest of the cabinet, was by no means satisfactory to all of his colleagues, and when he heard of it the Duke of Richmond remonstrated in a private letter to the minister, saying that it was an act ill calculated to alleviate the troubles with the lord chancellor.[4] But Pitt was looking farther ahead than to a mere reconciliation with Thurlow. The king granted the request, though he complained that the House of Peers was certainly becoming too numerous,[5] and Pitt reaped the

[1] Evening Mail, February 25–28, 1791.

[2] Stanhope, Life of William Pitt II, 43. Harcourt, Diaries and Correspondence of George Rose I, 98. Browning, Political Memoranda of the Duke of Leeds, 139–141. Auckland MSS. XXXII, 308.

[3] Salomon, William Pitt I, 589. This is an appended letter from Pitt to the king.

[4] Stanhope, Life of William Pitt II, 75–80. The letter from Richmond to Pitt is quoted.

[5] Stanhope, Life of William Pitt II, Appendix XII–XIII. The letter from the king to Pitt was dated November 21, 1790.

reward of his foresight. Eighteen months later he dismissed the chancellor and thereby secured the needed bait to gain the support of a prominent Whig lord. The next step was the substitution of Grenville for Leeds in the foreign department and the appointment of Henry Dundas in Grenville's place, thereby greatly increasing the personal power of the minister. The circumstances which attended these changes in the cabinet introduced a strenuous era in English party politics. The crisis came in the early months of 1791.

Russia and Turkey were at war. England's ally, Prussia, desired that the English government join with her in a demand that peace be made on the basis of the status quo ante bellum, that is, without the necessity of Turkey's ceding to her enemy any conquered territory. The question turned on the possession of the fortress of Ochakov. After considerable preliminary discussion, it was finally decided by the British cabinet on March 21, 1791, to send a fleet to the Baltic for the purpose of overawing Russia and compelling her to accede to the terms of the allies. On March 25 notice was given in Parliament that an address from the king would be presented requesting a grant of money for this purpose. Two days later a despatch was sent to the English minister at Berlin informing him of the line of action determined upon. This course had been championed by the Duke of Leeds and supported by Pitt, but had been opposed by both Grenville and the Duke of Richmond. However, all had finally agreed to it.[6]

When, on March 29, the king's message was discussed in the House of Commons, the proposal was carried by a vote of 228 to 135.[7] But the Whigs were active in their opposition, and in the division several of Pitt's adherents voted with them.[8] Two days afterward the minister called

[6] Browning, Political Memoranda of the Duke of Leeds, 148–152. Auckland MSS. XXIV–XXVI. Leeds MSS. IV–VIII. These collections contain numerous despatches, letters, etc., which give a detailed account of the entire negotiation.

[7] Hansard, Parliamentary History XXIX, 31–79.

[8] Browning, Political Memoranda of the Duke of Leeds, 152–155.

on Leeds, and informed him that on further inquiry he had found that many who had voted with him were not inclined to support the measure which had been proposed.[9] Additional inquiries served only to confirm this opinion, and at the cabinet meeting of April 16 an entirely different policy was considered and adopted. The government decided to withdraw the offer which had been made to Prussia, and to send to Russia a special agent authorized, if necessary, to yield every point that the empress claimed.[10] Since Leeds refused to sign the necessary despatch to Berlin, Grenville acted in his stead. A short time afterward the cabinet changes mentioned above took place. Pitt now had a secretary of state for home affairs of whom he later said, "Every act of his is as much mine as his."[11] If he had not been writing to Grenville he might with equal propriety at that time have affirmed the same thing of the new head of the foreign department. The result, as Grenville's under-secretary saw it, was that Pitt practically gained control of the departments of home and foreign affairs in addition to his own.[12]

Thus, though Pitt's personal influence in the administration was heightened by the outcome of the Russian fiasco, the Whigs appeared on the surface to have triumphed in their opposition. A less astute politician than Pitt might have been at a loss how to proceed. To make matters worse, Thurlow regarded the new home secretary as "the most impudent fellow he ever knew."[13] In fact, the lord chancellor had told Leeds some time before that he was sure he would be dismissed as soon as a successor could be found.[14] Leeds thought that the entire administration should admit their defeat and follow his example. Moreover, the

[9] Browning, Political Memoranda of the Duke of Leeds, 159–160.
[10] Browning, Political Memoranda of the Duke of Leeds, 165–166. Auckland MSS. XXV, 451, 452; XXVI, 239, 258.
[11] Dropmore Papers II, 596.
[12] Hutton, Selections from the Letters and Correspondence of Sir James Bland Burges, 174.
[13] Browning, Political Memoranda of the Duke of Leeds, 149.
[14] Browning, Political Memoranda of the Duke of Leeds, 149.

king was reported to have intimated that "he was not so wedded to Mr. Pitt as not to be willing to give his confidence to Mr. Fox if the latter should be able in a crisis like the present to conduct the government with greater advantage to the public."[15] In self-defense, Pitt assumed the aggressive, and immediately began to attack his enemy. In looking for the weak point in his opponent's armor, he found an ally who was a welcome addition to his forces at this juncture.

Pitt had joined in the chorus of dissent from Burke's theories which began to be heard soon after the publication of the Reflections. The World, which was extremely partizan in its support of the administration, repeatedly criticized the book, sometimes using ridicule.[16] There was

[15] The Argus, April 22, 1791.

[16] The World, November 3, 1790:—

"The manner in which Burke holds forth on the 'horizontal beauties of the queen of France' is the newest kind of praise in a publication dedicated to the national Revolution that has ever appeared. Added to this, the number of swords that were to 'leap out of their scabbards' is another living image which has not yet made its way into politics! Don Quixote now falls into nothing before Burke! And it may fairly be expected that, the impeachment being over, he will now employ himself in rescuing distressed damsels about the different parts of the country."

Two months later the same paper contained a more serious criticism:—

"Possessing, as we do, the highest opinion of the splendid talents and private worth of Mr. Burke, we most sincerely regret that his last production was ever given to the world; as, in our opinion, it detracts, in point of composition, from his merits as an argumentative writer, and is (a matter of much greater moment), in its political tendency, subversive of those principles which form the basis of our excellent constitution, and which he long supported with so much firmness and warmth as a British Senator. The rhetorical flourishes with which it abounds might give promise of future eminence to any youth who wrote it as a college exercise, and whose unformed judgement might be allowed the privilege of substituting flowery declamation and pathos for substantial reasoning. Its principles are those of the once happily exploded Filmer. There is nothing in them original, no trace of superior political genius or learning. It can only be said that the same excreable sentiments are obtruded upon us in a more elegant and fashionable dress. In this pamphlet, we lament to see the author of Thoughts on the present Discontents;—the declaimer against the American war—the peace, etc., contend that any form of government is preferable to innovation; and that the many were formed for the convenience of the few. Heu! quantum mutatus! Who

certainly little in common in the views which had hitherto been held by the Whig orator and the minister. The former had not swerved a whit from his opinions; but Pitt gave mere theories or principles little consideration when his own power and influence were concerned. He did not necessarily accept Burke's opinions now. He merely found in his former antagonist a convenient instrument to serve his own purposes, and he did not hesitate to make use of him.

His method of doing so was as follows. We know that Burke published his pamphlet in spite of the advice of one friend. Another friend of his, on the day he received a copy of the work, noted in his diary that the writer was "a man decried, persecuted and proscribed; not being much valued, even by his own party, and by half the nation considered as little better than an ingenuous madman."[17] This being so, we are surely not justified in believing that a work by such an author could in the course of a few months change the point of view of a nation. It is not strange, therefore, that when Fox openly dissented from his opinions, and his supporters did the same, Burke should have become melancholy and dejected, and could find only comfort not joy in the large sale of his book.[18] Perhaps his feelings on the subject may be best expressed in his own words:—

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could have supposed that the philosophic eye of Burke was capable of being dazzled by the taste, the politeness and magnificence of that cruel despot, Louis XIV? Yet, to judge from his book, that prince's patronage of letters, the splendour and gaieties of his palaces and his camps, not only (in Mr. Burke's opinion) palliated, but amply compensated for the havoc and desolation which marked his infamous passage through a world which he filled with carnage and despair. We feel, in common with Mr. Burke, for the fallen and distressed. But is beauty an apology for enormous profligacy? The king of France draws forth his sympathy—but he drops not a tear to the memory of the miserable martyrs of despotism, who ended their days in the horrid dungeons of the Bastille." The World, January 7, 1791.

See also the same paper, November 25, 1790; January 4, 12, 1791.

[17] Baring, Diary of Rt. Hon. William Windham, 213.

[18] Life and Letters of Sir Gilbert Elliot I, 365, 371. Burke wrote to Sir Gilbert on November 9, 1790:—

"The public has been so favourable that the demand for this piece has been without example; and they are now in the sale of

"According to the common principles of vulgar politics this would be thought a service not ill intended, and aimed at its mark with tolerable discretion and judgment. For this, the gentlemen have thought proper to render me obnoxious to the party, odious to the Prince, (from whose future prerogative alone my family can hope for anything)[19] and at least suspected by the body of my country. That is, they have endeavoured completely and fundamentally to ruin me and mine in all the ways in which it is in the power of man to destroy the interests and objects of man, whether in his friendship, his fortune or his reputation."[20]

In other words, Burke had intended to serve his party and the prince by his pamphlet. Instead of receiving thanks for the service, the author believed that Fox and Sheridan had so damaged his reputation with both the prince and the aristocratic Whigs that any further advancement of his fortunes from these sources was put in jeopardy. Having such a belief, it was only natural that his resentment should cause him to discredit those who, he imagined,

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the twelfth thousand copies. I know very well how little elated I ought to be with this, perhaps, momentary opinion, which time and reflection may change, and which better information from those who are preparing to give it may dissipate. In truth, everything rather disposes me to melancholy than to elevation. It is comfort and not joy that I feel. It is indeed necessary for me to have some, and that not a little support when a man like Fox declares his entire disapprobation of the work in the most unqualified terms, and thinks besides that in point of composition it is the worst I ever published. When Fox disapproves and Sheridan is to write against me, do not I want considerable countenance?"

[19] In this parenthetical statement Burke probably referred to his ambition to become a peer. It is well known that for the services he rendered the Pitt administration from this time to his death it was the purpose of the minister to gratify this ambition. It is said that the patent was actually being made out when the death of Burke's son caused the title to be no longer a thing which the father desired. Therefore he contented himself with a pension which was said to have had a present value of thirty-six thousand pounds.

For correspondence and other matter relating to these facts see: Fitzwilliam, Correspondence of Burke IV, 239. Stanhope, Life of William Pitt II, 244–250. Morning Chronicle, October 1, 1794; November 13, 1795. It is unnecessary to mention here Burke's pamphlet in defense of his pension and the debate in Parliament which occasioned it.

[20] Fitzwilliam, Correspondence of Burke III, 402–403.

were seeking to injure him. He therefore readily played into Pitt's hands, and in that way helped the minister out of a perplexing political situation.

The first public notification of the fact that the two eminent Whig orators would no longer act together was given on the floor of the House of Commons. Burke had been accustomed to hold opinions different from those of Fox and Sheridan on several questions, such as parliamentary reform. On these occasions they had maintained their party relations, though disagreeing on the question at issue. Fox seems to have seen no reason why they should act otherwise with reference to a matter as purely speculative as he believed the approval or disapproval of the French Revolution to be at that time.[21] On April 8, 1791, in the first debate on the Quebec government bill, he expressed himself as opposed to reviving in Canada "those titles of honour, the extinction of which some gentlemen so much deplored," and referred to the fact that the territory had formerly been a French colony.[22] Again, a week later, in a debate respecting the proposed Russian armament, he incidentally described the new French constitution as, all things considered, "the most glorious fabric ever raised by human integrity since the creation of man."[23] Burke attempted to reply at the time, but was prevented by cries of "Question!" Six days later, when it was proposed to renew the debate on the Quebec bill, Burke called on Fox, and informed him that he intended to take part in the debate and discuss the French Revolution. It was reported that he also informed Pitt of his intention. At any rate, when the order of the day was proposed, Sheridan asked that the consideration of the measure be postponed. When Pitt refused to grant this request, Fox made a brief speech in which he lamented that what he had said previously had been misunderstood, and affirmed that while he admitted his admiration for the

[21] Hansard, Parliamentary History XXIX, 378, 390.
[22] Hansard, Parliamentary History XXIX, 107.
[23] Hansard, Parliamentary History XXIX, 249. Fox afterwards asserted that he had referred to the French Revolution and not to the constitution, as was reported. See the same work, 377.

French Revolution he had never, either in or out of Parliament, defended republican principles where England was concerned. Burke began his speech by recalling his friendship with Fox, but went on to say that his principles "were even dearer to him than his friendship." Fox made no reply, and the matter rested until May 6, the next date set for consideration of the Quebec bill.[24]

It will be observed that these discussions were taking place at precisely the time when the minister was most embarrassed by the outcome of the Russian imbroglio. The brief and entirely incidental panegyric on the French Revolution which escaped Fox on April 15 gave Pitt his opportunity of widening the breach between the Whig orators, and in conjunction with Burke of drawing away from Fox a large body of his aristocratic supporters.

The next move came when on the appointed date the speaker put the question whether the Quebec bill should be read paragraph by paragraph. It is difficult to see how the occurrences of that day can be interpreted as anything but deliberate manœuvers on Burke's part. Immediately after the announcement of the speaker, Burke rose and began a speech which bore little relation to the question before the house. At the outset he proceeded to deny the proposition that "all men are by nature free, and equal in respect of rights, and continue so in society," and persisted in this line of discussion in spite of repeated attempts to call him to order. Fox ironically remarked that he did not think his right honorable friend out of order, since it seemed to be a day of privilege when any gentleman might stand up and select his mark and abuse any government he pleased. After considerable discussion of the point of order, during which Burke, declaring that "he was fully convinced as he could be that no one gentleman in that house wanted to alter the constitution of England," continued his former discussion, Pitt suggested that some one move

[24] Hansard, Parliamentary History XXIX, 359–364. Morning Post, April 23, 1791.

that it was "disorderly to avert to the French constitution in the present debate." When Burke persisted in his disquisition, Lord Sheffield acted on Pitt's suggestion. The natural result of such a motion, as the minister probably foresaw, was to afford a more suitable pretext for the discussion which it was designed to prevent. In the debate that followed, Fox again defended himself from the insinuation that he had maintained republican principles, and insisted that there was no more reason for discussing in the house the constitution of France than there was for discussing the constitutions of Athens and Rome. Burke, now clearly in order, proceeded with his speech. Toward its conclusion he said that "it certainly was indiscretion, at any period, but especially at his time of life, to provoke enemies, or give his friends occasion to desert him; yet if his firm and steady adherence to the British constitution placed him in such a dilemma, he would risk all; and, as public duty and public prudence taught him, with his last words exclaim, 'Fly from the French constitution.'" At this point, Fox, who sat near the speaker, whispered that there was no loss of friends. Burke continued: "Yes there is a loss of friends. I know the price of my conduct. I have done my duty at the price of my friend. Our friendship is at an end."[25] This entirely uncalled-for outburst could have had but one meaning. It was a declaration of war against Fox.

There was little delay on Burke's part in continuing the struggle with his former friend and ally. Within a few days after his public avowal on the floor of the house, he endeavored, through Sir Gilbert Elliot, to have the Duke of Portland demand an explanation from Fox. With that purpose in view he sent to Elliot minute instructions concerning the proper procedure for the duke to use on the occasion of such an interview. According to these instructions, Portland was not to be misled by any general assurances. "The point to be explained," his instructor went on to say, "is not whether he [Fox] means to introduce the

[25] Hansard, Parliamentary History XXIX, 364–401.

French Revolution here, but why, if he does not, he extols and magnifies it in the language and sentiments of those who do." Not content with this, the instructions continued, "The truth is, that no explanation can give satisfaction." However, Elliot did not agree with Burke's suspicions of Fox, and declined to perform the task thus imposed upon him.[26]

Having failed in his first attempt, Burke had recourse to a pamphlet which he published late in the summer.[27] The occasion for this work was, as he explained it, a paragraph in the Morning Chronicle, which he regarded as the authentic exponent of the views of the supporters of Fox. This paragraph stated that the Whig party had decided the question between its two orators, and concluded in these words, "The consequence is, Mr. Burke retires from Parliament."[28] In this pamphlet Burke referred to his Reflections where he had attempted to prove that the existing state of things in France was "not an undigested, imperfect, and crude scheme of liberty, which may gradually be mellowed and ripened into an orderly and social freedom; but that it is so fundamentally wrong, as to be utterly incapable of correcting itself by any length of time, or of being formed into any mode of polity of which a member of the House of Commons could publicly declare his approbation."[29] He further said that he was ready to show "that those who could, after such a full and fair expression, continue to countenance the French insanity were not mistaken politicians, but bad men."[30] He next proceeded to quote at length some of the more radical statements made in Paine's Rights of Man, which, it will be remembered, was a pamphlet confessedly in favor of republican doctrines as that

[26] Life and Letters of Sir Gilbert Elliot I, 376–378.

[27] "Appeal from the New to the Old Whigs in consequence of some late Discussions in Parliament relative to the Reflections on the French Revolution." This pamphlet was published anonymously, but was immediately accredited to Burke. In fact, Richard Burke had had a part in its composition.

[28] Morning Chronicle, May 12, 1791.

[29] Burke, Appeal from New to Old Whigs, 11.

[30] Burke, Appeal from New to Old Whigs, 14.

author understood them. These quotations Burke professed to believe representative of the views of those in England who admired the French Revolution.[31]

There are two possible explanations of Burke's course on this question. One impeaches his moral and the other his mental integrity. We might conclude, and not without plausibility, that when the author of the Reflections discovered that, as a result of the publication of his pamphlet, he could hope for little further advancement from his former associates, he deliberately decided to support the ministry, with the design of retrieving his political fortunes. But there is another view more favorable and probably more nearly correct. It was patent to any well-balanced mind that there certainly was not at this time, if there ever was afterward, any considerable party in England that desired to reenact the scenes of the French Revolution in their own country. Pitt, even when dealing with Burke, was not so hypocritical as to profess to believe that there was.[32] Yet Burke was unable to rid himself of the notion, which he had hastily adopted, that there was such a party and that the established government in England was in imminent danger of overthrow at its hands. He was so possessed with this idea that in his frantic efforts to thwart this imaginary party he entered into a political alliance with the most eminent exponent of the constitutional views which the Reflections had been intended to combat. That he acted in conjunction with Pitt with the definite intention of furthering the interests of that minister, the evidence at hand does not, perhaps, warrant us to conclude. Yet, at any rate, he must have understood that his efforts to stigmatize Fox, both in his instructions to the Duke of Portland and in the Appeal from the New to the Old Whigs, as far as they were to have any effect at all, must inevitably result in advantage to Pitt's interests and that too at a time when the minister stood in sore need of such assistance. Furthermore, though no official cognizance had been taken of the

[31] Burke, Appeal from New to Old Whigs, 85–100.
[32] Fitzwilliam, Correspondence of Burke III, 344.

project, Pitt and Dundas had tacitly acquiesced in the mission which the younger Burke had undertaken in favor of the exiled French princes. The son had assisted his father in the preparation of his last pamphlet, and was quite as enthusiastic in the matter as his sire. All of this necessitated frequent communications between the Burkes and the minister, and gave ample opportunity for any agreements they might have deemed it advisable to reach. Whether or not the advice of the ministers had been sought or any suggestions received from them before the publication of the Appeal from the New to the Old Whigs, it is certain that the author expected them to approve of it and thank him for it after its appearance. In view of these facts, it mattered but little whether or not there was an explicit understanding among the members of the new coalition opposed to the French Revolution.[33]

It is certain that Burke had not labored alone and without encouragement in his efforts to induce the members of the aristocratic party to separate from their leader, Fox. The supporters of Pitt were ready to welcome him with open arms into their camp. The World, which since their publication had been busy in its efforts to ridicule the Reflections, by June 4, 1791, began to give more credence to the opinions of one who had "manfully torn himself from connections dishonourable to the interests of his country."[34] After the publication of the Appeal from the New to the Old Whigs, and after the author had been received at Windsor, the same paper felt constrained to recant openly and explicitly its former views:—

[33] For Burke's correspondence with his son while the latter was on the Continent in 1791, and other information regarding his mission, see Fitzwilliam, Correspondence of Burke III, 201–383. In a letter to his son, dated August 16, 1791, Burke referred to the mission on which the younger man had gone to the Continent, and said, "I ought to be cautious of seeking the ministers on this business, because they have made no advances whatever to me on the subject; no, not so much as to thank me for my pamphlet." Further on in the same letter he said: "I told you that the ministers had taken no notice of my book. It was then true. But this day I had the inclosed civil note from Dundas."

[34] The World, June 4, 1791.

"However we might have censured many parts of Mr. Burke's political conduct while he disgraced himself and his ability by a uniform concurrence with the rest of the party, it is but justice at present to announce our hearty absolution. His candid avowal of lurking mischiefs in the minds of certain dangerous men, and his beautiful communication of sentiment upon the French Revolution, preponderate all his former political tendencies. . . . By a noble secession from treason intended against the constitution of his country, Mr. Burke has reinstated himself in the high opinion of those who formerly disapproved of his politics: by an open declaration of his motives, he has put the nation on its guard; and by asserting the just privileges of monarchy he has obtained the peculiar favour of his sovereign."[35]

This was not purely a tribute to Burke's newly acquired zeal on behalf of the administration. The supporters of the minister were busy with their endeavors to supplement the efforts of their ally, and this paragraph was part of a propaganda which had been begun soon after Fox made the avowal in the debate on the Russian armament. The evident purpose of the paragraphs appearing almost daily in the administration newspapers was to create a popular belief that since Fox had confessed his admiration for the French Revolution, he must therefore desire to compass the destruction of the British constitution. These attacks were soon directed against the proposed celebration of the second anniversary of the fall of the Bastille. A similar celebration had been held the year before and had received a rather favorable notice from the administration papers.[36] These festivals were designed to afford an opportunity for conviviality to those who attended. Usually such functions began in the afternoon and continued far into the evening, during which time twenty-five or thirty toasts were drunk. The advertisement for the second banquet specifically re-

[35] The World, October 27, 1791.
[36] Public Advertiser, July 16, 1790. The World, July 16, 1790.

quested that the participants refrain from political discussions.[37] Therefore it is difficult to imagine any unfavorable results from such a celebration except, perhaps, injury to the reputation for sobriety of those who attended. Yet this proposed assembly was now held up as a political red rag to frighten the aristocratic supporters of Fox. Taking their cue from the wild rhetoric of Burke, the writers for the press endeavored to connect this celebration with the intentions of the Whig leader, and to imply that an event of this kind would lead to the most mischievous consequences. For example, as early as May 9, 1791, the World said:—

"We are told by Mr. Burke that plots and strategems are ripening—and we all know that pamphlets, speeches, public meetings and public toasts, of the most seditious kinds are setting afloat by a few artful and designing men, who would plunge their country in ruins for the purpose of ambition or enthusiasm. It behooves Englishmen to watch over such men; they are easily known—they carry their dark lanthorns in their faces—their half speeches, hesitations and innuendoes—'Willing to wound, but yet afraid to strike.'

"The anniversary of the 14th of July too is approaching, (the memorable anniversary of Mr. Fox's glorious fabric, the French Revolution)—From these beacons, therefore, let Englishmen take warning, and guard that constitution, which has been for ages the nurse of heroes, the pride of nations, from being trampled on, or annihilated by ambitious democrats or canting republicans."

As the date for the celebration approached, these implications became more specific, and the suggestion was repeatedly made that if any disorders should result they must be laid to the charge of the admirers of the French Revolution.[38] One of the papers most active in its efforts to

[37] The Star, July 11, 1791.

[38] The World, April 27, 1791; June 4, 8, 18, 1791; July 14, 1791. The Oracle, June 15, 1791; July 4, 1791. Evening Mail, June 17–20, 1791; June 29–July 1, 1791. The following quotations are from these papers. Only a few of those found have been cited. The Evening Mail said:—

"A few false patriots, clothed in the masquerade dress of liberty.

convince the public that the approaching celebration would be made the occasion for carrying into effect "some seditious projects" on the day that the feast was to be held, took the precaution to announce that the government, instead of betraying any dread of a dinner, would labor to avoid the slightest appearance of any such apprehension. "The Bank Guard has even been forbid to march through the Strand, that no irritation might be given to inflame the popular mind; and a field day of the first regiment of foot guards, destined for today, is, to remove the slenderest pretext, postponed."[39] The most plausible interpretation of this editorial is that it was a case of protesting too much, since such popular excitement as existed had been aroused solely by the supporters of the administration. Those concerned in the celebration insisted that they only intended to

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and concealing beneath it the spirit of the most daring licentiousness, shall in vain attempt to plunge their murderous daggers into the side of a common venerable parent. A vigilant ministry will, no doubt, take timely precautions for the prevention of those tumults and disorders which afflict the miserable kingdom of France; and into the net which treacherous *soi-disant* patriots may rashly spread for others will their feet be taken;—the danger will fall on their own heads."

The World:—

"The respectability of the house of the Crown and Anchor in the Strand, and the number of men of fashion who are to meet there on this occasion put it out of our power to believe that anything can be meant beyond what is fair and proper. But it will undoubtedly be well deserving the attention of the directors of that meeting to prevent every possible tumult, lest they should share the odium which any such circumstance would properly deserve."

Again: "St. George's Fields will be double guarded, it is said, on the 14th of July next, for reasons too obvious to mention."

Again: "But the stronger reason why any man who bears the name of Englishman should watch over such an intended celebration, is when the chief of the party declares in the face of the world that he looks upon the French Revolution to be one of the most glorious fabrics ever raised by the wisdom of mankind. Such declarations should put every man on his guard, for if he and his adherents really think so, as good patriots, they should endeavour to make this country (which they do not seem to admit so glorious a fabric) something like it. Therefore, it is to meet this intended reformation in the bud, that remarks and observations are made on this unnatural fete, and which we trust will be followed up by the prudence and foresight of government as well as by the public at large."

[39] The Oracle, July 14, 1791.

spend a social evening together, and in fact they did nothing more. Because of the feelings already stirred up the principal Whig leaders did not attend,[40] and for the same reason the diners broke up somewhat earlier than was customary on such occasions. After they had nearly all gone, at the time when attendants on such functions were apt to be considerably under the influence of the beverages used on the occasion, a mob, seemingly bent on mischief, appeared at the tavern, but finding that the party had dispersed, caused no serious disturbance.[41]

In order to understand the real significance of this dinner in English politics, we must consider it in connection with a riot which took place in a neighboring town on the same day. On July 13 the World announced that seditious handbills had been posted in the vicinage of Whitehall and in other towns in England, "evidently with a view to excite the populace to riot tomorrow." As Birmingham was the only place at which such an event actually occurred, it will be necessary to consider at some length the disorders at that place, but we must acknowledge at once that because of the mystery which still envelops the origin of these riots it will not be possible to reach positive conclusions. The best that can be done is to give the circumstances in detail. Any explanation of the event demands the adoption of one of two hypotheses. It is possible that these seditious handbills and the riots at Birmingham were the work of revolutionary enthusiasts who failed entirely to appreciate the real attitude of the English public. The other explanation is that these seditious notices were a part of the furtive efforts of some of the supporters of the ministry to make the celebrations on July 14 the occasions for popular disorder, with the design of attaching the responsibility for such disorders to those who admired the French Revolution. Neither of these conclusions can be completely substantiated by the evidence at hand, therefore a statement of the case

[40] Morning Post, July 13, 1791.
[41] Morning Post, July 15, 1791. The World, July 15, 1791. The Oracle, July 15, 1791. General Evening Post, July 14–16, 1791.

is all that will be attempted here. The facts, briefly, are as follows.

Dr. Joseph Priestley, the celebrated theologian and chemist, lived in Birmingham and was the minister of a dissenting congregation at that place. On account of his polemical abilities, he was much disliked by the orthodox clergy in the community, who were frequently engaged in discussions with him. The fact that while the established church was at a standstill in Birmingham the dissenting sects were growing rapidly and contained the people of the most considerable means in the town,[42] only served to add fuel to the flames of discord. Priestley not only disagreed with the doctrines of the established church but was also frankly opposed to any state church. As he himself expressed it, his teachings laid "grains of gunpowder" which would finally "blow up the established hierarchy."[43] He had taken an active part in the efforts to secure the repeal of the Corporation and Test Acts, and had thereby aroused additional opposition on the part of the clergy of the Church of England. The discussions went to such length that the ministers of the establishment, in speaking to the lower classes, charged Priestley with the design of blowing up the churches. The agitation was kept up in Birmingham even after the motion for repeal was defeated in March, 1790.[44]

Under these circumstances, on July 7, 1791, at about the same time that such notices were appearing in the papers of the other towns in England, the friends of the French Revolution in Birmingham advertised that they would have a dinner on the anniversary of the fall of the Bastille. With the proposed celebration, however, Priestley seems to have had nothing to do, nor did he attend the function when it was held. It is unnecessary to observe that those in

[42] Morning Post, January 11, 1791; December 24, 1791. The Oracle, July 29, 1791. The Diary; or, Woodfall's Register, July 22, 1791. Evening Mail, July 27–29, 1791.

[43] Priestley, Letters to Rev. Edward Burn, Preface.

[44] For the titles of some of the pamphlets published, see the appended bibliography.

Birmingham who were friendly to the French Revolution were, in a large measure, Dissenters, and that an agitation directed against the Dissenters was also directed against the admirers of the French Revolution, and vice versa. It was said at the time that reports were industriously circulated among the lower classes charging the magistrates with being unfriendly to the Nonconformists and likely to impose no punishment for destroying their houses of worship. A few days after the announcement of the proposed dinner, the following notice was circulated:—

"On Friday next will be published, price one half penny, an authentic list of all those who dine at the hotel, Temple Row, Birmingham, on Thursday the 14th instant in commemoration of the French Revolution. Vivant Rex et Regina."[45]

On the morning of July 11 there appeared in one of the taverns and on the streets, from some unknown source, a handbill which was certainly of a seditious character.[46] On

[45] Authentic Account of the Riots in Birmingham, etc. This pamphlet was published in September, 1791, and it contains a collection of documents and contemporary accounts pertaining to the riots. See the first two pages for the information contained in the above paragraph.

[46] London Gazette 1791, 431. Copies of this handbill may be found in any of the contemporary papers and in many other places. The following copy is taken from the official proclamation of the king offering a reward of one hundred pounds for the arrest of its author:—

"My Countrymen! The second year of Gallic Liberty is nearly expired. At the commencement of the third on the fourteenth of this month, it is devoutly to be wished that every enemy to civil and religious despotism would give his sanction to the majestic common cause by a public celebration of the anniversary. Remember that on the fourteenth of July the Bastille, that high altar and castle of despotism, fell. Remember the enthusiasm, peculiar to the cause of liberty, with which it was attacked. Remember the generous humanity that taught the oppressed, groaning under the weight of insulted rights, to save the lives of the oppressors! Extinguish the mean prejudices of nations; and let your numbers be collected and sent as a free will offering to the National Assembly. But is it possible to forget that your own Parliament is venal! Your Ministers hypocritical! Your Clergy legal oppressors! The reigning family extravagant! The Crown of a certain great personage becoming every day too weighty for the head that wears it! too weighty for the people who gave it! Your taxes are partial and excessive—your representation a cruel insult upon the sacred rights of property, religion and freedom.—But on the fourteenth

the same day another tract was distributed under the caption, "An Incendiary Refuted," which was intended as an answer to the first paper, and was calculated to arouse the popular mind against the admirers of the French Revolution, who were supposed to have been the authors of the tract to which the reply was addressed. It is certainly noteworthy, if true, that this reply was written and printed in time to be circulated on the same day that the other handbill made its appearance. The only alternative to this conclusion is to assume that the papers were the work of the same author, or, at least, that there was a previous concert between the writers.[47]

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of this month, prove to the political sycophants of the day that you reverence the olive branch, that you will sacrifice to public tranquility till the majority shall exclaim—The peace of slavery is worse than the war of freedom. Of that moment let tyrants beware."

The authorship of this document has never been determined. There are two hypotheses, which are probable according to the theory adopted to explain the origin of the disturbances. It may have been the work of a misguided enthusiast for liberty, who vastly mistook the sentiment of the people. If such was the case and the authorities were desirous of apprehending the author, in view of the rewards offered by both the king and the Dissenters it offers a difficult problem to explain how a person of that character was able so successfully to conceal his identity. On the other hand, if the publication of this handbill was merely a part of a preconcerted plan to instigate disorder by furnishing a ground on which to carry on the agitation in such a manner as to fix the blame on the supposed revolutionists, it must be admitted that it was a daring undertaking executed with phenomenal success.

[47] Authentic Account of the Riots in Birmingham, 3. The following is a copy of the second paper:—

"A paper having been distributed in the town this morning, evidently calculated to weaken the attachment of the people to the present excellent form of government, and to excite tumults similar to those which have produced the most atrocious murder, anarchy, and distress in a neighbouring kingdom, it is thought proper to apprize the good and peaceable subjects of this place, that every position in that seditious hand-bill is as false and fictitious as the wretch who composed it. The present enjoyment we now experience, of every blessing, freedom and protection a mild government can bestow, is the best refutation of the detestable calumnies of the author of this hand-bill; and whatever the modern republicans may imagine, or the regicidal propounders of the Rights of Man design, let us convince them that we are not so destitute of common sense, as not to prefer the order, liberty, happiness and wealth, which is diffused through every portion of the British Empire, to the anarchy, the licentiousness, the poverty and misery which now overwhelm the degraded kingdom of France."

The gentlemen who had published the advertisement for the dinner now, on July 13, offered a reward of one hundred guineas for the author of the first handbill. In the same notice they declared their entire ignorance of its origin, and expressed their firm attachment to the government as it existed, vested in the three estates of King, Lords, and Commons.[48] They had written and were preparing to publish another advertisement recalling the notice of the dinner when they were visited by the proprietor of the tavern at which it was to be given, who argued that the excitement was subsiding, and that he could not afford the loss which would be entailed if the dinner should not be held after the preparation which had been made for it.[49] It was thereupon decided to adhere to the plan for the celebration, but to refrain from speeches, and to disperse at an early hour. This was accordingly done. The company met at three o'clock in the afternoon and by seven o'clock had all dispersed. A considerable number of bystanders had been present, and had groaned and hissed as the diners went into the tavern. However, they then left, and did not return until more than an hour after the dinner was over and the hall entirely empty. An effort was made to convince the mob that the celebration had been concluded, but they demolished the windows and otherwise injured the hotel. Next they proceeded in turn to both the "New" and "Old" dissenting meeting-houses, and destroyed them. In the midst of the attending disorder, precautions seem to have been taken not to endanger the adjacent property. The seats and woodwork of the Old Meeting-House were torn out and burned in the churchyard near by, and it was said that the engine was permitted to play on the adjoining houses, but not on the church, which was in flames.[50] The rioters, gaining recruits from the colliers, now proceeded to

[48] Morning Post, July 23, 1791. Authentic Account of the Riots in Birmingham, 3.

[49] The Star, July 21, 1791. Gentleman's Magazine LXI, 599.

[50] Hutton, Life of William Hutton, including a particular Account of the Riots in Birmingham, 244.

demolish the residences of Dr. Priestley and other prominent Dissenters. Among other unfortunate circumstances was the almost total destruction of the books and laboratory of the distinguished scientist. But, even when engaged at these tasks, the mob furnished a remarkable example of order amidst confusion. They carefully protected the property of Methodists and followers of the Countess of Huntingdon, as well as of the members of the established church. It was only those who would not join their cry of "Church and King" who suffered.[51]

In response to the requests for protection and offers of assistance in quelling the disorders by those whose property was being destroyed, the magistrates replied, "Pacific measures are adopted."[52] These same magistrates, from either design or neglect, had already failed to read the Riot Act, as was their duty whenever such outbreaks occurred. This omission was an item of not a little importance when the time came for the trial of the rioters.[53] At length, on the third day of the riots, the magistrates and some of the more prominent churchmen printed and circulated among those who were taking part in the disorders the following extraordinary broadside, which they styled, "Important Information of the Friends of the Church and King:"—

"Friends and fellow churchmen, being convinced you are unacquainted with the fact that the great losses which are sustained by your burning and destroying the houses of so many individuals will eventually fall on the county at large, and not upon the persons to whom they belonged; we feel it our duty to inform you that the damage already done, upon the best computation that can be made, will amount to upwards of one hundred thousand pounds, the whole of which enormous sum will be charged upon the respective parishes and paid out of the rates: We therefore, as your friends, conjure you immediately to desist from the destruction of any more houses; otherwise the very proceedings

[51] Evening Mail, July 15–18, 1791.
[52] Hutton, Life of William Hutton, 248.
[53] The Star, August 24, 1791.

which your zeal for shewing your attachment to the Church and King inspired, will inevitably be the means of most seriously injuring innumerable families who are hearty supporters of the government, and bring on an addition to taxes, which yourselves and the rest of the friends of the church will for years feel a grievous burden. And we must observe to you that any further violent proceedings will more offend your King and country, than serve the cause of him and the church. Fellow churchmen, as you love your King regard his laws and restore peace."[54]

The "friends and fellow churchmen" either differed from the opinions so politely expressed by their courteous advisers, or, as is more likely, they were to such an extent intoxicated by the liquors they found in the wine-cellars of the houses that had been destroyed that they did not feel obliged to heed these admonitions. At any rate, they did not disperse until a body of militia appeared.[55]

The authorities took no more vigorous measures to punish the offenders than they had taken to suppress the disorders. Only nineteen of the thousands engaged in the riots were arrested. These were men of the lowest character, and, since the Riot Act had not been read as the law provided, it was necessary to prove that they had taken part in the actual pulling down of a house before they could be convicted.[56] A few days before the trials the World announced: "It may, indeed there can be no doubt that it will, be a happy circumstance for the misguided rioters at Birmingham, that the judges appointed for their trials are men not only of extensive legal knowledge, but of admired humanity."[57]

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[54] Morning Post, July 20, 1791.

[55] For accounts of the riots that have not been cited, see Morning Post, July 18, 19, 22, 30, 1791. The World, July 18–22, 1791. The Oracle, July 18, 19, 23, 1791. Evening Mail, July 18–20, 1791. The Star, July 16, 18, 20, 1791.

[56] For reports of the trials, see Authentic Account of the Riots in Birmingham, etc. The Star, August 1, 24, 1791. The Diary; or, Woodfall's Register, August 26, 1791. Whitehall Evening Post, August 25–27, 1791; September 1–3, 1791. General Evening Post, July 16–19, 1791.

[57] The World, August 9, 1791.

Of the five rioters who were finally convicted, only three were executed. The others were released by the clemency of the king. It was said that the juries at the trials, either accidentally or purposely, were composed entirely of persons who sympathized with the church party.[58] In any event, the circumstances were such that even the Evening Mail, a paper which was favorable though not extremely partizan in its attitude towards the administration, felt obliged to admit that "from the general complexion of the late trials at Warwick, it is tolerably evident that party prejudices, even in cases of life and death, can be carried too far, and that the dire course of national justice may be stopped by the political point of view in which conscience shall behold the nature of an oath. Compassion is, no doubt, a noble attribute, and nearly allied to mercy; but there are cases in which the exercise of either may be a high crime against the peace of society; and lenity to rioters comes under that description."[59] The World, on the other hand, announced to its readers that "the trials of the rioters at Birmingham were, perhaps, the most uninteresting thing which has taken place these ten years."[60] For this reason, no account of them whatever was given.

In forming conclusions concerning these disorders, it is important to consider that the majority of those who took part in them were from the lowest stratum of society, and, according to contemporary statements, ordinarily gave no attention to any church or sect. Yet, by some means, in the midst of riot and lawlessness, in the name of church and king, their efforts were so directed that they destroyed only the property of the members of the societies which were deemed hostile to the church and the constitution. While the troubles were in progress and after they had been quelled the influence of those who were in authority seems to have been exerted to shield the participants in the disorders. Though the partizans of the government were quick

[58] Hutton, Life of William Hutton, 275.
[59] Evening Mail, August 29–31, 1791.
[60] The World, August 31, 1791.

to seize on the riots at Birmingham as an additional argument to support their political purpose, nevertheless it must be stated that sufficient evidence has not been adduced to prove that any member of the administration had any direct part in their instigation. However, it should be noticed that the papers which supported the minister were unanimous in commending the spirit which had given rise to the disturbances, though they professed to regret the excesses that had resulted. They asserted that the troubles had been occasioned by the handbills which had been distributed, and they ascribed these handbills to the same persons who had been present at the dinner in the hotel. The papers laid special stress upon the fact that the fears expressed before the celebration had been realized, and that the subsequent riot had been the work of the admirers of the French Revolution.[61]

[61] Such arguments and sentiments appeared in the papers already cited.

The World said, July 18, 1791: "The populace of Birmingham, conceiving that a commemoration of French anarchy in this country was an insult to the majesty of the Constitution, and a design to disturb the general and enviable tranquility of the State, assembled on Thursday before Doadley's hotel, where about eighty persons were met for the purpose of celebrating the *glorious* 14th of July. We lament, however, that what certainly proceeded from so laudable a principle should end in consequences so unjustifiable; but their resentment being once warmed, soon became inflamed, and the influence communicated to certain religious conventicles where they conceived an opposite, though no less inflammable spirit originated."

Same, July 20, 1791: "Such are the mischiefs of public meetings which have for their objects revolutions of governments generally approvable and approved. . . . Some very inflammatory bills dispersed by dissenters previous to the meeting of the 14th of July, we fear, have all the late disturbances to answer for."

Same, July 21, 1791: "That the riots at Birmingham originated in a well founded zeal of the people for the support of their government is evident. Those only, therefore, are to blame who, by the celebration of revolutions in other countries, and by publications of an alarming and seditious tendency, impress upon the minds of the people the idea of deep laid schemes for the overthrow of our own happy and glorious constitution."

The Oracle, July 18, 1791: "Humanity will certainly regret the injuries sustained by the dissenters of Birmingham; but the people lately have been witnesses to a conduct highly reprehensible in the pastors of such men. They whose sacred functions it is at all times to preach peace and to promote it, have latterly been foremost in the ranks of such as eulogize the miserable anarchy of a neighbour nation. Their publications too have endeavoured to

The evidence adduced shows that this statement of the papers was either a mistake or a wilful perversion of the truth to serve political interests. If the misrepresentation was intentional, it certainly does not tend to discredit the conclusion that the entire affair was but a part of the propaganda instituted by Pitt in self-defense immediately after the failure of the Russian armament.

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incite the million to tear the vulnerable fabric of our Constitution to pieces, and frame one for themselves."

Same, July 19, 1791: "The outrages at Birmingham, though they are justly deplored by every good citizen, at least prove one theory which gives a salutary damp to the enthusiasm of the revolutionists. They prove that the mob is hostile to them, and that, therefore, all hope of popular aid in their revolutionary schemes are vain. It will now be obvious that the policy of government has been cautious and secure in giving no check whatever to the factious proceedings of designing dangerous characters. The insult offered by these men to the Constitution which is their protectress, has made itself so flagrantly visible, that the people themselves will need the temperate restraint of the ministry to prevent a general sacrifice to offended power."

CHAPTER III.

Party Realignment.

The chief question at issue between the English political parties in 1792 was whether Pitt or Fox should dominate the government. Aside from the advantages which possession gave, there were several other reasons why the former was confident of ultimate success. Whether his motive was ambition, patriotism, or a mixture of both, it is certainly true that Pitt, in meeting the problems which faced him in this and the following years, manifested the ability and the willingness to adapt his wishes and principles to existing opportunities whenever he was convinced of his inability to make circumstances conform to his will. Whether it be decided that his stake was the common good or the gratification of his own desires, it is undeniable that his political methods resembled those of a man who was playing a stupendous game, and who was too intent on winning to be over-scrupulous as to the means employed to attain the end in view. In appearance at least he sought to bind his associates to him by ties of self-interest rather than by sentiment or appeals to principle. But, if his political conduct during these seven years be compared to a game, it must be admitted that he played it with consummate skill and ability, and for a time at least with continued success. His appeal to the selfishness of those whom he wished to control was seldom in vain, and stamped him as a statesman able to estimate accurately the character of the men with whom he had to deal.

We should be slow to affirm that Fox was actuated by motives or employed methods that were on a higher plane than those of his eminent rival. The Whig leader was probably as capable as was Pitt of shaping his principles to meet

the exigencies of his political ambition and of advocating reform because he believed that it would ultimately be the popular side. It may be that, if opportunity had offered, he would have hazarded public fortune to secure his private interest. But to his credit be it said he did not do so. He resisted the importunities of powerful and influential friends, severed ties which had endured for a generation, and faced the immediate destruction of cherished hopes, which but a few months before had seemed on the point of realization, in order to raise his voice on behalf of a cause which he professed to believe was in the interest of the public good. We do not imply that he was in advance of the school of politics in which he had been trained, or was above rewarding his followers with public spoils. Yet it is an eloquent testimony to the personal magnetism of the man that, at the hour of parting, he could claim the respect and admiration of those who could no longer agree with him politically, and that he was able to prevent the final dissolution of his party organization for more than a year after many of his aristocratic friends had withdrawn from him their support.[1]

The political situation in the spring of 1792, as it appeared to Pitt, seemed to present the following possibilities. He and Thurlow still found it difficult to work together in harmony, and an open breach between them was only a matter of time. Whenever that time should come, Pitt naturally wished to be in a position to dictate the dismissal of the lord chancellor. In the meantime, however, the Whigs appeared to have triumphed in the matter of the Russian imbroglio, and the prestige of the minister seemed to have been lessened accordingly. Again, the king had already been called on to consent to the retirement of the

[1] For evidence on the personal relations of Fox with the aristocratic members of the party, in addition to the citations that will be found in other parts of this study, see Carlisle Papers, 698. Lessons to a young Prince from an old Statesman, 6. This pamphlet was an anonymous publication which purported to instruct the Prince of Wales as to how he should read Burke's Reflections. It was published in 1791, and was probably written by Burke himself.

Duke of Leeds, and it was manifestly impolitic to request him to dismiss Thurlow without good reasons. Should the chancellor unite his forces with the aristocratic Whig leaders it was by no means certain that George III would not look with favor on such a combination even though Fox was not then in favor. Among the personal adherents of Pitt there was not a man of sufficient attainments to succeed to the chancellorship if Thurlow should be dismissed. In addition to this, the defection of Thurlow in the House of Lords would leave Grenville the only champion of the ministerial program, with the ex-chancellor as an adversary, and this possibility was an item of no mean consideration since, in spite of its ample voting strength, the administration was singularly destitute of leaders in the upper house.[2] Therefore, if the minister was to secure himself in the possession of the government, it was necessary for him not only to strengthen his hold on the leadership of his own party but also to weaken the Whigs. His efforts to divide and discredit the opposition, which he now maintained with renewed vigor, had a twofold purpose: he hoped to bring those who adhered to the party into such ill repute that the king would not intrust the government to them, and at the same time to detach a conservative element in order to add it to his own followers. Incidentally, he remembered that the woolsack might be useful to induce a reluctant Whig to desert his party. But the fear of the French Revolution was the effective weapon with which he expected to destroy the strong organization that opposed him. The reform element in the party itself, in the spring of 1792, had prepared the way for its own destruction. It only remained for Pitt to take advantage of the situation.

Singularly enough, the opportunity came with the organization of a society to support an issue of which Pitt himself had earlier been an enthusiastic champion. On April 11, 1792, one hundred and thirty-seven gentlemen, including

[2] For a discussion of this phase of the situation, see Burges to Auckland, Auckland MSS. XXXII, 308–310; also Dropmore Papers II, 272.

twenty-two members of Parliament, founded an association which they called "Friends of the People associated for the Purpose of obtaining a Parliamentary Reform." According to the statement which the charter members signed, this association was organized for the purpose of "promoting to the utmost of their power, the following constitutional objects, making the preservation of the Constitution, on its true principles, the foundation of all their proceedings." The first of these "constitutional objects" was "to restore the freedom of election, and a more equal representation of the people in Parliament." The second was "to secure to the people a more frequent exercise of their right of electing their representatives."[3] Those who participated in this organization were largely of two classes. One consisted partly of the younger element among the Whigs and partly of older members, like Sir Philip Francis, who did not agree with the views of the conservative landowners. The remainder were such men as Major Cartwright and others who had been members of similar societies in the early eighties, when a more radical reform than was now proposed had been advocated by Pitt and the Duke of Richmond. The more prominent members of Parliament who signed the declaration were Charles Grey, Sheridan, and Thomas Erskine, the advocate.[4]

At a meeting of the society on April 26, 1792, an "Address to the People of Great Britain" was drafted for publication. As a further means for carrying on the propaganda, a motion for parliamentary reform was to be made in Parliament. Grey was selected to make and Erskine to second this motion. The address merely set forth the moderate aims of the society and the eminent precedents for advocating a reform such as the society favored.[5]

[3] Wyvill, Political Papers III, Appendix, 128. The proceedings of this society were published in several forms shortly after its organization. For titles see the appended bibliography. The proceedings also appeared in the contemporary newspapers. A convenient edition of them was published as an appendix to the third volume of the Political Papers of Rev. Christopher Wyvill. This edition will be used in the citations which follow.

[4] Wyvill, Political Papers III, Appendix, 129.

[5] Wyvill, Political Papers III, Appendix, 143.

As was pointed out at the time by a newspaper,[6] it was extremely unlikely that the aristocratic Whigs could be brought to support a reform that would lessen their own influence by eradicating the rotten boroughs, some of which they controlled. Fox recognized the nature of the situation and did not join the society. On the day before Grey was to announce his motion a meeting of prominent party leaders who were opposed to the movement was held to consider what attitude should be adopted. They knew that Fox would vote with his friends although he had not joined their club. Those who attended the meeting seem to have decided to follow their usual course in such cases, and to oppose the measures, though without any thought of deposing Fox from the leadership. However, the mere fact that a meeting was called showed that considerable feeling had been aroused. Pitt learned of the meeting through Lord Auckland, and immediately determined to put into effect a piece of political strategy.[7]

On April 30, 1792, Grey gave notice that in the next session he would submit for consideration a motion for parliamentary reform. He accompanied the announcement with a brief statement of the circumstances, and of the reasons for the proposed motion. Ordinarily this would have ended the matter until the motion was actually made. Pitt immediately rose, remarking that he believed that he was not strictly in order, but since no objection was made he would go on with his speech. He admitted in the beginning that he was not going to act consistently with his past record, but excused himself on the ground that "the question to be brought forward on this subject would involve something more than the character, the fortune, the connexion, the liberty, or the life of any individual." He was convinced that it would "affect the peace and tranquility which, under the favour of Providence, this country had, for a long time, enjoyed, in a superior degree perhaps to any part of the habitable globe." He argued that the time

[6] The Oracle, April 16, 1792.
[7] Auckland, Journal and Correspondence II, 401.

set for the motion was inopportune, and called attention to the situation in France. "He did not mean," he said, "to allude to the sentiments of any particular member of that house for the purpose of being severe; but when they came in the shape of advertisements in the newspapers, inviting the public as it were to repair to their standard and join them, they should be reprobated, and the tendency of their meetings exposed to the people in their true colours." He next urged the friends of the constitution to be particularly active against such men, because he had seen with concern "that those gentlemen of whom he spoke, who were members of that house, were connected with others, who professed not reform only, but direct hostility to the very form of our government. This afforded suspicion that the motion for a reform was nothing more than a preliminary to the overthrow of the whole system of our present government. . . . When he saw these opinions published, and knew them to be connected with opinions that were libels on the form of our government,—the hereditary succession to the throne—the hereditary titles of our men of rank,—and the total destruction of all subordination in the state, he confessed he felt no inclination to promise his support to the proposed motion for a parliamentary reform." Few men besides Pitt would have had the audacity to make such a speech. He was accusing a society of reputable men, organized to promote a less radical reform than he himself had championed, of something closely akin to treason, merely on the ground that they had been courteous enough to reply to the communications of another society which recommended that its members read Paine's Rights of Man; and he made this accusation in face of the fact that even the second society professed to favor no further change in the British constitution than a reform of the lower house of parliament.

Fox, who had not joined the Friends of the People, replied to this extraordinary speech. He admitted that he would not have advised the bringing forward of the pro-

posed motion at that time, but said that, since it had been done, he would support it. He pointed out that Paine's book was not designed as an argument for the reform of the government, but "went the length of changing the form of it." He asked, "Why, then, should those who professed reverence for the constitution of this country be charged with having taken up with sentiments contained in a book that was a libel on it?" Burke spoke next, and "ridiculed the idea of a moderate or temperate reform as impossible." Windham, Thomas Grenville, and other sympathizers with the aristocratic Whigs also expressed themselves as opposed to reform. But, in general, they agreed with the sentiment of Lord North, who concluded his speech by saying, "He hoped his differing in this particular instance from the opinion of his honourable friend who had given notice would make no alteration whatever in that friendship which had hitherto subsisted between them."[8]

But this debate, which, it will be observed, had been started by Pitt, served the purpose which the minister had in view. It confirmed the impressions which he had received from Auckland, that the question of reform as agitated by Grey's society had already created a serious difference of opinion in the opposition. He had now only to convince prominent Whigs that the Friends of the People were such a serious menace to the peace and safety of the country that it was their duty to accept offices and support his administration for the purpose of counteracting the influences of this society. With that purpose in view, he wrote to Auckland on the day after the discussion in Parliament, requesting him to obtain a list of the Whigs who had attended the party council two days before, and in the same letter he made the following statement:—

"I wish also you would turn in your mind whether it might not be useful to summon a Privy Council, at which the Duke of Portland, Lord Guilford, Lord Fitzwilliam, Lord Loughborough, and the leading persons might attend

[8] For this debate, see Hansard, Parliamentary History XXIX, 1300–1341.

for the express purpose of considering proper instructions to be given to the Lord Lieutenants and Magistrates in the different counties, and such other measures as the present circumstances may require."[9]

It was clearly Pitt's aim to cultivate, by means of a campaign against imaginary dangers, the fears which had already been aroused in the minds of some of the prominent Whigs and so to gain their support for his measures. His purpose was primarily to promote party defection among the Whigs, and only secondarily, if at all, to check the propaganda of the reformers. Probably he had no great fear at this time that this particular reform movement would become a matter of any considerable importance. James Bland Burges, who to a large extent shared the confidence of the ministers, writing May 4, 1792, with regard to the movement, concluded, "They [the reformers] have not, however, met with any success; on the contrary, the people are generally against them."[10] Sir Gilbert Elliot, a prominent Whig who had hitherto been much concerned for fear lest the reform movement would gain ground owing to the agitation, wrote to his wife on May 12, after he had gone to London, "On the whole, this affair seems less formidable than it might have been, and is likely enough by want of heartiness in many of the members and by divisions among themselves, to dwindle and expire pretty quietly."[11] No other evidence has been found which indicates that there existed at this time among the people at large any sufficient sympathy with this movement to warrant the measures now adopted by the administration.

However, two days after he had sent the above letter to his wife, Sir Gilbert Elliot had a conversation with the Duke of Portland "on the subject of these associations, which have come to be thought much more seriously of than one could so soon have imagined." And he reported

[9] Auckland, Journal and Correspondence II, 402.
[10] Hutton, Selections from the Letters and Correspondence of Sir James Bland Burges, 220.
[11] Life and Letters of Sir Gilbert Elliot II, 21.

that Pitt told the Duke of Portland he had the permission of the king to take up the matter of the associations with him, at the same time expressing satisfaction "at the disposition which had been shown by the Duke and his friends to preserve tranquility." In the conversation "Pitt told the Duke that he had undoubted information of many foreigners who are employed to raise sedition in England, and that money is sent from France to assist in this attempt." He proposed that Portland and his friends should attend the Privy Council for the purpose of taking steps to avert these alleged dangers, and he even offered "to make those Privy Councillors whom the Duke should recommend for that purpose." The minister suggested also that a proclamation should be issued "against seditious writings and publications, and calling on the magistrates to be vigilant in suppressing any appearance of tumult if it should be necessary."[12] Portland refused to take part in the Privy Council, but expressed his willingness to support the minister in any measure necessary to secure the interests of the country.

In spite of this partial miscarriage of their program, the ministers decided to issue the proclamation and to prepare addresses in both houses of Parliament. It was hoped that by making the question one which concerned the safety of the most cherished English institutions, the Whig aristocrats would thereby be induced to support the ministers without inquiring too closely into the nature of the alleged dangers. But it is not improbable that the real occasion for so much haste in carrying out this program grew out of an incident in the House of Lords.[13]

That body was considering paragraph by paragraph a bill "for appropriating a certain sum annually for paying off the national debt," which was one of Pitt's own measures. A discussion arose on the provision that "no future loan shall be made without being provided for at the same time."

[12] Life and Letters of Sir Gilbert Elliot II, 23–25.
[13] Buckingham, Court and Cabinets II, 207.

Thurlow, while he supported the bill, ridiculed this feature, which, he said, "would only hand down to posterity aphorisms." The force of his argument was that the clause was useless, since no minister in the future would feel any obligation to comply with such a provision if it should interfere with his plans.[14] Now we know that Pitt was only awaiting a suitable opportunity to get rid of the lord chancellor, and that he had taken the precaution to commit the king to his program by informing him of the supposed dangers to the constitution from the Friends of the People and by securing his approval of the administrative measures which were designed to avert these dangers. Pitt, therefore, felt that the king would dismiss Thurlow if he should demand it. There was no immediate need of the services which the lord chancellor had been accustomed to render as a leader in the upper house. With the Great Seal added to other inducements which he had to offer, Pitt hoped to gain additional support from the Whigs in the upper house before Parliament should assemble again. Accordingly, he resolved to make Thurlow's speech on the sinking-fund paragraph the occasion of his dismissal. On May 16, 1792, he wrote to the king declaring that he would resign if the lord chancellor were not dismissed. George III did not hesitate, and on that same day Thurlow was asked to resign.[15]

The prospects for the success of Pitt's schemes now seemed bright. On May 31, 1792, he issued his proclamation against seditious writings, which he had previously submitted to the Duke of Portland for approval.[16] He proposed to increase the excitement which the proclamation would naturally arouse by discussions both in Parliament and throughout the kingdom, and accordingly he caused addresses to be brought forward in both houses, which became the subjects of long debates. He hoped that these

[14] Debrett, Parliamentary Register XXXIII, 418. Hansard omits this debate from the Parliamentary History.

[15] Stanhope, Life of William Pitt II, 149. Buckingham, Court and Cabinets II, 208. Dropmore Papers II, 271.

[16] Life and Letters of Sir Gilbert Elliot II, 26.

debates would mark the final separation of some of the aristocratic Whigs from Fox and his friends, but, according to the speech of Windham, the success was slight as the Whigs merely adhered to their policy of differing on the proposition at issue, and showed themselves unwilling to sever their relations as yet with their leader.[17] But the value of the proclamation against seditious writings had yet to be tested. For two months after its publication addresses of thanks and professions of loyalty were sent from almost every county and borough in the kingdom.[18] Some of these addresses were directly inspired by members of the administration; others, perhaps, were the results of meetings called by the clergy or other officials or by partizans of the government in the communities from which they came. When the wishes of the government became known to its supporters it did not become necessary to make suggestions as directly as did Lord Grenville to his brother on June 13: "Our addresses are going on swimmingly, and it will, I think, soon be time for the loyal county of B—— to show itself."[19] Nor is it probable that the ministers took as much pains with the phraseology of all the addresses as they did with this one. When the first draft was presented for his approval, Grenville wrote, "I think the address perfectly unexceptionable as it now stands; but I should wish to add a sentence somewhere, expressing the satisfaction and concurrence of the county in the sentiments expressed by Parliament on this subject, because I think it may not be indifferent to future debates to have to quote expressions of this sort, in order to show that, on a great occasion like this, the sense of the people was immediately and completely expressed by Parliament."[20] In order that Buckingham might know more precisely the kind of address that was desired, a copy of one from Devonshire,

[17] Hansard, Parliamentary History XXIX, 1476–1534.
[18] London Gazette 1792, 372–769. The addresses were published in the order in which they were received.
[19] Buckingham, Court and Cabinets II, 209.
[20] Buckingham, Court and Cabinets II, 211. For further particulars concerning this address: Dropmore Papers II, 282, 284, 285.

which had also been submitted for approval, was inclosed with this letter.

No sooner had the snare been set than the ministers became busy in their attempts to capture their prey. According to the plan, of which the proclamation of May 21 was a preliminary, the time had now come to begin negotiations with the aristocratic Whigs.[21] On the very day that the debate on the address took place in the House of Lords, Dundas made the first overtures.[22] On June 9, a few days later, Burke visited the Duke of Portland, and, in the presence of the duke, Lord Loughborough, Lord Fitzwilliam, and Lord Malmesbury, argued at great length, amidst the silence of his auditors, "that it was absolutely necessary to force Fox to a specific declaration." In addition, he contended that the times required "a union of all abilities, all the weight, and all the wealth of the country." After Burke had gone, Loughborough, for whom the Great Seal was intended[23] and who had already been approached, took up the argument and asserted that Burke had said "what was true, but that it should not be said."[24] On June 13 Loughborough called on Portland with a definite proposition which had been made to him by Dundas on behalf of the administration. The Whigs were offered the lord chancellorship, the secretaryship of state for home affairs, the presidency of the council, and the privy seal, besides two or three members of the Privy Council in the House of Commons.[25] Portland imagined that this was a bona fide proposal for a union of parties, and immediately desired that Fox be consulted. He himself suggested that the most feasible solution would be for Pitt to resign the chancellorship of the exchequer in favor of a neutral man like the Duke of Leeds, under whom both Pitt and Fox would serve as secretaries of state.[26] Fox expressed a readiness to go into office if

[21] Dropmore Papers II, 272.
[22] Life and Letters of Sir Gilbert Elliot II, 35.
[23] Buckingham, Court and Cabinets II, 212.
[24] Malmesbury, Diaries and Correspondence II, 453.
[25] Malmesbury, Diaries and Correspondence II, 458.
[26] Malmesbury, Diaries and Correspondence II, 459.

his friends thought it best, provided he was given an equal share of power with Pitt. At the same time he expressed his belief that the minister had no other purpose than to weaken the Whig party and strengthen his own.[27] Meanwhile, on June 15, Loughborough dined with Pitt and Dundas. The minister said "that he did not come with the command of the king to propose a coalition, but that he would be responsible that it would please the king and queen, and that the only difficulty at all likely to arise was about Fox." The difficulty suggested was that the king would have nothing to do with the Whig leader on account of his approval of the French Revolution and parliamentary reform.[28] After further consultation with Portland and his friends, in which he tried to convince them that it was unreasonable to expect the minister "to give up the Treasury,"[29] Loughborough again dined with Pitt and Dundas on June 25. The minister now "declined going further with the arrangement." But Loughborough told Malmesbury that he "spoke in such a manner as to leave no doubt whatever that he meant and wished it should come forward again."[30]

In the meantime Burke was doing his utmost to convince the friends of the Duke of Portland that "the principles broached by Grey and others, and not disavowed by Fox, had necessarily drawn a line of division in the party, and that it was necessary to declare this distinctly and decidedly; that for the better security, and in order to give a strong and convincing mark of it to the public, Lord Loughborough should, by being made Chancellor, represent the party in the Cabinet."[31] Pitt had by no means given up the project; he had merely changed his tactics. Lord Guilford, the chancellor of Oxford, was critically ill, and the minister proposed that on his decease the Duke of Portland should

[27] Malmesbury, Diaries and Correspondence II, 461.
[28] Malmesbury, Diaries and Correspondence II, 459.
[29] Malmesbury, Diaries and Correspondence II, 465.
[30] Malmesbury, Diaries and Correspondence II, 468.
[31] Malmesbury, Diaries and Correspondence II, 466. Life and Letters of Sir Gilbert Elliot II, 51–52.

be elected to succeed him, and with the permission of the king should receive the garter.[32] With considerable effort on the part of the ministers, Portland was elected to the chancellorship of Oxford;[33] but he refused the "blue ribbon."[34]

At this point it is well to recall another plan for a coalition between the parties, which did not originate with the administration and had little to do with the final arrangement, but which historians have confused with the negotiations described above. We have already noted that when the prospect of a coalition was first mentioned to the Duke of Portland, he suggested the Duke of Leeds as chancellor of the exchequer. Leeds seems to have heard of this through some one of that group of personal hangers-on whom Malmesbury not inaptly designated a "string of toad-eaters."[35] A meeting was arranged between Portland and Leeds, which took place on July 20, 1792.[36] At this meeting Leeds offered to speak to "the King himself, or Mr. Pitt, should any interference be thought expedient in that quarter."[37] After receiving further communications from his personal adherents, Sir Ralph Woodford and Stephen Rolleston, who had really inspired the entire scheme, Leeds wrote to Portland asking for permission to relate the substance of their conversation to the king.[38] With a view to granting this permission, Malmesbury was assigned the task of consulting Fox in order to gain his consent. In a conversation on July 30 the Whig leader approved of the proposed step but insisted that Leeds speak to the king before mentioning the matter to Pitt and Dundas. He expected thereby to prove the truth of his

[32] Dropmore Papers II, 294.
[33] Dropmore Papers II, 300.
[34] Malmesbury, Diaries and Correspondence II, 471.
[35] Browning, Political Memoranda of the Duke of Leeds, 179.
[36] Browning, Political Memoranda of the Duke of Leeds, 175.
[37] Browning, Political Memoranda of the Duke of Leeds, 179. Leeds MSS. VIII, 1–37. Malmesbury, Diaries and Correspondence II, 470.
[38] Browning, Political Memoranda of the Duke of Leeds, 180–182. Leeds MSS. VIII, 39–43.

contention that the minister had never had any other purpose than to divide the opposition.[39] When, on August 14, Leeds visited the king and unbosomed himself, George III told him that he had heard nothing on the subject for a long time, but that Pitt had some months before spoken of "something like an opening on the part of the Duke of Portland and his friends," and that he had replied, "Anything complimentary to them, but no power."[40]

The negotiation now reached the ears of Pitt, who naturally resented such an interference in his relations with the king. Therefore, when Leeds felt obliged to tell the minister of what he had done, he received "a very curt note from him," appointing an interview for August 22.[41] After he had told his story, Pitt replied "that there had been no thoughts of any alteration in the government, that circumstances did not call for it, nor did the people wish it, and that no new arrangement either by change or coalition had ever been in contemplation." Leeds recalled the conferences with Loughborough, which Pitt acknowledged, but said "that such meetings had not in view any change of administration."[42] Naturally these assertions surprised Leeds. But, if allowance is made for the exaggerations in statement caused by Pitt's resentment and for the inaccuracies inevitable in reporting such a conversation from memory, it is probable that the minister told substantially the truth. His purpose was merely to strengthen his hold on the government by dividing the opposition, and he was only holding out some vacant offices as a means to accomplish that end. It was becoming increasingly necessary for Pitt to bring matters to an issue. With Thurlow in opposition, he could not meet Parliament without the possibility of serious embarrassment unless he could win and hold considerable support from the aristocratic Whigs. The very fact that they were likely to gain such a considerable ally

[39] Malmesbury, Diaries and Correspondence II, 472. Leeds MSS. VIII, 47.
[40] Browning, Political Memoranda of the Duke of Leeds, 188.
[41] Browning, Political Memoranda of the Duke of Leeds, 192.
[42] Browning, Political Memoranda of the Duke of Leeds, 194.

as the ex-chancellor seemed to make it necessary to use more extreme measures in order to induce a sufficient number of them to secede from their party.

At this juncture a new phase of policy began to develop for Pitt on the Continent, a phase that concerned the time-honored relations between England and France. His father had been obliged to leave the task unfinished, but now the trend of events in France seemed to be toward a situation which, should he be able to take advantage of it, would enable the son to carry the work to completion. If, in the latter months of 1792, Pitt was willing to hazard much on a single throw, he was no longer playing for a petty stake. He was already reasonably certain that in the end his government would come out of the struggle with Fox as strong as and perhaps stronger than at the beginning, and his only concern was as to whether it would be strong enough for him, at an opportune moment, to plunge England into the sea of continental strife for the purpose of obtaining territory which seemed at the time easy of capture. The precise moment at which Pitt ceased to be contented with the prospect of securing his own political position and began to strive for the larger prize is not easy to determine. The circumstances which attended this change of his program, as far as it pertained to continental affairs, will form the subject of the next chapter, but it has been necessary to note the change of purpose in order to understand the extraordinary measures which the minister used in the later months of 1792 for the purpose of making absolute his dominance in English politics.

According to a letter which George Rose, secretary of the treasury and one of Pitt's confidential subordinates, wrote to Auckland on July 13, 1792, the minister's first hope had been to induce a large number of the aristocratic Whigs to secede in a body and coalesce with his administration. To succeed in this plan, it was necessary to leave Fox with the reformers, since the Whig leader would certainly not agree to become as subservient as Pitt desired

that his associates should be. On the other hand, the noblemen whose support the minister wished to secure were exceedingly reluctant to sever their relations with Fox, though they would readily have joined the administration party if their talented leader had agreed to accompany them.[43] Consequently Rose was convinced as early as August 20 that the best plan would be to induce prominent Whigs to accept office as individuals.[44] Rose and Burges, both of whom had the confidence of the ministers, were agreed that it was imperative to find some solution of the matter before the meeting of Parliament.[45] Lord Auckland desired one of the vacancies in the cabinet, and on August 31 Pitt himself authorized Rose to write to him, stating that he could do nothing until after Parliament assembled, as he still hoped to induce prominent members of the opposition to accept office under his government.[46] That he would succeed in his attempts in this direction was now reasonably certain. The only doubt lay in the time required for Loughborough and those of his type to make up their minds. That they should come to a decision at once was imperative if Pitt were to carry out his projects, and extreme measures therefore became necessary.

Parliament was summoned to meet on November 15, 1792. Loughborough and Windham had already been offered places.[47] Consequently they became active in their efforts to persuade the adherents of Portland to unite with Pitt. Even Burke wrote to his son in September, "Lord Loughborough and Windham are alarmed about the present state of Europe in a different manner from that which is common, and they have a real desire of doing something."[48] However, they would not accept office without the consent of the Duke of Portland, and the duke persisted in his decision that, while he was ready to support the adminis-

[43] Auckland MSS. XXXII, 326.
[44] Auckland MSS. XXXIII, 106.
[45] Auckland MSS. XXXII, 308–310.
[46] Auckland MSS. XXXIII, 183, 210.
[47] Baring, Diary of the Right Honourable William Windham, 257.
[48] Fitzwilliam, Correspondence of Burke III, 526.

tration in particular measures designed to secure the safety of the country, he saw no need for making a public announcement that opposition was at an end.[49] Under these circumstances, on November 15, Parliament was further prorogued until January 3, 1793, and Pitt proceeded to take more energetic steps to convince the aristocratic Whigs that it was necessary for them to separate from Fox.

In addition to the addresses from the counties and boroughs, already mentioned, two other results of the proclamation of May 21, 1792, contributed to the spread of a fear of sedition and French principles in the minds of the landed class and the people generally. One, at least, of these consequences had been anticipated in the original plan. The justices, in their charges to the grand juries at the regular assizes, had included comments on these subjects. Some of these comments were afterwards published and distributed.[50] At the same time, the clergy in their sermons endeavored to impress similar warnings on the people. Perhaps it did not require any direct suggestions from the source from which preferment would come to induce a would-be bishop to preach a political sermon. Still, if pressure from above had been necessary, it is worth noting that at another time Pitt, in directing his subordinate to notify a new dean of Canterbury of his appointment, had also requested him to contrive "at the same time to make sure of the return we wish as far as you can with propriety."[51] But the government's proclamation was probably all that was needed in this case to urge the patriotic divines to what they may easily have believed to be their duty. However that may be, the fact remains that the ecclesiastics became even more extreme in their loyalty than the minister himself ever professed to be. Take for example the views of the chaplain of the Duke of York:—

[49] Carlisle Papers, 697.

[50] Dropmore Papers II, 284. For titles of several that were published, see the appended bibliography.

[51] Harcourt, Diaries and Correspondence of Right Honourable George Rose I, 107.

"As men have not in reason any right to govern themselves, or to be governed by their own consent, so neither do there appear in the established order of nature any traces of a plan by which they may enjoy that privilege. As soon as man is born he is subject, by the ordinance of nature and Providence, to the government of others."[52]

Another sermonizer on "Christian Politics" asserted:—

"Power belongs with God; and all power and authority come from God. They are given and intrusted by Him for the general good of his creatures. Power can no more originate from the people than the soul can originate from the body; or than heaven can originate from the earth: the higher produces the lower; the greater produces the less; and not the reverse of it."[53]

It should not be inferred that even a majority of the clergy held these views, though it is clear that most of them inclined in that direction. "Let every soul be subject to the higher powers" and "Meddle not with those who are given to change" became favorite texts for sermons.[54] We should remember that the clergy were often men of considerable consequence. They were sometimes the younger sons of the nobility and were, in many cases, prominent in the local affairs of the community. Their sermons were frequently published in pamphlet form, and it is only necessary to examine the files of a contemporary review to understand something of the estimation in which they were held.

Coincident with the warnings of the justices and the sermons of the clergy, neither of which were calculated to allay the excitement that naturally resulted from the meetings held for the purpose of approving the proclamation of May 21, the administration newspapers carried on a similar

[52] Nares, Principles of government deduced from Reason, 18.

[53] Agutter, Christian Politics, 5. Continuing, the preacher denounced republican government as "the lowest and worst of all forms of government. . . . Where the people are deluded with the name of liberty, whilst they groan under severest tyranny of licentiousness and are insulted by the lowest of the people."

[54] For titles of other sermons, etc., of this character which have been examined, see the appended bibliography.

propaganda. Every local disturbance, arising from whatever cause, was heralded as sedition, or something worse.[55] The country gentleman, who did not understand the ulterior source of all these alarmist reports, naturally thought the government neglectful of its duty in not taking more radical steps to meet such impending dangers. The situation is disclosed in a reply written by Grenville, November 14, to a letter from his brother, urging measures of this kind:—

"It is not unnatural, nor is it an unfavourable symptom, that people who are thoroughly frightened, as the body of landed gentlemen in this country are, should exaggerate these stories as they pass from one mouth to the other; but you, who know the course of this sort of reports, ought not too hastily to give credit to them."[56]

It is also apparent from the letters of Burges and Rose to Auckland, as well as from the first part of the letter noted above from Lord Grenville, that the ministers themselves were not seriously alarmed at the prospect of any seditious outbreaks.[57] This conclusion is strengthened by the fact that on November 15 they thought it proper to delay the meeting of Parliament until the early days of the next year.

Three days after the proclamation postponing the meeting of Parliament was issued, Pitt summoned Loughborough to a conference.[58] From the accounts which have been

[55] The only possible reference is to the files of the contemporary papers. Few days passed on which a paragraph of this nature was not published. The following from the Public Advertiser, October 2, 1792, will serve as an example:—

"Is this a time for the Blue and Buff to think of getting into power, when they are known to be zealous patrons of the French Revolution, and have been attempting to form societies in this country similar to that of the detestable Jacobins, who seem to be only actuated by ambition or love of mischief, and who care not what blood is shed and what horrors prevail, so that their authority is not diminished. Let the Blue and Buff make the *amende honorable* before they presume to expect the public to place any confidence in them, and fairly acknowledge that sedition is not freedom nor subordination slavery."

[56] Buckingham, Court and Cabinets II, 227.

[57] Auckland MSS. XXXIII, 288, 327; XXXIV, 342.

[58] Leeds MSS. VIII, 83, 85. The personal agents of the Duke of Leeds had been secretly continuing their efforts to convey to the

preserved of this interview, the minister seems to have proposed to Loughborough that if he still found it impossible to accept the Great Seal, he should, in any case, give the administration open support in the upper house. According to the report of the conversation which Pitt sent to Grenville on the same day, Loughborough replied that he had long been willing to accept the office "whenever the Duke of Portland and his friends thought it would be useful that he should. . . . He therefore declined (as we expected) giving his answer till he should have seen the Duke." But the would-be lord chancellor "confirmed the account of the disposition of the party to support without making terms," and "stated his own clear opinion that it was the only line for them to adopt." However, Loughborough promised to call on Pitt again, after a few days, to give him the result of the interview with Portland.[59] Three days after this conference, Loughborough and Malmesbury dined with the Duke of Portland. Regarding the conversation which took place at that time, Malmesbury told Sir Ralph Woodford that "they talked everything over, but that they were of opinion nothing was to be done at present, for fear of exposing too much the weakness of government, but to give their support spontaneously; all change to be deferred for the present."[60] The reply which Loughborough was thereby enabled to give to Pitt was of such a nature that Rose wrote to Auckland on November 27: "Your friend, Lord Loughborough, has acted in a manner that does him the most possible honour, and marks his judgement strongly as his disinterestedness. You will probably hear the particulars mod-

king suggestions of the necessity for a change in the ministry, with a view to securing some important office for the duke. As a consequence they were suspicious of any independent move on the part of the aristocratic Whigs. When Loughborough was summoned by Pitt, they immediately reported the fact to their patron, and even went so far as to inform him that the interview had lasted exactly one hour and ten minutes, and that immediately afterwards Pitt had written a note to Grenville, who, after considering it for three hours, replied on the same day.

[59] Dropmore Papers II, 335.

[60] Leeds MSS. VIII, 87.

estly told by himself. I am sure you will never drop a hint of what I mention to you till you hear the same matters from other channels. He declines any change of situation."[61] From this time forward Malmesbury and Loughborough were to be united with Burke in an open effort to persuade the Duke of Portland and others of his friends to separate from Fox and declare themselves as supporters of the administration. Without attributing improper motives, it should not be forgotten that each of these men knew that material advantages would accrue to him from alliance with the government.[62] It will also be seen later that Malmesbury and Loughborough could not even wait for their rewards until the Duke of Portland had been persuaded to agree with their views.

In spite of these successes, the ministers do not appear to have been satisfied with the situation. They seem still to have desired to bind their friends among the Whigs by some stronger tie than mere "spontaneous support." Grenville has explained in his letter to his brother of November 20, 1792, how they now tried to aid Loughborough and Malmesbury in affecting this result. He says:—

"Our hopes of anything really useful from opposition are, I am sorry to say, nearly vanished. In the meantime, the storm thickens. Lord Loughborough has declined, and Fox seems to govern the rest in just the same old way.

"In the meantime, we are preparing an association in London, which is to be declared in the course of next week. I enclose you the plan of their declaration, in which, you see, the great object is to confine it within the limits of regular government, and not to go beyond that point. A few persons of rank cannot be kept out of it, but we mean it

[61] Auckland MSS. XXXIV, 430.

[62] Fitzwilliam, Correspondence of Burke III, 430. Life and Letters of Sir Gilbert Elliot II, 115. Loughborough expected to become lord chancellor; Malmesbury hoped for a restoration of the diplomatic pension which had been taken away at the time of the Regency debate, while Burke, among other ambitions for his family, had parliamentary aspirations for his son, which could be satisfied only when a coalition had been effected.

chiefly to consist of merchants and lawyers, as a London Society, and that the example should be followed by each county or district—including then as many farmers or yeoman as possible."[63]

In addition, as we learn from another source, suggestions were made by the ministry as to the proper time for organizing such an association in the county of which the Marquis of Buckingham was lord lieutenant. The advertisement was published, and as Grenville had indicated the London association was formed on December 5.[64] But, on the very day on which Grenville had written to his brother, the first rumors were heard from France of an event which precipitated more strenuous measures on the part of the English ministry.

Before considering these measures we must notice another association which, discerning apparently by intuition the

[63] Buckingham, Court and Cabinets II, 228.

[64] London Gazette 1792, 957. This declaration was signed by more than eight thousand persons. Accounts of it may be found in the contemporary newspapers. A convenient place to examine it is, Debrett, Parliamentary Register XXXIV, 39. The declaration was as follows:—

"We, the Merchants, Bankers, Traders and other inhabitants of London whose names are hereunto subscribed, perceiving with deepest concern, that attempts are made to circulate opinions contrary to the dearest interests of Britons and subversive of those principles which have produced and preserved our most invaluable privileges, feel it a duty we owe our country, ourselves and our posterity, to invite all our fellow subjects to join with us in the expression of a sincere and firm attachment to the constitution of these kingdoms, formed in remote and improved in succeeding ages, and under which the glorious revolution of 1688 was effected: a Constitution wisely framed for the diffusion of happiness and true liberty, and which possesses the distinguished merit, that it has on former occasions been, and we trust in the future will be found competent to correct its errors and reform its abuses. Our experience of the improvement of agriculture and manufactures, of the flourishing state of navigation and commerce, and of increased population, still further impels us to make this public declaration of our determined resolution to support by every means in our power the ancient and most excellent constitution of Great Britain, and a government by King, Lords and Commons; and to exert our best endeavours to impress, in the minds of those connected with us, a reverence for, and a due submission to the laws of their country, which have hitherto preserved the liberty, protected the prosperity and increased the enjoyments of a free and prosperous people."

purposes of the administration, came into existence rather mysteriously at this opportune time. This new society called itself an "Association for preserving Liberty and Property against Republicans and Levellers." This organization, which soon came to be known as the "Crown and Anchor Association," gave notice of its existence by an announcement which began as follows: "At a Meeting of Gentlemen at the Crown and Anchor Tavern, November 20, 1792, John Reeves, Esq., in the chair, the following considerations and resolutions were entered into and agreed upon." Then followed a discussion at length of supposed "mischievous opinions" that were being circulated, and of the nature of such principles, in addition to an attempt to explain the true "rights of man." The document concluded:—

Impressed with these sentiments in favour of our happy establishment, and alarmed by the michievous endeavours, that are now using by wicked men, to mislead the uninformed, and to spirit up the discontented by furnishing them with plausible topics, tending to the subversion of the state, and incompatible with all government whatsoever:

We do, as private men, unconnected with any party or description of persons at home, taking no concern in the struggles at this moment making abroad, but most seriously anxious to preserve the true liberty, and unexampled prosperity we happily enjoy in this kingdom, think it expedient and necessary to form ourselves into an association for the purpose of discouraging, in every way that lies in our power, the progress of such nefarious designs as are meditated by the wicked and senseless reformers of the present time; and we do hereby resolve, and declare as follows:

First.—That the persons present at this meeting do become a society for discouraging and suppressing seditious publications, tending to disturb the peace of this kingdom, and for supporting a due execution of the laws made for the protection of persons and property.

Secondly.—That this society do use its best endeavours to explain those topics of public discussion which have been so perverted by evil designing men, and to show, by irrefiagable [sic] proof, that they are not applicable to the state of this country, that they can produce no good, and certainly must produce great evil.

Thirdly.—That this society will receive with great thanks all communications that shall be made to it for the above purposes.

Fourthly.—That it be recommended to all those, who are friends to the established law, and to peaceable society, to form themselves, in their different neighbourhoods, into similar societies for promoting the same laudable purposes.

Fifthly.—That this Society do meet at this place or elsewhere every Tuesday, Thursday, and Saturday.

Sixthly.—That these considerations and resolutions be printed in all the public papers and otherwise circulated in all parts of the Kingdom.

This statement was signed by "J. Moore, Secretary," to whom it was requested that all communications be addressed.[65] Concerning the number and character of those present at this initial meeting, it is only known that the name signed as that of the secretary was an alias of Reeves, the chairman. The gentleman thus doubly honored had only a few weeks before reached England after serving his second term as chief justice in the recently established court in Newfoundland. The professed purposes of his new venture, as stated above, were three: to promote the organization of similar associations throughout England and to give publicity to their efforts; to ferret out and suppress sedition and seditious publications; and to carry on a propaganda against sedition. Just why this newly returned justice should have developed on so short a notice so great a fervor of patriotic zeal it is impossible to say. The idea of combining in the same person under different names the offices of secretary and chairman was suggested to Reeves by Andrew Wilson, who, about this time, began to publish the True Briton, a paper which became the authentic vehicle for making public the opinions of the ministers.[66] The committee for the government of the society was appointed without warrant from those whose names were used, as is clear from the letter of Charles Townshend to the secretary, dated November 27, 1792:—

[65] A convenient place to examine this declaration is, Debrett, Parliamentary Register XXXIV, 26. It is also to be found in contemporary newspapers and pamphlets. The titles of some of the latter are indicated in the appended bibliography.

[66] Parliamentary Papers, 1795–6, Vol. XVIII, Nos. 130 and 130*a*. Hansard, Parliamentary History.

Sir, I received this evening a letter without any signature dated from the Crown and Anchor, and I send the earliest answer. When I set down my name, I was determined to go through the business, and I am not afraid of any obloquy thrown out upon me, but I submit to the consideration of the supporters of the society whether the circumstances of my being Deputy Teller of the Exchequer be not a sufficient reason for my name being not inserted in the list of the first committee upon the outset of this business.[67]

Others chosen as members of this body seem to have had the honor thrust upon them in the same manner. At least one other besides Townshend assigned as a reason for refusing to serve the fact that he was an official under the administration.[68] One of the gentlemen who did accept in good faith afterwards declined to take an active part in the work on the ground that the managers were accustomed to act upon anonymous letters, which he thought might be written by private enemies of those concerned, and therefore have no other purpose than to vent personal spite.[69] The conductors of this association, while it was still a useful instrument for accomplishing the purposes of the administration, thought it necessary in June, 1793, to make the following declaration: "It is due to the society, to the Ministers, and to the public, to make this declaration—That none of the King's Ministers knew or heard of this association till they saw the first advertisement in the public prints."[70] Since, however, this association appeared at the

[67] Reeves MSS. I, 71.
[68] Reeves MSS. I, 121, 127, 129, 130, 132.
[69] Reeves MSS. IV, 147, V, 162.
[70] Association Papers; containing the Publications of the Loyal Associations, Preface, IV. This preface naïvely continued:—
"Most certainly the Minister had no more to do in the formation of this association than of the two thousand and more that were formed in other parts of the kingdom. They were all voluntary movements of persons, who thought it a crisis in which the country should declare itself, and strengthen the hands of government, for the preservation of the King and Constitution. When the nation had thus plainly declared its apprehension for our laws and liberty, the government could not do otherwise than concert measures for their preservation. Hence the calling out of the militia—the assembling of Parliament—the proceedings against seditious persons and writings. All these measures have been called for or approved by the nation as necessary for its safety both public and private."

precise moment when the members of the administration were planning associations of a similar character among the higher classes; since, as will be seen further, it was conducted with the sole aim of persuading the lower classes to support the measures which the ministers were contemplating; since something connected with its origin made it necessary for one person to serve as both chairman and secretary and to assume, at the same time, the obligation of appointing the governing committee; and finally, since the deception with regard to the chief executive officials of the society was suggested by one who was working under the auspices if not in the employ of the government, there is certainly some reason to doubt whether such statements by the officials of the association as to its origin are to be taken at their face value. It is possible of course that the purpose of this society was altered somewhat by the information which came from France almost contemporaneously with its birth.

Although the British government appears to have had in mind for several months the possibility of hostilities with France, the decree of the French Executive Council, on November 16, 1792, relative to the opening of the Scheldt, seems to have been the measure which finally determined the ministers to enter upon a war policy.[71] The first knowledge of the decree reached London on November 25.[72] The next day it was confirmed.[73] Manifestly, before embarking on a war policy, it was essential that Pitt assure himself of the hearty support not only of the hesitating aristocrats but also of the people at large. He therefore decided to issue a proclamation calling Parliament together about the middle of December. In order to do this, the militia was called out on December 1, which made it necessary, according to law, that the legislative body assemble within fourteen days thereafter.[74] The decision to call Parliament had

[71] The events relative to the outbreak of the war with France will be discussed in Chapter IV.
[72] Auckland MSS. XXXIV, 377.
[73] Auckland MSS. XXXIV, 393.
[74] 26 Geo. III, c. 10.

been reached as early as November 29. On that date Grenville wrote to his brother, who, it will be remembered, was one of the "frightened landed gentlemen," as follows: "We have, I think, determined that, in consequence of the situation of affairs, both at home and abroad, we cannot discharge our duty to the country, nor even answer for its security, without calling the whole, or a considerable part of the militia." However, he concluded: "You must not, from this measure, think the alarm is greater than it is. The step is principally founded on the total inadequacy of our military force to the necessary exertions." This letter was not written to explain the purpose of the ministers in taking the step, but to enable the recipient to hold himself "in readiness to take your measures;" and to suggest to the writer "any particular of importance that may occur to you respecting the mode of doing the thing."[75]

In order to justify the calling out of the militia under the statute, it was necessary to allege that "rebellion or insurrection" existed in England. As a fulfilment of this requirement the ministry made the following assertion in the proclamation issued on December 1: "We have received information, that in breach of the laws, and notwithstanding our royal proclamation of the twenty-first day of May last, the utmost industry is still employed by evil disposed persons within this Kingdom, acting in concert with persons in foreign parts, with a view to subvert the laws and established constitution of this realm, and to destroy all order and government therein; and that a spirit of tumult and disorder, thereby excited, has lately shown itself in acts of riot and insurrection."[76]

At any other time the ministers might have found it difficult to establish the truth of the last assertion, and when Fox heard of the measure on the day that the proclamation was published, he expressed a different opinion in no uncertain language in a letter to the Duke of Portland: "If

[75] Buckingham, Court and Cabinets II, 230.
[76] London Gazette 1792, 901. Also Debrett, Parliamentary Register XXXIV, 31.

they mention danger of insurrection, or rather, as they must do to legalize their proceedings, of rebellion, surely the first measure all honest men ought to take is to impeach them for so wicked and detestable a falsehood. I fairly own that if they have done this, I shall grow savage and not think a French lanterne too bad for them. Surely it is impossible—if anything is impossible for such monsters, who for the purpose of weakening or destroying the honourable connection of the Whigs, would not scruple to run the risk of a civil war."[77]

After Pitt had published the proclamation, it seems to have occurred to him that his opponents might require some evidence of an "insurrection" before assenting to his extraordinary measure. In spite of the fact that the militia had been called out in the vicinity of London and the Tower fortified, the decision was reached to locate the insurrection in Scotland. Referring to the expected criticisms, on December 4 Pitt wrote to Dundas, who was at that time in his native country: "I doubt whether we could from our present materials give as precise answer as we could wish to cavils of this nature. The proceedings at Yarmouth and Shields certainly both amounted to insurrections, but they were not on political questions, and therefore what passed at Dundee furnishes the specific ground which seems best to be relied on. After all there will be no difficulty in avowing that at any rate we thought it necessary for the public safety."[78]

If any further evidence were necessary to indicate the real nature of this supposed insurrection, the existence of which had to be demonstrated before suppression could take place, we find it in the opinion of a member of Parliament from Scotland. Sir Gilbert Elliot, a Whig of the Loughborough faction, wrote to his wife on December 13, immediately after his arrival in London, as follows:—

For my part, I am determined to support government in its measures for suppressing sedition and putting the country in a

[77] Russell, Memorials and Correspondence of Fox IV, 291.
[78] Stanhope, Life of William Pitt II, 177.

state of defence against the many dangers it is exposed to both at home and from abroad. At the same time, the mismanagement of the Ministry has thrown great difficulties in our way in supporting their very first measure. They thought it necessary that Parliament should meet immediately, and the only way which they had left themselves of calling it was calling out the militia, for it could not in any other case meet at so short a notice. The militia cannot be called out during a recess of Parliament, except in the case of actual insurrection or imminent danger of invasion. They are therefore obliged to justify it on the ground of insurrection; and as no insurrection has taken place in England, which seems, I think, rather more quiet than usual, they lay it all on the insurrections which have taken place in Scotland and, I believe, in Ireland. The Scotch insurrections consist of the planting of the tree of Liberty at Perth, and the Dundee mob, and some others of less note. This is certainly ridiculous to those who live in Scotland and know the truth. This conduct of the Ministry imposes on those who wish to stand by government the heavy task of defending, or at least approving of, an unconstitutional act relating to the military, a subject on which it is easier to arouse jealousy than any other.[79]

It is evident that the militia was not called out because of any immediate domestic dangers which made it necessary for Parliament to meet before the expiration of the time to which it had been prorogued. What the ministers seem to have desired was carte blanche to carry out an aggressive program on the Continent. Pitt still remembered how he had been obliged to give up his Russian policy the year before because of opposition by the Whigs, and more particularly because of a lack of popular support. He was resolved not to repeat that mistake. The obvious method of securing popular approval for hostilities against France was to convince the people that the French were endeavoring to overthrow the existing English institutions. It was also evident that the disruption of the Whigs would be complete if the aristocratic element could be convinced that the danger from the French principles was real and immediate. It has been seen that when, in the middle of November, the Whigs were still unconvinced, it was decided to postpone the meeting of Parliament until the first days

[79] Life and Letters of Sir Gilbert Elliot II, 80.

of the next year. Thus six weeks were given in which to carry on a more aggressive propaganda for accomplishing the purpose of the ministry. Up to November 15 nothing had occurred which seemed to make it possible to bring matters to a crisis on the Continent before the expiration of that period. The associations were instituted and were naturally attended by discussions both in pamphlets and in newspapers. But before the campaign had fairly begun, the decree of the Executive Council furnished a plausible, if not a valid, occasion for aggressive action against France. It was therefore necessary to bring about immediately that which the ministers had but a few days before given themselves six weeks to accomplish. The measure decided upon to produce this result was bold almost to rashness. It is probable that this boldness was one of the elements that made the measure so effective. The mere fact that the ministers had taken such an extreme position gave a color of truth to their assertions that their action had been based on information which was not proper to divulge at that time, but which made it necessary to give them complete confidence or condemn them in the most severe manner. It was a dangerous game, and it is not probable that Pitt would have dared to play it if he had not been confident that the majority of the people had already been unduly excited by the agitation which had been kept up since the spring of 1791. It required only a few days to convince the ministers that they had estimated the public mind correctly. On December 5 Lord Grenville wrote to his brother:—

> We determined last night to call out, in addition to the regiments already ordered, the militia of the maritime counties from Kent to Cornwall inclusive, and those of Berks, Bucks, Herts and Surrey. You will, in consequence, receive by this messenger the warrant and letter for that purpose. The reason for the addition is partly the increasing prospect of hostilities with France, and partly the motives stated in your letter. Our object at first was to limit the number in order not to give too great an alarm. The spirit of the people is evidently rising, and I trust we shall have energy enough in the country to enable the government to assert its true situation in Europe and to maintain its dignity. We shall proceed to busi-

ness on Thursday; but how long we shall sit, it is impossible, as yet, to decide. I think the present idea is to bring forward bills immediately which are necessary for strengthening the hands of government. Hitherto, we have every reason to be satisfied with the impression our measure has made.[80]

In a letter written to Lord Auckland the day before, the same minister expressed his opinion that Holland was going "a great deal too far in its expressions of a disposition to recognize the present French government." He also said that with respect to "the comparative state of our preparations with those of France, . . . to you privately, I may say that our confidence on that head is very great indeed." He continued: "The spirit of this country seems rising, though there still prevails an apparent dread of the events which all the new circumstances of the present moment may bring forward. But every hour's exertion gives vigour to people's minds; which are dispirited when nothing is apparently done; and I trust the meeting of Parliament on which so much depends may be very satisfactory."[81]

The ministers did not await in idleness the assembling of Parliament. Partly by direct suggestions from themselves, and partly through the cooperation of the now thoroughly frightened aristocratic Whigs, loyal associations were organized throughout the country;[82] the ecclesiastical establishment, perhaps willingly enough, became an organ for propagating so-called constitutional principles; political sermons were preached;[83] and the Crown and Anchor Association

[80] Buckingham, Court and Cabinets II, 232. Dropmore Papers II, 348. Buckingham had advised the calling out of more militia in order to give a longer time for drilling it; in this way it might be more serviceable if it should be needed.

[81] Auckland MSS. XXXV, 32.

[82] Dropmore Papers II, 337, 344, 345, 352, 354-355. Auckland MSS. XXXV, 441. Prothero, Private Letters of Edward Gibbon II, 349. The newspapers almost daily contained announcements of the formation of such associations.

[83] Life and Letters of Sir Gilbert Elliot II, 77. Lady Malmesbury mentions a sermon written by George Ellis, a member of Parliament, who afterwards, in connection with Canning, conducted the Anti-Jacobin. This discourse was preached by the local clergyman. For the titles of some of the sermons which were published, see the appended bibliography.

sent to some person in each parish who was known to favor their cause a circular letter[84] accompanied by literature for distribution to ministers, churchwardens, and overseers.

Whether in response to these efforts or for other reasons, many local associations were organized.[85] The Crown and Anchor Association issued also a broadside, published in the administration papers, announcing that they felt "it to be their duty to warn all good citizens to be watchful and on their guard, in order to detect and bring to justice such persons, whether foreigners or British subjects, who appear to plot and contrive against the peace and good order of this happy country."[86] The chief immediate result of their agitation in this direction was the trial of Thomas Paine on December 18—a barren victory, since Paine, who had made, so far as we know, no converts to republicanism in England, was now a member of the National Assembly in France and had to be convicted in absentia.[87] In carrying on a propaganda of discussion, Reeves and the association were more successful in using their "best endeavours to explain those topics of public discussion which have been so perverted by evil and designing men." The first response to their advertisements was a flood of manuscripts from second-class preachers and cheap pamphleteers, who desired an opportunity to get their productions before the public.[88] Many of these contributions were accepted and printed and some of them were widely distributed. Songs were printed and sung on the streets. The sentiments expressed were often of a nature little in harmony with

[84] Preserved in the British Museum in a volume of tracts and broadsides.

[85] For evidence that many of them were direct results of the efforts of the Crown and Anchor Association, see the correspondence with respect to them preserved in the Reeves Manuscripts in the British Museum.

[86] Preserved in the British Museum. Also published in newspapers of that date.

[87] Howell, State Trials XXII, 357–472.

[88] Reeves MSS. Letters which accompanied such offerings, and in some cases the manuscripts themselves, are scattered through these papers.

English traditions.[89] The fictitious correspondence between Thomas Bull and his brother John, which appeared in broadsides supposed to contain "one penny-worth of truth," are representative examples of such literature.[90]

The spirit of the people must have been rising when such tracts as these could be received favorably. Yet Lady Malmesbury wrote of one of the broadsides as one of the cleverest things she had ever read.[91] Another loyal subject who had received a tract wrote to Reeves that it contained "so much clear information to the lower classes of people

[89] Association Papers; Containing the Publications, etc., of the Loyal Associations. Other titles not contained in this collection will be found in the appended bibliography.

[90] There are several of these broadsides preserved in the British Museum. The following quotation from "One Pennyworth More, or a second Letter from Thomas Bull to his Brother John," will show their character: "When we talk about Kings, it reminds me of what happened here very lately. A man, like a London Rider, thrust himself in amongst us at the public house. He talked at a high rate about French Liberty, and the tyranny we live under here at home; he laughed at the *nonsense* and *blasphemy* of Kings having authority from Providence. What, said he, are we such fools as to believe that Kings are sent down booted and spurred from the clouds to ride mankind?

"Some of our company stared at him and looked as if they felt the spurs in their sides; but, says I, hold a little Mr. Londoner, you don't put the case quite right. You know we must all be ridden by somebody, for we cannot ride upon ourselves. When a good horse carries a gentleman, he is as well pleased as his master; but suppose, Mr. Londoner, suppose he should take it into his head to throw the master that he might be ridden by his equals, then in that case you know, Mr. Londoner, he will have a horse on his back instead of a man; aye, twenty or a hundred horses, all clambering upon his back at once, till they break him down, and he is fit for nothing but the dogs. This is my way of understanding liberty and equality. And now go ask your Birmingham Doctor how much that horse will better himself. This is the way they have bettered themselves in France. They that will not carry a King, shall have the beasts of the people upon their backs; and the poor fools are pleased because they think it will be their turn to ride next. Everybody can see how bad it would be for horses to carry horses; and it is always the same thing where the people carry the people. After this Londoner was gone, we found he was one of those fellows who was hired to go about with Tom Paine's books; but he did not think proper to produce them: if he had we should have put them into a pitch kettle and stirred them about well, and then burned the pitch and books together; this being the proper end of that black doctrine, which some men put into others to set the world on fire."

[91] Life and Letters of Sir Gilbert Elliot II, 77.

that I cannot say too much in its favour."[92] But as Paine was the one man brought to account at this time, so his work, which was frankly republican, was the one source to which the agitators were obliged to have recourse for their specific instances of seditious utterance. For that reason, an attempt was made to confuse with Paine those who advocated reform, and to attribute to them the views of the author of the Rights of Man. Just as, in the spring of 1792, Pitt condemned the Friends of the People as dangerous because they replied to letters written by another society which, without adopting Paine's principles, recommended that his book be read, so, in the spring of 1794 he was destined to accuse the officials of still another society of high treason on the same grounds. Similarly, at this time all of the agitation in England against monarchy or any of the existing governmental institutions was contained between the covers of the Rights of Man. The best advertisement that this work received was the systematic exploitation of its contents carried on by those who professed to oppose its principles.[93] Nowhere is there any evidence of a party who desired to act on the suggestions which it contained. The Sheffield Society which recommended it to their members insisted that the sole purpose of their organization was to secure a reform of Parliament, and although the administration sent spies to their meetings no more serious offence was ever proved against them.[94]

In order to aid in this agitation two additional newspapers were founded, one of them having for its motto: "Nolumus leges Angliae mutari." These journals, according to the under-secretary for foreign affairs, now became the authoritative organs of the administration.[95]

[92] Reeves MSS. V, 142.

[93] Critical Review V, 583. The conductors of this review, who were, at this time, supporters of the administration, were very emphatic in expressing this idea.

[94] Howell, State Trials XXIV, 200–1408. In the trial of Thomas Hardy in 1794 an unsuccessful effort was made to prove that this society had treasonable intentions.

[95] Auckland MSS. XXXVI, 404. The papers were called "The

As a result of all these forces, set in motion to frustrate a danger the very existence of which depended upon the unsupported statements of the members of the administration, the excitement of the people reached a high pitch by the middle of December, when Parliament came together. It is not possible to describe the characteristic spirit of the time without making quotations for which there is not space here. It is almost incredible that such an extravagant propaganda could have been carried on against an imaginary danger with so great success. But it should be remembered that events hitherto undreamed of were happening in France, and that the mere suggestion of such happenings in England was enough to arouse the English nobility and clergy to an exaggerated sense of the danger of their positions. Again, it should not be forgotten that this Quixotic campaign, which was destined to continue much longer, had already lasted nearly two years. It was not a sudden conviction that influenced the aristocratic Whigs in Parliament and led to their eventual conversion to the policy of the administration. This change of heart, as well as the terrors of the people at large, was due to a systematic effort on the part of the government to bring it about.

Parliament assembled on December 13, 1792. Two days before, a meeting of prominent Whigs had been held at Burlington House, the residence of the Duke of Portland. The majority of those present expressed their intention of supporting the government. But, according to Lord Malmesbury's report, "Fox treated the alarms as totally groundless—that they were raised for particular purposes by Ministers—that there was not only no insurrection, or imminent danger of invasion, but no unusual symptoms of discontent, or proneness to complain in the people; that the whole was a trick, and as such, he should oppose it." Portland himself said little.[96] On the next day, at the same place, there was a meeting of Whig lords to decide what line the party

True Briton" and "The Sun." The latter was published in the afternoon. They immediately became important factors in the political situation.

[96] Malmesbury, Diaries and Correspondence II, 473.

should pursue in the upper house. They determined, "after a good deal of very desultory talk, and a great many sour and very peevish things from Lord Derby towards Lord Loughborough," to support the address, and to permit it to pass without a division. But each member was to say what he might think proper on any part of it. There was no meeting of the Whig members of the Commons. Fox appeared at the conclusion of the meeting of the Lords at Burlington House and said "that he should certainly advise another line of conduct."[97] As a result, Sir Gilbert Elliot wrote to his wife, "It is now unavoidable that we should publicly go to the right and left."[98]

The speech from the throne[99] announced that: "Events have recently occurred which require our united vigilance and exertion, in order to preserve the advantages which we have hitherto enjoyed. The seditious practices which had been in great measure checked by your firm and explicit declaration in the last session, and by the general concurrence of my people in the same sentiments, have of late been more openly renewed, and with increased activity. A spirit of tumult and disorder (the natural consequence of such practices) has shown itself in acts of riot and insurrection, which required the interposition of a military force in support of the civil magistrate. The industry employed to excite discontent on various pretexts, and in different parts of the Kingdom, has appeared to proceed from a design to attempt the destruction of our happy constitution, and the subversion of all order and government; and this design has evidently been pursued in connection and concert with persons in foreign countries." Therefore, the speech continued, the king deemed it "right to take steps for making some augmentation of my naval and military force."[100]

[97] Malmesbury, Diaries and Correspondence II, 475.
[98] Life and Letters of Sir Gilbert Elliot II, 79.
[99] It is, perhaps, unnecessary to say that such speeches at this time were the work of the ministers, and were in no way representative of the personal views of the king.
[100] Hansard, Parliamentary History XXIX, 1556.

The lord mayor of London was selected to move the address in the House of Commons. He referred to the proclamation which had been issued in the spring, and asserted that "he was scarcely seated in the Mayoralty chair, before he became possessed of a variety of information, through different channels, which convinced him that the same mischievous attempts were renewed with augmented force, under a material change of affairs in another country." The sole evidence upon which he rested this assertion is his statement that numerous societies had been established "within the city of London, corresponding and confederating with other societies in different parts of the United Kingdom all formed under specious pretences, but actually tending to subvert the constitution of the country." Wallace, who seconded the address, repeated and expanded the statement of the mayor but carefully refrained from giving any facts. He declared that "publications had been circulated through the country, calculated to inflame the minds of the people, to render them dissatisfied with the present government, induce them to pull down our happy constitution, and establish in its stead another, formed on the model of the French Republic. That societies, by which these publications were circulated, must have had such a revolution for their object, could not be doubted by any man who considered that there was a close connection between them and the ruling powers in France." And again, instead of adducing some evidence that the connection which he had alleged existed, he continued in the same strain:—

"These societies sympathized with everything French; their countenances betrayed a dejection, when the Duke of Brunswick was on his march to Paris, which could be surpassed only by the extravagant joy which they expressed when he was obliged to retreat."

In replying to such statements as these, Fox, in the opinion of his former associates at least, fulfilled his promise to the Duke of Portland that he would become "savage." He certainly left no doubt as to which side he intended to take

in the discussion. He had hardly begun when he said: "I state it, therefore, to be my firm opinion and belief, that there is not one fact asserted in His Majesty's speech which is not false—not one assertion or insinuation which is not unfounded. Nay, I cannot be so uncandid as to believe, that even the Ministers themselves think them true." Coming to the questions at issue, he continued:—

> The next assertion is, that there exists at this moment an insurrection in this Kingdom. An insurrection!—Where is it? Where has it reared its head? Good God! an insurrection in Great Britain! No wonder that the militia were called out, and Parliament assembled in the extraordinary way in which they have been; but where is it? Two gentlemen have delivered sentiments in commendation and illustration of the speech, and yet, though this insurrection has existed for fourteen days, they have given us no light whatever, no clue, no information where to find it. The right honourable Magistrate tells us, that, in his high municipal position, he has received certain information which he does not think it proper to communicate to us. This is really carrying the doctrine of confidence to a length indeed. Not content with Ministers leading the House of Commons into the most extravagant and embarrassing situations, under the blind cover of confidence, we are now told that a municipal Magistrate has information of an insurrection, which he does not chuse to lay before the Commons of England, but which he assures us is sufficient to justify the alarm which has spread over the whole country! The honourable gentleman who seconded the motion tells us that the insurrections are "too notorious to be described." Such is the information which we receive from the right honourable Magistrate, and the honourable gentleman, who are selected to move and second the address. I will take it upon me to say, that it is not the notoriety of the insurrections which prevents them from communicating to us the particulars, but their non-existence.

The orator concluded his long speech, which was full of such pertinent and angry comments, by moving an amendment to the address. Windham and Burke declared their intention of supporting the measures of the administration. Thomas Grenville, who had supported the proclamation of May 21, and who was later to be instrumental in the negotiation that was to effect a final party coalition, was now not able to find anything "equivalent to an insurrection."

He therefore supported the amendment, as, naturally, did Grey and Sheridan. Since Pitt had just been made warden of the Cinque Ports, and had not been reelected to Parliament, he was absent, and it fell to Dundas to reply to Fox. The secretary for home affairs summed up his case by saying, "The fact was that an universal and most serious alarm had been excited among the country gentlemen, farmers, etc., and some active measures were necessary on the part of government, in order to restore confidence to the country, and prevent the dangers which threatened its security." He then proceeded to enumerate the disorders mentioned by Pitt in the letter which has been cited. These he could consider "as nothing less than insurrection." However, if he was to be asked "what strictly constituted an insurrection, he must own that he should find it difficult to give any precise definition." He did not now wish to enter into the contest of words but would only remark "that a mob on one occasion, and in particular circumstances, might constitute an insurrection, which would not at another period and in different circumstances." But whether convincing or not, defence on the part of the government was unnecessary. Fox, as he said in concluding his speech, had merely opposed himself "to the furor of the day." The address was carried by a vote of 290 to 50. Yet, among the minority were several of those who were supposed to be most closely connected with the Duke of Portland.[101]

Two days later Fox moved that the king be requested to send a minister to Paris "to treat with those persons who exercise provisionally the functions of Executive government in France, touching such points as may be in discussion between His Majesty and the French Nation." He prefaced this motion by saying that he did not mean thereby to express any "approbation of the conduct of the existing French government, or the proceedings that had led to the present state of things in France. He meant simply to

[101] Hansard, Parliamentary History XXX, 1–60. Debrett, Parliamentary Register XXXIV, 1–74.

declare, and record his opinion, that it was the true policy of every nation to treat with the existing government of every other nation with which it had relative interests, without inquiring or regarding how that government was constituted, or by what means those who exercised it came to power." Lord Sheffield, a former Whig, immediately exclaimed: "It is impossible to be silent. Are we then in that deplorable situation? Are we the vilest and most contemptible of nations? Are we to be the first to acknowledge, to cringe to these cut-throats and robbers, who have not the recommendation of being able to control their own banditti?" At the conclusion of a long debate the question was negatived, as the mover had expected, without a division.[102]

Meanwhile, Loughborough and Malmesbury had not met with the success for which they had hoped in their efforts to persuade the Duke of Portland to sever entirely his party relations with Fox. On December 16 Malmesbury and Sir Gilbert Elliot called on the duke and endeavored to persuade him that the break was necessary. But Malmesbury recorded that "the only word we could draw forth was, that he was against anything that could widen the breach, and put it out of Fox's power to return."[103] Two days later, Loughborough called on Malmesbury and insisted on further exertions. They decided that it was "absolutely necessary for the Duke of Portland to declare his sentiments and ours in the House of Lords." Therefore, Malmesbury and Windham called on him, and induced him to agree to speak on "a bill relative to the power of the crown over aliens" which Grenville was to introduce the next day. Lord Fitzwilliam left London on that day, "from difficulty how to act, and distress of mind relative to Fox."[104]

On the nineteenth Portland excused himself for his failure to speak by saying that he had not reached the house in

[102] Hansard, Parliamentary History XXX, 80–128. Debrett, Parliamentary Register XXXIV, 98–154.
[103] Malmesbury, Diaries and Correspondence II, 477.
[104] Malmesbury, Diaries and Correspondence II, 478.

time. However, he still "reprobated the idea of breaking with Fox," though he promised to speak on the twenty-first.[105] On the twentieth Lord Loughborough, tired of waiting, sent Elliot to ascertain whether the duke would consent that he should accept the Great Seal. The answer was an emphatic negative.[106] On the next day Portland complied with his promise. He expressed his approval of the Alien Bill, because he thought "some measure of this sort necessary to quiet the alarm that had been excited in the minds of the people." But he qualified his action by saying that it was not on account of any personal attachment to the present administration that he supported the measure; that he could not forget the manner in which they came into power, nor could he forget several other things which he proceeded to enumerate.[107] Naturally this did not satisfy those at whose request the statement had been made. On the next day there was a meeting of that faction at Malmesbury's house at which Lord Loughborough said that "it was become necessary to decide what was to be done, and how the Duke of Portland could be obliged to declare his sentiments to be contrary to those of Fox."[108] Sir Gilbert Elliot was sent to converse with the duke, and he brought word that Portland's excuse was that "from embarrassment in speaking in public, he had omitted to declare his general intention to support government under all the circumstances of the present crisis." Loughborough was therefore persuaded to give the duke another chance before taking more radical steps, and a delegation was sent to call on the Whig leader.[109] Malmesbury, Elliot, and Windham went, and, after putting the case, informed the duke of Loughborough's threat to call a meeting of the party in order to force action, if Portland did not comply with their wishes. According to Malmesbury's report, the much-

[105] Malmesbury, Diaries and Correspondence II, 479.
[106] Malmesbury, Diaries and Correspondence II, 480. Life and Letters of Sir Gilbert Elliot II, 89.
[107] Hansard, Parliamentary History XXX, 158.
[108] Malmesbury, Diaries and Correspondence II, 481.
[109] Malmesbury, Diaries and Correspondence II, 483.

harassed leader agreed to what they said, but confessed a private affection for Fox. He further consented to make another statement in the House of Lords, and also to authorize Lord Titchfield to declare the same opinions in the Commons. In addition, he said "that any friend of his declaring these sentiments . . . may state himself to speak his sentiments and be authorized to say so."[110]

On December 26, two days after the above interview, the Alien Bill was brought to its third reading in the House of Lords.[111] Pitt wrote on the same day to Grenville, who was absent on account of illness, describing the debate which ensued:—

> Lord Guilford, Lord Lauderdale, Lord Lansdowne opposed the third reading of the bill. Lord Hawkesbury made a very good speech; Lord Carlisle a very fair and explicit one, not only in support of the bill but on general grounds; and Lord Loughborough made one of the best speeches I ever heard, which concluded with a decided declaration of *full support* in the strongest terms we could wish. Lord Carlisle, Lord Bute, Lord Malmesbury seemed by their manner to concur in the full extent. The Duke of Portland said nothing and looked embarrassed. Lord Rawdon said a few words only to declare himself in favour of the bill and disposed to give support to government, but in terms that seemed to be against his inclination. Of course there was no division. I look upon the day to be a very important and useful one.[112]

But Malmesbury did not take such a hopeful view. He said that "the Duke of Portland, to the great concern and grief of his friends, did not say a word. I urged him repeatedly to get up, but he said he could not, he felt it was impossible; that Lord Loughborough had said all that could be said, and that it was impossible to speak after so fine a speech. I pressed him to say those very words and nothing more, but without effect."[113]

Portland's friends now decided to overcome his embarrassment by speaking in his stead. On December 28, in the

[110] Malmesbury, Diaries and Correspondence II, 485. Life and Letters of Sir Gilbert Elliot II, 90.
[111] Hansard, Parliamentary History XXX, 161–170.
[112] Dropmore Papers II, 360.
[113] Malmesbury, Diaries and Correspondence II, 488.

House of Commons, Elliot rose to speak on the Alien Bill. He expressed regret that he differed from Fox and could no longer act with him, but he considered it as "the duty of every man to stand forward in support of His Majesty's government, and thus to maintain the Constitution and save the country." He declared that he expressed "the same sentiments with many other honourable friends with whom he had been accustomed to act, and who still continued to act upon their ancient principles, and under their ancient leader (the Duke of Portland)—that illustrious personage whose character was so highly respected, and whose sentiments could never fail to have the greatest weight." He concluded by saying that he gave "his entire approbation to the precautions which had been taken by ministers as highly necessary and proper in the present situation of affairs." Fox very naturally resented this implication that Portland had separated from him, and he explained that, as he understood the situation, the duke had agreed to maintain his former party relations; that the Alien Bill and other similar measures were to be regarded as subjects on which they held different opinions, but that the opposition to the administration was to be maintained.[114] This assertion raised a question of veracity between Elliot and Fox, and on December 31 the former made an explanation. He asserted that he had been misunderstood, that all he had intended to present was the opinion which he had formerly expressed, though in his own mind he had no doubt it was a sentiment which had the approval of that noble person. Immediately after the speaker took his seat, Lord Titchfield rose to make the statement which Portland had promised. He asserted that his "opinion of the gentlemen who compose the present administration was in no respect altered. . . . His political sentiments and attachments remained the same that they had ever been. . . . But he felt the dangers which surrounded us, and the necessity, in that case, of giving to gov-

[114] Hansard, Parliamentary History XXX, 176–180. Life and Letters of Sir Gilbert Elliot II, 96–98.

ernment such support as might enable it to act with effect; a support, therefore, directed to that effect, and governed by those considerations would be given."[115]

But Pitt had now decided to bring relations with France to an immediate crisis, and he pressed Loughborough to take the Seal. But Loughborough still hoped to win over the Duke of Portland, and requested a further delay. By January 18, 1793, however, Loughborough told Malmesbury that he had decided to accept the office, but was only doubtful as to the time.[116] Lord Grenville wrote to his brother the next day that the time was to be the following Wednesday, and added, "It is as yet very difficult to say what proportion of the ci-devant Opposition will follow Lord Loughborough's example, and join government avowably, but I am inclined to hope a pretty large one."[117] On January 20 Loughborough called on the minister, and returned to Malmesbury's house. He informed his host that Pitt had decided on war, and ended, according to Malmesbury's diary, by telling him "in Pitt's name and from him, that Pitt wished everything that had passed between him and me at the time of the Regency to be forgotten; and that he wished to have my support, that I would consider myself as much connected with him as ever. He likewise offered office through me to Sir Gilbert Elliot."[118]

Three days later, Malmesbury accepted Pitt's offer and notified both Pitt and the Duke of Portland of that fact.[119] He also informed Sir Gilbert Elliot of the minister's proposition.[120] A few days afterward Windham was also offered a place.[121] Thus Fox was able for the time being to pre-

[115] Hansard, Parliamentary History XXX, 191–192. Life and Letters of Sir Gilbert Elliot II, 100. Sir Gilbert wrote to his wife that Windham had written Titchfield's speech and submitted it to Portland. The duke had made the addition nullifying the sentiment which the Loughborough faction desired to have expressed.
[116] Malmesbury, Diaries and Correspondence II, 498–501.
[117] Buckingham, Court and Cabinets II, 236.
[118] Malmesbury, Diaries and Correspondence II, 501.
[119] Malmesbury, Diaries and Correspondence II, 501–504.
[120] Life and Letters of Sir Gilbert Elliot II, 106.
[121] Life and Letters of Sir Gilbert Elliot II, 112.

serve his party from final dissolution by sheer force of his own personality, and the attempt to separate himself and the Duke of Portland ceased for a while to be agitated.[122]

[122] Life and Letters of Sir Gilbert Elliot II, 115. Elliot wrote to his wife February 16, 1793:—

"Nothing has happened in politics, nor seems likely to happen. One reason of this calm, I think, is Lord Loughborough's having attained his own point. Lord Malmesbury is now equally still on the subject; we neither meet, nor converse, nor bustle with him as we did a few months ago. The fact is that he has also settled his point, and will accept the first foreign mission that is offered him. One strong, and indeed just and reasonable inducement for his taking this line is, that it will restore him to a claim to his pension—£2000 a year. He was, in fact, entitled to it before in point of professional claims. All this, however, being settled in his own mind, a comfortable apathy and quietness has taken the place of his former animation."

CHAPTER IV.

The Outbreak of the War with France.

The first inquiry which it is necessary to make in a discussion of the French declaration of war against England in February, 1793, is the extent to which the English ministers were instrumental in creating the conditions which brought about that result. We may readily adopt the generally accepted view that the English government was pursuing a pacific policy until the events of August and September, 1792, had taken place in France, but it is less easy to understand the purposes of Pitt's administration from that time. The domestic situation in English politics must be kept constantly in mind. It may have been true, as was said by a paper which supported him, that as early as October 16, 1792, Pitt contemplated taking part in the continental war as soon as any other state should be involved by France.[1] It may also have been true at the same time that Pitt told the truth when he wrote to Lord Auckland, the day before, that the meeting of Parliament, which he had fixed for November, did not imply war. Yet the writer of that letter explained that it was impossible to take such measures as had been taken in that direction without "an early communication to Parliament."[2] Remembering the failure of his Russian program of less than two years

[1] The Oracle, October 16, 1792.

[2] Auckland MSS. XXXIV, 85. It is probable that Pitt expressed his real attitude toward France at this time in a letter to Grenville which was written on October 16; in it he explained some changes made by him in one of the despatches of the foreign secretary relative to the French situation:—

"In substance, my reason for changing it was to make the declaration more general and leave it clearly to ourselves to determine what consequences are too important to let us remain spectators. The French retaining Savoy, or any other acquisition great or small, might be argued to come within the description *un nouvel ordre de choses*." Dropmore Papers II, 332.

before, Pitt would certainly make sure of two things before embarking on a second hostile project, however tempting the opportunity might be. He would not interfere in the French troubles without a pretext sufficient to justify such an action to the English people; and he would make sure of his majority in Parliament. For though a majority in both houses of Parliament were supporters of the administration, the opposition party, particularly in the upper house, contained a great number of men of ability, and was strong enough to oppose successfully any measure which did not meet with popular approval. Therefore, if the ministers had desired to take part in the continental struggle at this time, it would have been unwise for them to do so, since it would have placed the existence of their administration in jeopardy. Moreover, it was manifestly to the interest of the French that England and Holland should remain neutral.

In view of these circumstances, we are not surprised to know that on November 6, 1792, Lord Grenville told Lord Auckland that England and Holland "ought to remain quiet as long as it was possible to do so." In answer to Auckland's inquiry with regard to the recognition of the French Republic, Grenville replied that England would probably decline such a request at that time, but in terms which would leave her free to act differently if a republican form of government should be permanently established.[3] Even as late as November 23 Grenville was "strongly inclined to believe that it is the present intention of the prevailing party in France to respect the rights of this country and the Republic."[4] Before this, and immediately after the evacuation of Brussels, practically the same sentiments were expressed in the declaration which England made to her ally through Lord Auckland.[5] In other words, up to this time the English ministers had refused to commit themselves, but had

[3] Auckland, Journal and Correspondence II, 465. Auckland MSS. XXXIV, 197.
[4] Auckland MSS. XXXIV, 350.
[5] Auckland MSS. XXXIV, 342. Debrett, State Papers I, 217.

been careful to leave the way clear for any action they might afterward desire to take.

On November 25, 1792, rumors of the French decree relative to the opening of the Scheldt reached London. At first, Grenville was inclined to discredit them.[6] On the next day, before the report was confirmed, in reply to a question which had been asked by Lord Auckland several days before, an official despatch was prepared which stated that England would follow the policy adopted by the Dutch with respect to any French boats entering the Scheldt. In the same despatch Grenville suggested that if the French were determined to force a rupture, it seemed of little moment what was the particular occasion taken for it. The chief consideration, he thought, was to determine, in that case, "to what degree it would be more or less advantageous to us or the French in point of our respective state of preparation, that things should come to a crisis now, or sometime hence." He added, "Such preparatory steps as were judged advisable, and not likely to attract too much notice, have already been taken, with a view to enabling us to proceed with more expedition in case of any sudden necessity for augmenting our naval force." Before this despatch was sent, the news of the decree was confirmed, and Grenville inquired in a postscript whether, if Dumouriez should take any steps to follow it up, "it would be more advantageous that this point should immediately be brought to its issue, or that by representations time should be given for further preparations." At the same time, the English minister objected to the request of the Dutch that several vessels be sent to Flushing or the Downs in order to assure Holland that she would be protected by her ally. The reason given for not complying with this request was that such a step would impede the naval preparations then in progress; but it was suggested to Auckland that the season of the year might be "ostensibly used as a reason for declining what is asked of us in this respect."[7] In the "most secret and con-

[6] Auckland MSS. XXXIV, 377, 382.
[7] Auckland MSS. XXXIV, 392–395.

fidential" letter which accompanied this despatch Grenville confessed that he was afraid that there was "too much reason to believe that the French were determined to drive England to extremities."[8] In considering the significance of such a statement we are impressed with the fact that it was addressed to a man who believed that England was sincerely desirous of peace, and who, ten days before, had suggested that Grenville make inquiries in order to ascertain whether he could not by mediation secure a cessation of hostilities between the powers which were at war.[9] Nor should we forget that immediately after this despatch was sent to Holland the English ministers decided, by mobilizing the militia and calling Parliament together, to force a decision from the aristocratic Whigs and at the same time create a popular desire for hostilities against France.

But, for some reason, the Dutch failed to appreciate the English point of view, and refused to proceed to extreme measures. On November 23, the day on which Auckland had written to ask for instructions on the subject, a French commandant had requested from the States General permission to take his boats through the Scheldt. It was decided to refuse permission, but if, in spite of this, the passage should be made, the French were not to be fired on, and measures were to be taken to obtain a disavowal and recall of the application.[10] However, the Dutch still declined to attach too great significance to the situation, and Auckland wrote to the English ministers that, while the right of navigation contended for might serve to arouse the people, he did not think the question was of much real importance, since the navigation of the river could at any time be obstructed by the Dutch.[11]

In the meantime the English ministers were endeavoring to remedy their lamentable lack of information concerning the intentions of the French. Chauvelin had been sent to

[8] Auckland MSS. XXXIV, 396. Dropmore Papers II, 341, Grenville to Auckland, November 26, 1792.
[9] Dropmore Papers II, 334.
[10] Auckland, Journal and Correspondence II, 469.
[11] Auckland MSS. XXXIV, 432. Dropmore Papers II, 346.

London before the fall of the monarchy in France, and had been received as the representative of the king. The Republic had retained him as its minister, but as yet he had not officially presented to the English court the credentials of his new office. In this anomalous situation he wrote to Grenville, November 19, 1792, requesting an interview.[12] Two days later the English minister replied that, before he could give an answer, "he must, under the present circumstances, request that Monsieur Chauvelin will be pleased to explain the object of the conference which he has desired."[13] Chauvelin replied on the following day that he thought the "private conversation" which he had proposed would have produced advantageous effects, and he regretted that Lord Grenville thought otherwise.[14] Grenville waited six days before he replied to this note, then, having received news of the decree concerning the Scheldt, he replied favorably requesting Chauvelin to call on him for an interview.[15] According to the report of the conversation which Grenville sent to Auckland, Chauvelin prefaced his statement by saying that he could communicate only that which he had been authorized to say when his first note was written. Since that time he had heard of the declaration of the English ambassador at The Hague, and had had reports of French boats entering the Scheldt. He could not say what difference these things might make as to the attitude of the French, but he could assure the minister that before these events took place France was sincerely desirous of cultivating peace with England. He contended that the opening of the Scheldt was not intended as a hostile measure, and that the French had no intention of attacking Holland. He added, further, that the Executive Council was willing to communicate at present in this informal manner, and to leave to the judgment of England the time when the Republic should be recognized. Grenville excused himself from a pertinent reply on the ground of Chauvelin's confession that

[12] Debrett, State Papers I, 218.
[13] Debrett, State Papers I, 218.
[14] Debrett, State Papers I, 219.
[15] Debrett, State Papers I, 219.

what he had said had been based on instructions received before the latest developments in the case. When Chauvelin offered to convey to the French any assurances of a friendly disposition on the part of England, Grenville replied that he did not feel that the government could send any such assurances, especially as Chauvelin had no other instructions than those which he might have presented several days before, but he assured him that "the King was resolved to maintain inviolate all the rights of this country and those of its allies." Finally, he added that he would be glad to hear other communications from Chauvelin "*dans la même forme.*"[16]

This interview, which, so far as it pertained to the subject, indicated a desire for peace on the part of the French, did not cause the English ministers to delay for a moment their proposed measures for preparing the public mind for the approaching hostilities. On December 1, two days later, the proclamation calling out the militia was issued. On December 2, through the intervention of W. A. Miles, one of his former diplomatic employees, Pitt had a conversation with Maret, who was an agent of the French foreign office, the purpose of which seems to have been much the same as that of Grenville with Chauvelin, that is, to gain information concerning the intentions of the French. Two reports, which differ in several particulars, have been preserved of this interview. One was sent by Pitt to Lord Auckland;[17] the other by Maret to Le Brun, the French minister of foreign affairs.[18] Maret came to meet Pitt believing that the English minister desired to preserve peace, and he interpreted the conversation in that light. He had received this impression from Miles, who knew little of the real intentions of Pitt, but who was a friend of Le Brun and was sincerely desirous of promoting the purpose of Maret. Indeed, so persistent was Miles in his efforts to

[16] Auckland MSS. XXXIV, 441.
[17] Auckland MSS. XXXV, 28.
[18] Debrett, State Papers I, 220. See also, for a minute of the report which Maret gave Miles of the interview the next day, Miles, Correspondence of W. A. Miles I, 368.

secure peace at this time that he besought Pitt to allow him to go to Paris in order to treat with Le Brun in person.[19] According to Pitt's report to Auckland, Maret began by saying that the French government "would be glad if means could be found, by private agents, with no official character, to set on foot a negociation." The English minister replied that he was willing to converse freely in order to "learn whether it was possible to avoid those extremities which we would very much regret, but which seemed from what we saw of the conduct and doings of France to be fast approaching." "I then mentioned to him distinctly," says Pitt, "that the resolution announced respecting the Scheldt was considered as a proof of an intention to proceed to a rupture with Holland; that a rupture with Holland on this ground or any other injurious to their rights must also lead to an immediate rupture with this country." Maret thereupon expressed a belief that the French government had no intention of proceeding to hostilities with the Dutch, but that it wished to be on good terms with both that nation and the English. He said that those were the sentiments of Le Brun when he left Paris, and that from the despatches since received by Chauvelin, which he had seen, he believed that they were unchanged and that Dumouriez shared in them also. Maret hinted that public opinion in France might force the Executive Council to ask the English court to receive some person in a formal character, but this proposition Pitt naturally refused to consider. When Maret in conclusion expressed his confidence in a satisfactory settlement of all difficulties, even including that of an envoy, the minister remarked that there was still "another point, namely, the decree of France to assist revolution." And when Maret replied to this that it was passed in a "moment of fermentation, and went beyond what was actually intended," that it referred only to nations with which France was at war, and that the Executive Council might find some means of revising it if it was objectionable,

[19] Miles, Correspondence of W. A. Miles I, 347–369, 397, 401–402.

Pitt still answered "that whatever were the sentiments of the *Conseil Executif,* the decree as it stood might justly be considered by any neutral nation as an act of hostility."

From these extracts it appears that Pitt in his report emphasized his justifications for war rather than the desires for peace, upon which Maret laid stress in his note to Le Brun. At any rate, it is quite certain that the official despatch of Lord Grenville to Auckland at The Hague which accompanied Pitt's minute offered no encouragement to pacific measures on the part of England's ally. Its contents were chiefly a recitation of the grounds which Holland had for a rupture with France. One paragraph, which was inclosed in brackets and to which attention was directed by an index finger, read: "Our general preparations will be proceeded in with as much vigour and despatch as circumstances will admit; and I trust that the Republic [Holland] will not be remiss, on her part, to take every possible means of putting her forces, both naval and military, in the most respectable state."[20] In order that he might not be misunderstood, in his "private and secret" letter to the English ambassador Grenville gave further emphasis to his purpose. He wrote, "The tenour of my dispatch will sufficiently show you that I think the Pensionary's government goes a great deal too far in its expressions of a disposition to recognize the present French government, under all the circumstances of insult and offence of which the Republic has to complain." Continuing, he said: "I have not expressed in my dispatch all the security which we feel respecting the comparative state of our preparations with those of France, because it is unwise in a public paper to commit one's self. But to you privately, I may say, that our confidence on that head is very great indeed."[21]

There was certainly no room for doubt that England was bound by the treaty of alliance to give aid to Holland if the latter country should be attacked.[22] But, to say the least, it seems unusual that the succor should have been proffered

[20] Auckland MSS. XXXV, 38. [21] Auckland MSS. XXXV, 32.
[22] Martens, Recueil de Traités IV, 373.

unasked, and at a time when the Dutch still refused to admit that they had been attacked. It is easy to believe that Grenville stated a truth when he wrote to Auckland on January 6, 1793, "We are awkwardly situated about the Scheldt till we hear something officially and formally from the Republic on the subject."[23] That no such declaration had been made before had not been the fault of the English ministers. On December 29, 1792, Auckland had been notified that the ships, which had been promised a month before,[24] would be sent immediately to Flushing. But Grenville added that he was particularly requested to insist that the vessels might not be detained "longer than was found really necessary," since their absence delayed the English naval preparations. He concluded by urging that the Dutch prepare for war, and that they consider the least aggression an act of hostility.[25] On December 18, immediately after the assembling of Parliament and in the midst of the propaganda which attended that event, Grenville had also written to inform Auckland that "nothing could exceed the good disposition" of the people of England. He continued, "If we can maintain the present spirit it will enable us to talk to France in the tone which British ministers ought to use under such circumstances as the present." He added, "Everything now depends on vigourous preparations in Holland, and even what cannot be done in fact should be done in appearance."[26]

Meanwhile, the French were making another attempt to ascertain what conditions the English ministers would impose before consenting to remain at peace. On December 23, 1792, in a letter to Lord Fortescue, with which was a letter from Paris that was to be shown to Grenville, Miles complained: "I have been asked what are the conditions this country exacts from France, and am assured that, if they are not too hard, they will be acceded to. If ministers would explain themselves—for the French are ignorant of what is meant to be exacted of them—I am of opinion that

[23] Auckland MSS. XXXV, 469.
[24] Auckland MSS. XXXIV, 439.
[25] Auckland MSS. XXXV, 281.
[26] Auckland MSS. XXXV, 160.

a satisfactory *éclaircissement* would almost instantly ensue, and the peace of Europe be obtained and preserved. But if no hints are thrown out, no communications made, directly or indirectly, how in the name of common sense are the differences to be adjusted?"[27]

On December 27, following the instructions of the Executive Council, Chauvelin, styling himself minister plenipotentiary of France, sent a note to Lord Grenville the day after he had requested an interview with Pitt himself. He declared that the Executive Council wished to know whether France ought to consider England as a neutral power or as an enemy. He insisted that Holland would not be attacked, and made an attempt to explain the decree of November 19. On this point he said that "the National Convention never meant that the French Republic should favour insurrections, should espouse the quarrels of a few seditious persons, or, in a word, should endeavour to excite disturbances in any neutral or friendly power whatever." He concluded his reference to this topic by adding, "This decree, then, is applicable only to those people, who after having acquired their liberty by conquest, may have demanded the fraternity, the assistance of the [French] Republic, by the solemn and unequivocal expression of the general will." He further argued that the opening of the Scheldt was "a question irrevocably decided by reason and justice, of small importance in itself, and on which the opinion of England, and perhaps of Holland itself, is sufficiently known, to render it difficult seriously to make it the single subject of a war." On these grounds, an explanation of the intentions of England was demanded.[28]

On the day after Grenville received this note he wrote to Auckland saying that he would tell the French envoy that the explanations were entirely unsatisfactory. He then proceeded to urge that the Dutch prepare for immediate war, and concluded with these words: "It is evident that the present intentions of France are those of aggression.

[27] Miles, Correspondence of W. A. Miles I, 416.
[28] Debrett, State Papers I, 224.

Whichever of the allies is first attacked, there can be no doubt, under the present circumstances, that they must make common cause to render the calamity of war short, if it is unavoidable."[29] The reply which Grenville sent to Chauvelin on December 21 had been written with two purposes in view: first, as a declaration by the English ministers of a hostile policy toward France, and it was so understood in England; and secondly, to serve as a defence of that policy to the English people.[30] The reply, which was immediately made public, began by reminding Chauvelin that since August 10 the king had suspended all official communications with France, and that the French minister himself was accredited only to Louis XVI. Chauvelin had asked for no other recognition, but Grenville thought it necessary to assert that he could not treat with him as a representative of the French Republic. Nevertheless, he deemed it wise to answer the explanations which had been offered. With regard to the decree of November 19, he insinuated but did not state expressly that the French had belied their professions by promoting sedition in Great Britain. He charged the French with "violating the territory and neutrality" of Holland by sending a boat up the Scheldt. Regarding the question of the Scheldt itself, he urged that France had no right to set aside treaties. Then followed this statement:—

England never will consent that France shall arrogate the power of annulling at her pleasure, and under the pretence of a pretended natural right, of which she makes herself the only judge, the political system of Europe, established by solemn treaties, and guaranteed by the consent of all the powers. This government, adhering to

[29] Auckland MSS. XXXV, 270.

[30] Auckland MSS. XXXV, 588. Grenville gave an account of the affair in a cipher despatch to Trevor, the British minister at Turin, on January 10, 1793. Public Advertiser, January 19, 1793. This paper, which supported the administration, said, "Lord Grenville's answer to the would be Ambassador is a decisive proof that Administration neither hold out an idea of the probability nor the wish for peace with modern France." In a letter to Gibbon, January 23, Lord Sheffield said: "But war between this country and France is more certain than you seem to think. You cannot have read Lord Grenville's notice of Chauvelin's paper. I like it much, it seems to show that war is inevitable." Prothero, Private Letters of Edward Gibbon II. 362.

maxims which it has followed for more than a century, will also never see with indifference, that France shall make herself, either directly or indirectly, sovereign of the Low Countries, or general arbitress of the rights and liberties of Europe. If France is really desirous of maintaining friendship and peace with England, she must show herself disposed to renounce her views of aggression and aggrandizement, and to confine herself within her own territory, without insulting other governments, without disturbing their tranquility, without violating their rights.[31]

In other words, Grenville implied that England reserved to herself alone the office of "general arbitress of the rights and liberties of Europe," at least as far as the relations of other nations with France were concerned.

But the other nations did not seem to regard their rights with the same degree of sensitiveness as did the English ministers, and on the next day after this note was sent Grenville wrote privately to Auckland: "As so many circumstances seem to point at the great probability of things being speedily brought to a crisis with France, it seems extremely desirable that the Dutch government should come to some determination which they may formally communicate to his majesty's ministers, either for advice or simply as a notification, respecting the line which they mean to follow on the subject of the Scheldt."[32]

It now appeared that both parties had charges to bring concerning the breach of treaties. The commercial treaty between France and England in 1786 had provided that subjects of one of the realms travelling in the other should

[31] Debrett, State Papers I, 227.

[32] Auckland MSS. XXXV, 383. The letter continued:—

"I have already in my public dispatches intimated the opinion of this government that further infractions or violations of the rights and territory of the Republic ought not to be permitted. But the precise mode and time of bringing forward a question which in the first instance at least concerns the Republic most directly should, as you will easily see, be suggested from thence, and not originate here. The King's determination to fulfil his treaties has been so clearly expressed as to admit of no doubt. The opinion which this government entertains of the political expediency of the Republic giving up to violence or intimidation any of its unquestionable rights has also been unequivocally stated. The rest must depend, at least in the first instance, on the Dutch Ministers—but every consideration makes it important to know their resolution, as it may be material for the regulation of many points of our conduct."

not be obliged to obtain special permission or safe-conduct.[33] Lord Grenville's Alien Bill, to which we have already referred, was confessedly intended to enable the government to prevent any Frenchmen from coming into the country except such as might be considered desirable.[34] It was, therefore, but natural that, on January 7, 1793, the Executive Council, through Chauvelin, should remind the English ministers that "it is at the very moment when France is accused in the British Parliament of violating treaties, that the public conduct of the two governments offers a contrast so proper to justify the retorting the accusation."[35] In this note Chauvelin acquiesced in the fact that his official position had not been recognized, but he remarked that this could not "alter or destroy the quality of delegate from the French government with which the undersigned is evidently invested." Grenville had implicitly conceded as much to him in the reply which had been made to the explanations sent by the French minister on December 27. But in this case the note was returned immediately "as being totally inadmissable, Monsieur Chauvelin assuming therein a character which is not acknowledged."[36] Apparently thinking that he had not acted in a sufficiently inconsistent manner, Grenville, on receiving a second note which Chauvelin sent to him on January 7, sent a reply two days later acknowledging receipt of the note and reminding Chauvelin that in the conversation on November 29 the English ministers had agreed to receive non-official communications. He begged him to remember that a reply to the note of December 27 had been sent, and as a reason for not returning an answer to the one under consideration he made the following statement: "I do not know in what capacity you address me the letter which I have just received; but in every case it would be necessary to know the resolutions which shall have been

[33] Martens, Recueil de Traités IV, 157.
It was further provided that such persons should conduct themselves conformably to the laws of the states in which they were sojourning.
[34] 33 Geo. III, c. 4.
[35] Debrett, State Papers I, 232.
[36] Debrett, State Papers I, 233.

taken in France, in consequence of what has already passed, before I can enter into any new explanations, especially with respect to measures founded in a great degree on those motives of jealousy and uneasiness which I have already detailed to you."[37]

On January 11 Chauvelin notified Grenville that on account of its violation by the English and the absence of any adequate explanation therefore the French would consider the commercial treaty annulled. Again the English minister ordered that the letter be returned.[38] On the next day Le Brun's reply to Grenville's note of December 31 reached London. Chauvelin immediately requested an interview with the English minister, and assured him that he would "not attach any importance to the form of this private conversation."[39] Grenville consented, and requested that Chauvelin make his communications in writing.[40] According to the minute of this interview which Grenville sent to Auckland, Chauvelin began by saying that since the end of December he had been acting according to explicit instructions from the Executive Council. He then presented Le Brun's note, and in addition to this, he requested permission to have more frequent conversations with Grenville privately, if he could not be recognized officially. The English minister took both this request and Le Brun's note under consideration, and promised to give his answers later.[41]

Le Brun's note, after assurances of a continued desire for peace on the part of France, took up the questions which Grenville had raised in his paper of December 31. With regard to the decree of November 19, the former arguments used by Chauvelin were repeated and amplified, and then Le Brun continued:—

[37] Debrett, State Papers I, 235. The note to which this was a reply alleged an unfair treatment of the French by the English officials in the enforcement of the proclamation relating to the export of grain.

[38] Debrett, State Papers I, 236.

[39] Debrett, State Papers I, 236.

[40] Debrett, State Papers I, 237.

[41] Auckland MSS. XXXVI, 25.

We have said, and we desire to repeat it, that the decree of the 19th of November could not have any application, unless to the single case in which the general will of a nation, clearly and unequivocally expressed, should call the French nation to its assistance and fraternity. Sedition can certainly never be construed into the general will. These two ideas mutually repel each other, since a sedition is not, and cannot be any other than the movement of a small number against the nation at large; and this movement would cease to be seditious, provided all the members of a society should at once rise, either to correct their government, or change its form *in toto,* or for any other object.

Thus, when by this natural interpretation the decree of the 19th of November is reduced to what it truly implies, it will be found that it announces nothing more than an act of general will, and that beyond any doubt, and so effectually founded on right, that it is scarcely worth the trouble to express it.

Concerning the general issue, Le Brun denied that France had any desire to become a universal arbitress of treaties, or that she desired to impose laws on any one. "She has renounced," he wrote, "and again renounces every contest; and her occupation of the Low Countries shall only continue through the war, and the time which may be necessary to the Belgians to insure and consolidate their liberty." As to the question of the Scheldt, he argued that it was a matter of little importance to either England or Holland, but of considerable importance to Belgium. The river had been closed without the consent of the Belgians, and this action was therefore contrary to the rights of nature and of nations. Still: "When that nation [the Belgians] shall be found in full enjoyment of liberty, when its general will can lawfully declare itself without shackles, then if England and Holland still attach some importance to the opening of the Scheldt, France will not oppose it; she will know how to respect their independence even in their errors."[42]

In his reply Grenville professed to find all of these explanations unsatisfactory. In answer to Le Brun's assertion that the French would be obliged to proceed to hostili-

[42] Debrett, State Papers I, 237.

ties if England maintained her haughty attitude and hostile preparations, he said that England would not cease in her efforts "to protect the security, the tranquility, and the rights of this country, to support those of our allies, and to oppose a barrier to views of ambition and aggrandizement, always dangerous to the rest of Europe; but which become much more so when they are supported by the propagation of principles destructive of all order and society."[43]

Manifestly now, in order to force France into hostilities, the English ministry must take another line. From Le Brun's note it was apparent that the Executive Council, if given an opportunity, would make even further concessions with reference to the points in dispute. Such concessions, as will be seen, were afterwards made. But the English administration had already begun to search for a more general ground for war. In his private letter accompanying a copy of Le Brun's note which he termed "Chauvelin's last humble paper," Grenville stated as much to Auckland. The circumstances were these. Auckland had at last received from the Dutch a definite note favorable to the preservation of peace and neutrality, and in despatching it to Grenville he recommended that it be printed in the English papers.[44] To this suggestion Grenville replied on January 15, 1793, as follows:—

> I had given directions for publishing the Greiffiers letter to you, but upon reconsidering that paper I am afraid the publication would do more harm than good here. It is, I doubt not, adapted to the present temper of the Republic, but the expressions of still hoping to preserve peace by adhering to neutrality would be construed here to exclude all measures to be taken on the general view of affairs, and for the object of restraining the progress of French arms and French principles, even though we should not be the immediate objects of attack. In truth, the Republic ought to convince herself of the impossibility of our acquiescing in all that has happened, with no better security against its recurring than a tacit disavowal, or even an express assurance.[45]

If this was a correct statement of the attitude of the Eng-

[43] Debrett, State Papers I, 241. [44] Dropmore Papers II, 365.
[45] Auckland MSS. XXXVI, 37.

lish ministers, it is evident that the French would have found it difficult to maintain peace under the circumstances which then existed.

Lord Grenville soon had an opportunity to give further evidence of his intention. On January 17, the day before he sent his reply to Le Brun's paper, he received a second note from Chauvelin. The latter first asked whether the king of England would receive his letters of credence as minister of the French Republic, or whether he was to be classed with other foreigners under the regulations imposed by the Alien Bill.[46] Three days later Grenville informed him that he would be received in no other capacity than as "Minister from His Most Christian Majesty," and therefore that he could be recognized "but as a private person," and as such would "return to the general mass of foreigners resident in England."[47] The meaning of such a communication required no explanation. It only remained now to force France, if possible, to make a specific declaration. An occasion for accomplishing this end was already approaching.

On January 12, 1793, Brissot, of the Committee of General Defence, made a report to the National Convention on the relations with England. As a result, the convention passed a decree instructing the Executive Council to communicate four points to England: first, to assure the English government that the French desired peace and would respect the independence of Great Britain and her allies as long as they did not attack France; second, to request England to enforce the commercial treaty of 1786 with respect to Frenchmen travelling freely in the country; third, to uphold the treaty regulations touching the exportation of grain and provisions; and fourth, to explain the meaning of the hostile preparations which were being made. If satisfaction was not given on all these points, immediate measures for defence were to be taken.[48] The news of the condemnation of the French king had now reached England,

[46] Debrett, State Papers I, 243. [47] Debrett, State Papers I, 244.
[48] Le Moniteur, January 15, 1793.

and both of these actions were considered by the ministers as admirably fitted to advance their plans. Lord Grenville, in a letter to his brother on January 19, said:—

"The first question, of guilty, decided almost unanimously; the third, that punishment should be inflicted, was deferred to the 16th. Brissot's report, which you will see in the French papers, seems well enough calculated for our purpose. The thing must now come to its point in a few days; and we shall, I trust, have appeared to the public here to have put the French completely *dans leur tort.*"[49]

It was evident that, under the circumstances, the popular feeling against France would reach its height when Louis was executed. Pitt decided to take advantage of this fact for the action which he expected would finally induce the French to declare war. He accordingly arranged to hold a meeting of the Privy Council immediately after the news of the execution should reach London that an order might be issued requiring Chauvelin to leave England.[50] On January 24 the news was received, and Chauvelin was ordered to retire from the kingdom within eight days.[51] On the same day Grenville wrote to Auckland:—

"The business is now brought to its crisis, and I imagine that the next dispatch to you, or the next but one, will announce the commencement of hostilities. Probably the French will commence them; but if not, after all lines of communication are interrupted of necessity, and after all hope of satisfactory explanation is over, I do not see how we can remain any longer *les bras croisés,* with a great force ready for action, that force avowedly meant against France, and the language and conduct of that power giving every day more instead of less ground of offence to us and all the world."[52]

Before the news of Chauvelin's dismissal reached France, Le Brun had decided to make a final effort to preserve

[49] Buckingham, Court and Cabinets II, 237.
[50] Dropmore Papers II, 271–272, Pitt to Grenville, January 23, 1793. Grenville's correspondence with the king is also published.
[51] Debrett, State Papers I, 245. [52] Dropmore Papers II, 372.

peace. Maret, who had described himself rather too confidently as persona grata to the English ministers, was sent as chargé d'affaires to London to make the proposals. If Miles reported Maret's statements correctly, he was authorized to give England practically every assurance that had been asked. In addition, he was to suggest that Dumouriez come to London as a special minister for negotiating a treaty. When Maret reached London and heard of Chauvelin's dismissal, he decided to await further instructions from Paris before attempting any formal communications. In the meantime, the English ministers were informed by both Talleyrand and Miles of the nature of the proposals which were to be offered, but instead of giving Maret an opportunity for communicating the purpose of his mission, they made haste to order him, on February 4, to leave the kingdom within three days.[53]

For the avowed purpose of delaying the outbreak of hostilities in that quarter until Holland should be in a better position to defend herself, the English ministers had consented that Auckland should conduct a negotiation with Dumouriez. On the very day that Maret was ordered to leave London, instructions were sent to Auckland to guide him in managing his negotiations. According to these instructions, if the French general should submit to all the conditions that were to be offered—a thing certainly improbable from the nature of them—the English ambassador was merely to enter into discussions without reaching definite conclusions.[54] But before the negotiations were begun, war had been declared, and the news had reached England. As a result, on February 13, Auckland was instructed to listen to what Dumouriez had to offer, without entering into any discussion whatever of terms,[55] though in fact England for several weeks had already been acting

[53] For Talleyrand's letter to Grenville, see Dropmore Papers II, 374. For other details as to the mission of Maret, see Miles, Correspondence of W. A. Miles II, 50–65.

[54] Auckland MSS. XXXVI, 426–435. Dropmore Papers II, 377–379.

[55] Auckland MSS. XXXVII, 47.

as though hostilities had begun. For example, on January 18 Lord Auckland had been authorized to furnish "Monsieur and the Comte d'Artois" with six thousand pounds in order to enable them to visit the courts of Europe for the purpose of furthering the royalist cause;[56] six days later, Grenville wrote that the king had ordered thirteen thousand of his electoral troops to be assembled for use in defence of the Dutch, to be paid by them;[57] on January 28 Parliament had been asked by the king "to make a further augmentation of his forces by sea and land," on the ground that it was necessary "for maintaining the security and rights of his own dominions; for supporting his allies; and for opposing views of aggrandizement and ambition on the part of France."[58]

From the negotiations which have been considered it is apparent that there were three issues involved in the attending diplomatic discussions, each of which was offered as a justification of England's hostile attitude toward France: the opening of the Scheldt; the decree of November 19; and the progress of French arms and principles. In order to ascertain whether these issues were the real causes of this hostile policy, or were convenient pretexts for its justification, it will be necessary to examine them more closely. In the view of the English administration, the provisional French government existed, in the sense that it could be bound by treaties and could have hostile measures directed against it. On the other hand, it had no official existence, and therefore was not able to conduct negotiations for settling diplomatic disputes or making peace. It is not necessary to criticize the English ministers for declining to recognize the French Republic, though the situation was unique and decidedly illogical, but it is reasonable to assume that if the administration had possessed amicable intentions it would have been disposed to wait for overt acts before proceeding to hostile measures against a government which,

[56] Auckland MSS. XXXVI, 108.
[57] Auckland MSS. XXXVI, 237.
[58] Hansard, Parliamentary History XXX, 238.

from its nature, could not be expected to observe the niceties of political etiquette. In any case, England could at any time have demanded explanations from France, while the French were never able to make an official communication to the English government. As a result, to use the expression of Fox, England became engaged in a war with a nation which she could not whip and with which she could not treat.

The opening of the Scheldt seems to have been the event to which the ministers were at first inclined to give emphasis as a provocation. There can be no question as to England's obligation in regard to that point, if the Dutch had considered themselves aggrieved and had called for aid. Instead of this, immediately after they heard of the French decree the English ministers began and persisted in their efforts to convince the Dutch that the question required the arbitrament of war. This was done in spite of the fact that before the specific incident occurred Lord Auckland had assured the States General that England was ready to aid her ally whenever there was need. Therefore it is apparent that if the English ministers desired a continuation of peace, and were liable to be involved in hostilities by the opening of the Scheldt, they had, to use Lord Grenville's expression, become involved in an extremely "awkward situation."

As regards the decree of November 19, if the ministers had possessed any evidence that the French were carrying on a republican propaganda in England, they might have had just grounds for a breach, even though it was quite apparent that the movement had made no serious headway. It has been seen that those who were responsible for the official expressions of opinion in proclamations and other public documents freely made such assertions. The obvious thing for the ministers to do would have been to produce some concrete evidence to substantiate their allegations. In the latter part of December, 1792, and the earlier days of January, 1793, when an effort was being made to

convince prominent Whigs that the country was threatened by serious dangers, some evidence of this kind might have been very useful. That it would probably have been brought forward if it existed is apparent from a letter which Grenville wrote to Auckland on January 1:—

"We have some idea of laying before a secret committee of the two houses (very small in number) some particulars of the designs which have been in agitation here, enough to enable them without reporting particular facts, and still less names or papers (names indeed, they need not know) to say that they are satisfied that such plans have been in agitation. Could you supply us with anything that might tend to the same object; it might be very useful in the view of embarking the nation heartily in the support of a war if unavoidable."[59]

The third consideration, which was brought forward by Grenville as early as January 15, and made public three days later in the king's speech, was the general issue of restraining the progress of French arms and principles. Indeed, this may be said to have been proposed as an ultimatum in the note to Chauvelin on December 31. No attempt will be made here to decide whether a nation which desired to remain neutral and had not been attacked was justified in taking part in the contest because of the success of the combatant which it was less disposed to favor. However great may have been the conceivable danger to the traditional balance of power, the time had not yet arrived for facing that issue. The French had promised that they would not retain their conquests, and, though their sincerity might have been doubted, it is hardly reasonable that ministers who desired to preserve peace would have made such doubts the grounds for a war, especially when that war would have been against a powerful nation flushed with conquests. Such a conclusion becomes more difficult to accept when we consider that the English ministers began the contest with the confident belief that the French had

[59] Auckland MSS. XXXV, 381.

almost reached the limit of their resources, and with the expectation that they would be able to bring the hostilities to an early and successful termination.[60]

In view of these circumstances, it does not seem to admit of doubt that the English ministers deliberately sought to provoke the declaration of war which was made by the French. It is almost equally apparent that the reasons which have been considered do not afford a satisfactory explanation of the purposes of the English administration. Therefore, it is proper to inquire whether there is evidence of other motives for such a war than those which were assigned at the time it was begun. From the discussions in the succeeding chapters we shall hope to show that England's chief purpose in the contest which followed was to reduce the power of her ancient rival and to obtain possession of its colonies. In the negotiations for peace in 1796 and 1797 it will be found that the English ministers insisted on retaining the more valuable of their conquests as a sine qua non of the pacification, until they were forced by internal difficulties to become less pretentious in their

[60] Several occasions have already been indicated on which Lord Grenville expressed to Lord Auckland his confidence in the superiority of the preparations which England had made for war to those of the French.

When Pitt, on January 20, 1793, told Loughborough that he had decided to go to war, he proceeded, according to Malmesbury's record of Loughborough's statement, to add:—

"That the nation was now disposed for war, which might not be the case six weeks hence. That we were in much greater forwardness than the French. They had only six ships of line in the Mediterranean—we upwards of twenty; that he had two millions ready, and that he trusted the surplus of his permanent revenue would be £600,000 a year. That the Dutch were quite right, and in earnest; that Russia was willing to go all lengths; that Spain was ready to join, and that all the little powers only waited on our giving the signal." Malmesbury, Diaries and Correspondence II, 502.

In a letter to Westmoreland, on December 9, 1792, the minister said, apropos of the prospective outbreak of hostilities, "The spirit of the country seems within the last ten days to have taken so favourable a turn that I think we may look with great confidence to the event, especially as our revenues in point of finance are such as will exceed expectations." Salomon, William Pitt I, 599. See also, Wilberforce, Life of William Wilberforce II, 10; Hansard, Parliamentary History XXX, 557.

claims. Taken together, these facts are, to say the least, significant.

In this connection it is well to observe the state of mind of a supporter of the administration after the events of August, 1792, in France. On the twenty-eighth of that month a newspaper which supported the minister made this suggestion: "The consequence of a war at this time between France and Great Britain would be that the former would be dispossessed of all its possessions both in the East and West Indies; that the works of Cherbourg would be destroyed; and that our quondam rival would be unable again to lift her head as a maritime power for at least a century—perhaps two."[61] The same paper concluded on the following day: "If the mind of Mr. Pitt were not as generous as it is confessed to be enlightened, France, for a perfidy that has been constant, might receive such a check as would humble her for ages. From India the French might be driven at once by the army of Cornwallis; and the West Indies might also be freed from a people which has become the natural enemy of Britain."[62]

These quotations indicate a state of mind which at that time was natural to a patriotic Briton. The French government seemed to be entirely disorganized; the country had been wasted by several years of continuous internal disorders. It was, therefore, not strange that, to an Englishman, France appeared to have lost the chief elements of her former greatness and to lie helpless at the feet of Great Britain.

It is not possible to indicate a specific moment when the mind of the English minister ceased to be as enlightened as it was stated to be by his editorial partizan. We have already pointed out that there were several reasons why, under the existing conditions, the war could not have been begun immediately, even if it had been thought desirable. A pretext had to be found by which it could be justified to other nations, and more especially to the English Parlia-

[61] The Oracle, August 28, 1792. [62] The Oracle, August 29, 1792.

ment and people. A strong opposition party, which had already thwarted one of the hostile projects of the minister, had to be divided and weakened. At the same time, the popular mind had to be excited to such a sense of danger from the French that hostile measures against them would receive general support.

By October 15, 1792, Pitt wrote to Auckland that his preparations for war had already been carried to such an extent that it was necessary to call Parliament at an early date.[63] The efforts to divide the Whigs, which had been begun for other reasons, were persisted in with vigor, and the propaganda of opposition to French principles was also continued. But up to this time no pretext existed which could justify an interference in continental affairs. When the news reached England that the French had officially determined to open the Scheldt, that want, as we have seen, was supplied. No time was spent in ascertaining the wishes of the Dutch. On the other hand, the communications which were immediately sent to the ambassador at The Hague implied that hostilities had been decided upon. In the meantime, within less than a week after this news was received, an extraordinary measure was put into effect which was intended to have the double result of forcing the division of the Whigs and inciting in the minds of the people a hostile attitude toward the French. Organizations sprang up immediately to carry on this movement. Enmity to France was preached from the pulpit, heralded in the press, and distributed in tracts upon the streets. At the time of the execution of the French king the excitement in England had reached its height. By December 18, 1792, Burges wrote to Auckland: "The spirits of our people are higher than you can imagine. There appears to be but one sentiment throughout the country—that of loyalty to the king—affection to the existing constitution—ardour to support it—and an earnest desire to go to war with France."[64] We are therefore not surprised that, with

[63] Auckland MSS. XXXIV, 85. [64] Auckland MSS. XXXV, 161.

reference to the execution of Louis, Grenville could write on January 24, 1793, the day that the news was received, "I cannot describe to you the universal indignation it has excited here."[65]

The ministerial correspondence and the editorials have the appearance of a premeditated program, with which certain diplomatic activities are in accord. In the early days of December, 1792, at least two members of the British cabinet were intriguing with a loyalist sympathizer from Guadalupe to provoke resistance to the authority of the National Convention in the French West Indies, with the understanding that England would send assistance in the probable case of the outbreak of hostilities between that power and France.[66] When Loughborough, on January 20, 1793, was finally induced by Pitt to take the Great Seal, the latter mentioned as one of the advantages which he anticipated from the war the conquest of the French colonies.[67] An editorial which appeared on the day before the news of the French declaration of war reached England in a paper that supported the policies of the administration, concluded with these significant words:—

> France is the only power whose maritime force has hitherto been a balance to that of Great Britain, and whose commerce has rivaled ours in the two worlds; whose intrigues have fomented and kept alive ruinous wars in India. Could England succeed in destroying the naval strength of her rival; could she turn the tide of that rich commerce, which has so often excited her jealousy, in favour of her own country; could she connect herself with the French establishments in either India, the degree of commercial prosperity to which these kingdoms would then be elevated would exceed all calculations. It would not be the work of a few years only, but would require

[65] Dropmore Papers II, 373.

[66] A minute of the interview from which these facts are taken is preserved in the Public Record Office. The interview took place on December 5, 1792, between Lord Hawkesbury and Mons. de Curt. It may be found in Foreign Office Papers, France, Vol. 40.

[67] Malmesbury, Diaries and Correspondence II, 501. Malmesbury recorded that Loughborough told him "that war was a decided measure; that Pitt saw it was inevitable, and that the sooner it was begun the better. That we might possess ourselves of the French islands, that the nation was now disposed for war, etc." Loughborough came from a conversation with Pitt directly to Malmesbury.

ages for France to recover to the political balance of Europe that preponderancy which she enjoyed previous to the Revolution. Such is the point of view under which government ought to consider the commercial interests! The indispensable necessity of extinguishing the wide spreading fire, whose devouring flames will sooner or later extend over all Europe; and the well grounded confidence of disembarrassing the commerce of Great Britain from those impediments which have so often clogged its wheels; these reasons, added to the prospect of annihilating the French marine, ought to determine us to immediate war.[68]

Such was, probably, the twofold motive which led William Pitt to launch England on a war which he erroneously believed would be of short duration. He desired to prevent the further spread of French arms and French ideas; but he also desired, and it was a matter of far greater significance, to complete the task which had been begun by his father. He expected to wrench from France both her conquests and her colonies, and to leave to the remnant of her population, in a reduced territory, the apparently impossible task of rebuilding the institutions and power which had been destroyed.

One of the first measures taken by the new European league against France points to the same conclusion. In the early days of April, 1793, the nations which were engaged in hostilities against the French sent representatives to a conference at Antwerp. Auckland announced that England was in favor of retaining conquests that might be made. As her share, he mentioned Dunkirk and the French possessions in the East and West Indies as desirable and appropriate.[69] The war went on and, if the newspaper which was said to be an authentic source of the views of the ministry is to be believed, the British demands were "indemnity for the past and security for the future."[70] In-

[68] The Times, February 8, 1793.

[69] For accounts of this conference see Auckland's despatches in the Public Record Office, F. O. Holland, Vol. 47. Also a despatch of Tauenzien on April 23, 1793, as quoted by Sorel, L'Europe et la Révolution Française III, 366–367; Sybel, Geschichte der Revolutionzeit II, 220; Häusser, Deutsche Geschichte vom Tode Friedrichs des Grossen I, 491.

[70] True Briton, December 25, 1794.

deed, Pitt himself expressed the same view on the floor of the house as early as June, 1793.[71] So persistent were the ministers in their demand for indemnity that, when in the autumn of 1793 they issued a manifesto for the purpose of enlisting the aid of royalists in France, the right to such a return was insisted upon.[72] How consistently this purpose was pursued and the circumstances that finally dictated its partial abandonment will appear in the following pages. Pitt had begun an undertaking which proved to be far more difficult than he had supposed.

[71] Hansard, Parliamentary History XXX, 1013.
[72] London Gazette 1793, 947.

CHAPTER V.

The Union of Parties.

Not until July, 1794, did Pitt finally persuade the Duke of Portland to sever his relations with Fox. This consummation of the efforts of the minister was not without significance for the success of his plans, but it should not be imagined that the coalition was so persistently urged because the ministers were fearful for the safety of the nation. It would be equally incorrect to conclude that this remnant of the aristocratic party which now joined the administration had experienced any change of principles. It requires only a brief recapitulation of the circumstances which have been described to make this apparent.

The old Whig party never acted together again after the meeting of Parliament in December, 1792. The schism had been growing since the discussions on the subject of parliamentary reform in the spring of the same year, and before the outbreak of the war with France there had been a realignment which had left little more than the names of the former Whigs and Tories. There were now two parties under the respective leadership of William Pitt and Charles James Fox. In neither was there marked solidarity, either of principles or of purposes. The party which supported the administration favored a war with France and were opposed to parliamentary reform, but the motives assigned for these views were by no means the same in all cases. The aristocratic members, who had recently been added, were opposed to reform on principle or from interest, and favored the war because they believed that the existing institutions were in danger. Those who were more nearly in accord with the views of the minister professed to oppose reform because they deemed it inexpedient under the existing conditions. They favored the war, in part at least, because they

believed that England could obtain by it certain coveted commercial and colonial advantages. The remnant of the aristocratic Whigs, who under the leadership of the Duke of Portland still adhered to Fox, really had few views in common with him. They were like those who had formally joined the ministerial party in opposing reform and supporting the war. In everything except name they were members of Pitt's party. The real opposition was composed of Fox and the half hundred Commoners and half dozen Lords who consistently favored reform and opposed the war. But since the early months of 1792 a third party, which as yet had taken no part in the government, had begun to make its appearance. Its membership was chiefly among the non free-holding class in the cities and towns, and it could give expression to its desires only through addresses, petitions, and public appeals. Singularly enough, its platform had been formulated a decade before by the Duke of Richmond and tolerated, if not assented to, by William Pitt. The most significant political changes which occurred in the next few years were the growth of this third party and the final separation of the friends of the Duke of Portland from Fox and those who advocated a conservative reform.

The ministers kept up their efforts to gain other individual members of the opposition after Loughborough accepted the Great Seal in January, 1793, and Sir Gilbert Elliot and Malmesbury gave favorable replies shortly afterward. Lord Carlisle became a knight of the garter in June.[1] Gradually others accepted honors or offices from the administration.[2] The Duke of Portland still continued steadfast, though supporting the immediate measures which the ministers proposed. On September 29, 1793, Burke sent him an elaborate paper in an effort to convince him that Fox was a traitor and to persuade him to join the

[1] Carlisle Papers, 701.

[2] Morning Chronicle, December 2, 1793. A list was given of those who had received honors and emoluments up to this time, and their offices were named.

administration.[3] The duke replied that he would continue to support the government as long as he believed that the condition of the country made it necessary, but that he was still unable to see sufficient reason for doing more. He concluded: "Farther than this I cannot go; and so far seems to me to be advancing no farther than I have done, and should consider it my duty to do, in any occasion of peril or importance to my country. In this I may be mistaken, as I may have been in other instances; but I must acknowledge, that when I have been in long habits of intimacy and friendship, when I have observed many and striking instances of very superior talents and judgment, the most incomparable integrity, the most perfect disinterestedness, I am much disinclined to impute to bad motives a conduct, however different and opposite it may be to that which I feel myself obliged to hold. This may be a great weakness, but it is a weakness I am not ashamed of confessing."[4] Windham, though still refusing to withdraw from the duke's party, confessed that he found it difficult to meet the arguments with which Pitt importuned him.[5]

The propaganda which had been begun among the lower classes in 1792 was kept up with considerable vigor along the same lines. As a natural result of the system of spies and informers which had been inaugurated, several acts of injustice were committed on the pretext of punishing sedition. On May 27, 1793, John Frost was convicted for seditious words, said to have been uttered on November 27, 1792. He was charged with having said, in a coffee-house, when half intoxicated, that he was in favor of equality and no king.[6] In the course of the year several others were convicted on less substantial evidence. Perhaps the most flagrant case was that of William Winterbotham, a dissent-

[3] Observations on the Conduct of the Ministry, Particularly in the last session of Parliament: addressed to the Duke of Portland and Lord Fitzwilliam. Burke brought fifty-four charges against Fox.
[4] Fitzwilliam, Correspondence of Burke IV, 165.
[5] Baring, Diary of the Right Honourable William Windham, 277–278.
[6] Howell, State Trials XXII, 471–522.

ing minister. He was accused of having made seditious utterances in a sermon which was preached on November 5, 1792, in commemoration of the Revolution of 1688. No complaint had been made to the authorities until a month after the sermon was delivered. The statements with which he was charged had been written down from memory by the witnesses for the crown, who had also waited a month before making their notes. Winterbotham, as well as others who had heard him, denied that he had used such expressions. Yet he was convicted and sentenced to fine and imprisonment.[7] Under the more rigorous procedure of the Scottish courts, Muir and Palmer had already received even heavier sentences for similar offences.

In the meantime, since the events of December, 1792, the papers which supported the administration had made almost daily attacks on both the public and private character of Fox. The Morning Chronicle did not exaggerate when it

[7] Howell, State Trials XXII, 823–876. The more important of the statements of the preacher which had fixed themselves so firmly in the memories of his hearers were given as follows in the indictment:—

"The laws made at that time [1688] have been since abused and brought into disuse; and it behooves me to speak of the present times."

"Why are your streets and poor houses crowded with poor, but because of oppressive laws and taxes? I am astonished that you are quiet under these grievances, and do not stand forth in defence of your rights."

"You fancy that you are under a good government and mild laws, but it is no such thing."

"When there is a demand made to the House of Commons for a supply, they deny it at first, and on a second demand, there are two thirds or three fourths will grant it, and they will share it among them."

"We have as much right to stand up as they did in France for our liberty."

"His Majesty was placed upon the throne upon condition of keeping certain laws and rules; and if he does not observe them he has no more right to the throne than the Stuarts had."

"Under these grievances 'tis time to stand forth in defence of your rights."

As an enlightening commentary on the ability of these witnesses to remember so accurately, one of them thought that "Stuart" meant "some office under the crown."

For other sources of information concerning these and the other trials which will be referred to, see the pamphlets the titles of which will be found in the appended bibliography.

said on January 2, 1794: "Mr. Fox, for more than twelve months past, has been most violently attacked in a continued series of ministerial libels, without the least proof of any mismanagement in office, or dishonourable practice in opposition. Thus unblemished in his public conduct, indefatigable pains have been taken to blacken his private character; and when facts are wanting to support the attempt, bad intentions are alleged against him as a positive charge."[8]

In January, 1793, Fox had written a justification of his conduct in his Letter to the Electors of Westminster.[9] On February 20 the Whig Club, from which the seceding members of the party had not yet withdrawn, formally assured the discredited leader of its confidence.[10] In consequence of this action, Elliot, Windham, Sheffield, Burke, and forty other members sent a public letter of resignation from the organization.[11] But as late as January 15, 1793, the club had drunk the regular toast, "The Duke of Portland and the Whig interests," while his grace was present and had a share in the festivities.[12] The duke had also continued to maintain his former attitude toward Fox.

During the early months of 1794 other circumstances arose which caused the ministers to continue their efforts to induce the Duke of Portland himself to withdraw from his relations with Fox. The campaigns in the East and West Indies had been successful, but the results on the Continent had not been so satisfactory. The failure of the siege of Dunkirk and the evacuation of Toulon left many things to be desired, since it was largely in the continental

[8] For confirmation of the facts which are stated in this paragraph, it is only necessary to examine the columns of any of the papers which were supporting the administration. Few days passed that they did not contain some reference of this kind.

[9] A Letter from the Rt. Hon. Charles James Fox to the worthy and independent Electors of the City and Liberty of Westminster, January 26, 1793.

[10] True Briton, February 23, 1793. A copy of the resolution which was sent to Fox was published at the expense of the club, in all the papers.

[11] True Briton, March 6, 1793.

[12] Morning Chronicle, January 16, 1793.

struggle that the French had to be reduced to the necessity of acceding to the English conquests in other quarters. It began to look as though Fox might find additional supporters of his proposed motion for peace. The Duke of Leeds was half inclined to take some step in that direction.[13] Lord Sheffield, who had been active in support of the measures which the ministers had taken in December, 1792, wrote to Auckland as early as September 12, 1793:—

"I am by no means edified by the state of things at Dunkirk. I fear there is no ground for supposing Toulon in our possession except that of Pitt's luck. If something very extraordinary does not happen, he and the war will be in a damned hobble."[14] Again, the same nobleman wrote on January 5, 1794, "You would all be kicked out before the end of the session if there was a suitable man to put in the place of Pitt."[15]

To make matters more embarrassing for the ministry, the king of Prussia was asking for financial assistance to carry on the war. Malmesbury had been sent to Berlin in the latter part of 1793. On January 9, 1794, he wrote to Pitt: "The question reduces itself to a very narrow compass. Can we do without the King of Prussia, or can we not? If we can, he is not worth giving a guinea for; if we cannot I am afraid we cannot give too many. We must only look to making the best and quickest bargain possible, to purchasing him as reasonably and binding as fast and securely as we can."[16] Such demand involved additional expenditure, and would darken still more the fair financial prospect with which the ministry had embarked on the war.

Hostilities had hardly begun before the country entered upon a serious financial crisis. Almost every gazette in the spring of 1793 announced a number of bankruptcies.[17] The effects of this crisis were felt in the manufacturing as well

[13] Leeds MSS. VIII, 108. Leeds wrote to Loughborough, and therefore his intentions were known to the ministers.
[14] Auckland MSS. XLI, 68.
[15] Auckland, Journal and Correspondence III, 168.
[16] Dropmore Papers II, 494.
[17] London Gazette, 1793.

as the commercial towns.[18] If the statement of the Morning Chronicle may be accepted, the gazettes did not tell the entire story. "Alarming as is the catalogue of ruin in every gazette, it does not exhibit a tenth part of the distresses of the day; every man in an extensive trade receives hourly information of unpaid bills, and houses on which he has claims praying for time."[19] On the same day that this statement was published, the minister suggested in the House of Commons a select committee "to take into consideration the present state of commercial credit."[20] Four days later a report was made, after much discussion and consultation with men who had extensive commercial and financial interests. According to this report, there had been an excessive issue of notes by banks which did not have sufficient capital to provide for their redemption. The run on these banks had extended to financial institutions which had no part in this issue, but which, as a result of it, were unable to realize a sufficient amount on their securities to meet the demands which were made on them. When these notes were suddenly either redeemed or discredited, an insufficient circulating medium was the result. This difficulty was increased because of the fact that bankers were obliged to keep on hand a larger reserve fund than was customary, and the amount of circulation was thereby further diminished. Consequently, the merchants had goods which they could neither dispose of nor use as a security for borrowing the money which they needed. The manufacturers were likewise affected, since they were not only deprived of their usual orders from the merchants, but were also unable to secure the loans which were necessary to make their regular payments. The committee did not believe that the situation

[18] The Oracle, March 1, 1793:—
"Since the resolution for war the manufacturers at Birmingham, Sheffield, Manchester, etc., experience a stagnation of trade. In the uncertainty of affairs, the merchants are afraid to fulfil their commissions, and have consequently, for the present, abandoned all thoughts of exportation, when so much is to be hazarded and so little gained." This paper supported the administration.

[19] Morning Chronicle, April 25, 1793.

[20] Hansard, Parliamentary History XXX, 739.

could be remedied without extraordinary measures. Therefore it was recommended that five million pounds of exchequer bills be issued bearing interest at a rate of slightly more than three per cent. These bills were to be distributed to those who were in need of them, and were to be secured by the goods of those to whom they were issued, which in their turn had to be placed in one of several towns which were designated. This suggestion was incorporated in a bill which was passed on May 3, 1793,[21] but needless to say the industrial and financial activities of the kingdom did not immediately recover from such a depression. Toward the end of the year relief had to be sent from London to workmen who had been deprived of employment.[22]

In view of these circumstances, we are not surprised that Grenville found a general indisposition in the House of Lords to come forward and take an active part in support of the administration. As a consequence, he was obliged to ask Auckland to second the address in reply to the king's speech at the opening of Parliament in January, 1794.[23] The former ambassador had been elevated to the English peerage as a reward for his services at The Hague in 1792.[24]

On March 7, 1794, Grenville expressed his regret to Mal-

[21] Hansard, Parliamentary History XXX, 740–766.

[22] Morning Chronicle, December 14, 1793. Critical Review IX, 584, December, 1793:—

"The arguments of opposition writers have received some additional force from the alarming and affecting distresses of the manufacturing poor. It has been alleged with a colour of truth that the miseries of the Spitalfield weavers could not be altogether the effect of the war, but though this assertion be admitted in its fullest extent, still it will not apply to the cotton and other manufacturers which have certainly been greatly distressed and nearly ruined by the war; nay we have good authority to affirm that the manufacturers out of employment at Manchester and other places have been reduced to the sad necessity of applying to neighbouring breweries for an article which had been usually set apart for the nourishment of quadrupeds; and that the grains have been latterly the food of those who had formerly lived with decency and comfort."

[23] Auckland MSS. XLI, 347, Grenville to Auckland, January 16, 1794.

[24] Auckland MSS. XXXIX, 436. Eden had been raised to the Irish peerage as Baron Auckland in September, 1789.

mesbury that the king of Prussia seemed disinclined to fulfil his engagements;[25] four days later, Sir Morton Eden wrote from Vienna lamenting the "want of decision" on the part of the Austrian court.[26] There was, therefore, no lack of reasons why the ministers should desire to destroy, as far as possible, any nucleus for an opposition party. As long as the support which the Duke of Portland gave to their measures was voluntary, this had not been done, and his grace was considered free to withdraw his support whenever he liked. Hitherto the duke had resisted the seductions of office to which some of his former partizans had proved themselves susceptible. Manifestly, then, he had to be persuaded that the country was in some immediate danger before he would yield to the importunities of his friends who were pleading the cause of his former political enemies. The fertile mind of the minister seldom failed to take advantage of circumstances, and the reign of terror which had been inaugurated in December, 1792, had succeeded admirably in aiding his policy. What was more natural then than that he should make use again of a similar scheme? The reform societies, which, as organizations, had so far escaped any public opposition from the government, furnished a sufficient basis for agitation, and these now became objects of attack.

We do not propose to describe in detail the organizations for promoting reform which existed in England at this time. Perhaps it is no longer necessary to point out that they were not the bodies of discontented men associated for treasonable purposes which they were alleged to be, but were societies composed of persons who believed that there was need of reform in the existing system of parliamentary representation. Their avowed purpose was to influence public opinion in favor of these reforms. They endeavored, therefore, to give the widest possible publicity to their proceedings. In spite of this, they were accused of having secret intentions, and strenuous efforts were made by the

[25] Dropmore Papers II, 516. [26] Dropmore Papers II, 525.

ministry to prove that such was the case. Spies and informers were introduced into their councils as members, and the records of their proceedings were given to juries, accompanied by all the testimony which it was possible to adduce against them. Despite these efforts, it proved impossible to demonstrate to the satisfaction of an English jury that these men had been guilty of doing more than advocating in an extravagant manner the reforms which they favored. This failure is the more remarkable when we realize that the persons so charged were members of a class of English society unaccustomed to any part in public life. The English administration soon began to interfere with portions of their proceedings which were regarded as cherished rights, yet they never professed, publicly or secretly, to desire to do more than reform the representation in the House of Commons. Such was the character of the societies which will be presently considered, and a careful search has failed to disclose any associations in England at this time with more radical intentions.

How far the revolutionary movement in France gave rise to or encouraged these associations is an interesting, if not very fruitful, subject for speculation. It does not seem capable of definite demonstration. In order to make this conclusion clear, it will be necessary to examine briefly the circumstances attending the origin of these societies. The Friends of the People have been referred to already. Among the other organizations, which deserve consideration and were typical of the rest, stand the Society for Constitutional Information and the London Corresponding Society.

The Society for Constitutional Information was instituted in 1780, and therefore was hardly inspired by the French Revolution. It had some of the same members in 1794 who had been present at its organization, but it was not at this time as flourishing as it had been formerly and was by no means, in point of numbers, one of the most im-

portant reform societies which existed in London.[27] In the spring of 1790 Henry Flood, an old-time opponent of the government, had revived the subject of reform by his motion in the House of Commons.[28] The measure was lost, but it served to increase the amount of attention given to its consideration outside of Parliament. In some instances the societies which had been founded in the early eighties took on new life, and other organizations of a similar nature came into existence. The Manchester Constitutional Society had its beginning in October of the same year.[29] In the next year the Society for Constitutional Information in Sheffield had its birth. In view of the discussions which followed, the declaration to which the members of this organization had to subscribe is not without interest:—

> I solemnly declare myself an enemy to all conspiracies, tumults, and riotous proceedings, or maliciously surmising any attempt that tends to overturn, or in any wise injure or disturb the peace of the people, or the laws of the realm: And that my only wish and design is, to concur in sentiment with every peaceable and good citizen of this nation, in giving my voice for application to be made to parliament, praying for a speedy reformation and an equal representation in the House of Commons.[30]

The society which attained the most considerable membership did not originate until the latter days of 1791 or the early part of 1792. It was conceived and instituted by Thomas Hardy, a shoemaker, who became its first secretary. If the statements of the founder may be credited, this project was suggested to him by the earlier tracts of those who had established the Society for Constitutional Information and had carried on the earlier reform agitation.[31]

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[27] Wyvill, Political Papers II, 463. The three volumes of this collection form a convenient source for reference as to the nature of these societies and as to the reform movement which was begun before the end of the American war. Other publications are noted in the appended bibliography.

[28] Hansard, Parliamentary History XXVIII, 452–479.

[29] Wyvill, Political Papers II, 570.

[30] Wyvill, Political Papers II, 578.

[31] Francis Place MSS. IV, 18. Hardy wrote in a letter in 1799:— "In the months of November and December 1791 my leisure hours

Hardy drew up a plan for his proposed society modeled largely upon the existing organizations of that kind. The preamble to this plan was as follows: "It has been a long and very just complaint that the people of this country are not equally represented in Parliament. Many large and populous towns have not a single representative." Details were added to substantiate this assertion, and the following conclusion was stated in the words of a public letter written by the Duke of Richmond: "We are more and more convinced from every day's experience that the restoring the right of voting universally to every man not in-

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were employed in looking over and reading some political tracts which I had formerly perused with much pleasure during the American war: Among them were a great variety published gratis by the Society for Constitutional Information at that time, and some excellent pamphlets written by Granville Sharpe, Major Cartwright, Dr. Jebb, Dr. Price, Thomas Day, Rev. Mr. Stone, Capel Lofft, John Horne Tooke, Thomas Goodend, Lord Somers, Duke of Richmond, Sir William Jones, Davenant, etc. From the small tracts and pamphlets written by these really great men, much political information was diffused throughout the nation at that period by their benevolent exertions. The sphere of life in which I was necessarily placed allowed me no time to read larger books, therefore those smaller ones were preferred which were within the compass of my ability to purchase and time to peruse, and I believe they are the most useful to any class of readers. Dr. Price's celebrated treatise on Civil Liberty was the first that confirmed me in the opinion that the American war was both impolitic and unjust. After reading and attentively considering the short statement of the representation which was published by the Society for Constitutional Information, although it was an imperfect statement, yet it was very evident that a radical reform in Parliament was quite necessary. I at first imagined that it might be possible to begin a society in London of those who had no vote for a member to represent them in Parliament, such as the populous parishes of St. Giles, Mary-le-Bone, Bloomsbury, and all those of every parish in London, Westminster and Southwark, who were not housekeepers, but who were arrived at the years of maturity, and who had an inherent right to vote, but were unconstitutionally deprived of it by an arbitrary statute enacted in the eighth year of Henry VI. I supposed that such a laudable scheme only wanted a beginning, and by persevering to obtain it. Upon farther investigation of the subject I found that it was impossible to establish a society to have any effect upon so narrow a scale. For it is as clear as a mathematical axiom that the whole mass of the people are unrepresented or misrepresented. Therefore I relinquished that ideal plan and formed another on a larger scale which included all classes and descriptions of men (criminals, insane and infants alone excepted) agreeable to the plan of the Duke of Richmond, Major Cartwright, Dr. Jebb, etc."

capacitated by nature, for want of reason, or by law for the commission of crimes, together with annual elections, is the only reform that can be effectual and permanent."

Following this preamble were eight simple rules, which constituted the basis for the organization. It was to be a self-governing society composed of persons who did not have the right of suffrage and had been residents of Great Britain for at least one year. Each new member was to be recommended and seconded by other members, and his name and address were to be recorded. The purpose of the association was to be the realization of the platform suggested in the quotation from the Duke of Richmond's letter. The means to be used were organization, discussion, and correspondence with other societies which had been instituted for a similar purpose. When the membership exceeded twenty, the association was to be separated into two bodies, and this process was to be kept up as the divisions grew, thus enabling the membership to multiply without increasing the size of each body beyond the point favorable for discussion.[32] This plan was submitted to a small number of Hardy's acquaintances, and, on January 25, 1792, the first meeting was held. In the declaration of their intentions, which was made shortly afterward, reasons for a reform were urged with the concluding resolution: "That this society do express their abhorrence of tumult and violence and threat, as they aim at reform; not anarchy, but reason, firmness, and unanimity are the only arms they themselves will employ or persuade their fellow citizens to exert against the abuse of power."[33] In spite of repressive measures which might reasonably have been made the pretext for a different procedure, the London Corresponding Society adhered to the letter of this promise, at least until after the measures taken in 1796, which is as far as this inquiry has been concerned.

Whether this society would have come into existence, or the others would have continued their organization, if the

[32] Francis Place MSS. IV, 20. [33] Francis Place MSS. II, 4.

French Revolution had not occurred, it is impossible to say. There is no evidence to show that the leaders of these associations ever proposed anything more than a reformation of the House of Commons. They invariably offered such reform as a panacea for all the political ills of which they complained. It had not required the French Revolution to call attention to the abuses which they desired to remedy, or to suggest the methods of organization and the propaganda which they adopted. It is more probable that the chief impetus was given by the circumstances which attended the war for American independence.

We do not imply by this statement that these societies did not take cognizance of the French Revolution or regard it with sympathy. They but followed the course of the radical Whigs in Parliament. On several occasions they sent felicitous addresses to the legislative bodies of the French, after the precedent set by the Revolution Society in 1789. Perhaps the most extravagant of these addresses was that prepared in the autumn of 1792 by the London Corresponding Society, and sent by that association in conjunction with several others. Yet even this address contained no stronger words than the following: "Warm as are our wishes for your success, eager as we are to behold freedom triumphant, and man everywhere restored to the enjoyment of his just rights, a sense of our duty as orderly citizens forbids our flying in arms to your assistance. Our government has pledged the national faith to remain neutral. In a struggle for liberty against despotism, Britons remain neutral. O Shame! But we have entrusted our king with discretionary powers, we therefore must obey. Our hands are bound, but our hearts are free, and they are with you."[34]

There was no attempt to conceal their sympathy with what they believed was an effort on the part of the French to improve their government. But toward the conditions in England the societies took a different attitude, and threaded their way through the intricate maze of political theories

[34] Francis Place MSS. IV, 46.

with remarkable precision for men with untrained minds. They consistently maintained that England needed reform and not revolution.[35]

Beginning October 29, 1793, an attempt was made to hold at Edinburgh a general convention of representatives from the societies in Great Britain which were organized for promoting parliamentary reform. The London Corresponding Society and several others from the English manufacturing towns sent delegates, but the majority were naturally from Scotland. The "British Convention of Delegates of the People, associated to obtain universal Suffrage and annual Parliaments," as this body styled itself, held fourteen sessions, in which the chief point at issue seems to have been whether it would be more proper to petition the king or the Parliament for the reforms which were desired. On December 5, the day appointed for the fifteenth sitting, the secretary of the convention and several other members, including the delegates from the London Corresponding Society, were arrested, and the papers of the convention confiscated. On the same day the lord provost of the city ordered the assembly to disperse. On the next day the sheriff broke up the meeting, though it was not

[35] A broadside addressed to Parliament and the people of Great Britain, published in the excitement of the closing days of 1795, gave a statement of the general views of the society which accorded with what had been its practice:—

"With respect to particular forms and modifications of government, this Society conceive, and ever have conceived, that the disputes and contentions about these, which have so often distracted the universe (like bigoted attachments to particular forms of worship) are marks only of weak and inconsiderate minds that in the pursuit of fleeting shadows forget the substance. Their attention has been uniformly addressed to more essential objects—to the peace—the social order—and the happiness of mankind; and these they have always been ready to acknowledge and believe might be sufficiently secured by the genuine spirit of the British Constitution. They have laboured, therefore, with incessant application, not to overthrow, but to restore and realize that constitution; to give practical effect to those excellencies that have been theoretically acknowledged; and to reform those corruptions and abuses, which, while some have attempted to justify, no one has had the hardihood to deny."

The numerous resolutions, tracts, petitions, broadsides, etc., which the society published agreed with what has been said of it.

necessary to use force, as the members readily submitted to the authority of the law. Skirving, the secretary of the convention, and Gerrald and Margarot, the delegates from the London Corresponding Society, were tried for seditious practices before the High Court of Justiciary at Edinburgh in January, 1794, and they were all transported to Botany Bay for fourteen years. The minutes of this convention are published as a preface to the report of the trial of Skirving, and give no indication that these delegates were engaged in more than fruitless discussions of the questions which they believed were involved in a reform of parliament. The style of the debates was such as would be expected from a body of men who felt their importance, and who lacked the mental balance of education. It is not necessary to agree with the later advocates of reform, who characterized as martyrs these men who were here convicted, but it is difficult to discover in the testimony which was adduced any justification for the sentences which were imposed.[36]

[36] For the trials of Skirving, Margarot and Gerrald, see Howell, State Trials XXIII, 391–1012. These reports naturally contain a considerable part of the materials for the history of the British Convention. Other extracts from the papers which had been seized were included in the reports of the secret committee of the House of Commons, which will be described later. The accounts in the contemporary newspapers add nothing that is new, and it has not seemed worth while to give specific citations. The titles of several pamphlets concerning the subject will be found in the appended bibliography. Some additional papers relating to the part which the London Corresponding Society had in the convention may be found in the Francis Place Manuscripts in the British Museum. An interesting example of these is the instructions which were given to Margarot and Gerrald by the society:—

"I. He shall on no account whatever depart from the original object and principles, viz. the obtaining annual Parliaments and universal suffrage by rational and lawful means.

"II. He is directed to support the opinion that representatives in Parliament ought to be paid by their constituents.

"III. That the election of Sheriffs ought to be restored to the people.

"IV. That juries ought to be chosen by lot.

"V. That active means ought to be used to render every man acquainted with the duty and rights of jurymen.

"VI. That the liberty of the press must at all events be supported, and that the publication of political truths can never be criminal.

On February 28, 1793, Sheridan moved in Parliament that the "house constitute itself a committee to inquire into the truth of the reports of seditious practices in this country."[87] On the day before he had called on Hardy, who offered to show him all the papers and correspondence of the society of which he was secretary.[88] It was but little more than two months previous to this time that Parliament had been summoned on account of an alleged insurrection. Obviously, Sheridan's purpose was to call attention to the excuses which the ministers could offer to support their action on that occasion. In the hurry of events at that time, all inquiry into the nature and extent of the alleged insurrection had been omitted, and it was only reasonable that those who had not agreed with the measures which had been taken then should now desire to investigate the assertions on which such measures had been based. But the motion which Sheridan brought forward was negatived after a warm opposition by the supporters of the government. The proposals and methods of the societies were well known, and any dangers which might result from them were already apparent, yet they were permitted to carry on their propaganda until the next year.

If the diary of an interested person may be relied on, the ministers had not ceased their proposals for a political arrangement which would include the adherents of the Duke of Portland. In April or early in May, 1794, Dundas called on Windham for the professed purpose of conferring as to the growth of the political clubs, which were alleged

"VII. That it is the duty of the people to resist any act of Parliament repugnant to the original principles of the constitution; as would be every attempt to prohibit associations for the purpose of reform.

"VIII. That this Society, considering all party names and distinctions as hostile to the general welfare, do absolutely restrict their delegates from assuming or accepting of that nature.

"IX. This society do further require their delegates to be punctual and frequent in their correspondence with this society."

Francis Place MSS. II, 75.

[87] Hansard, Parliamentary History XXX, 523.

[88] Howell, State Trials XXIV, 1100. Sheridan testified to this fact in the trial of Hardy.

to be seditious. But this lieutenant, whom Pitt found so useful, contrived to turn the conversation to the proposed alliance. Windham answered that he would ascertain the sentiments of the duke.[89]

On May 12, a few days after this conference, Dundas presented to the House of Commons a message from the king, which gave information of the seizure of the papers of the London Corresponding Society and of the Society for Constitutional Information. Several of their leaders had been arrested at the same time. On the following day the papers which had been seized were presented to the house under seal. Pitt immediately moved that they be referred to a committee of secrecy. In reply to a criticism by Fox, Dundas justified the seizure on the ground that treasonable practices had been alleged. On the fifteenth the committee was chosen by ballot, and naturally, although Windham became a member, none of the friends of Fox were selected. On the next day the minister, as chairman of the committee, made a preliminary report, in which the societies were charged with "uniformly and systematically pursuing a settled design which appears to your committee to tend to the subversion of the established constitution." This charge was based in part on the assertions that as early as the spring of 1792 one of the societies applauded the proposal to publish a cheap edition of Thomas Paine's Rights of Man. The report stated that "this single circumstance would in the judgement of your committee, leave little doubt of the real nature of the designs entertained by this society." It further asserted that proposals had been made to assemble, under the color of advocating reform, a convention intended "to supersede the House of Commons in its representative capacity, and to assume to itself all the functions and powers of a national legislature;" and it alleged, in conclusion, that although the committee had not "yet had the opportunity of investigating as fully as they could wish," still, "it appears to your committee,

[89] Baring, Diary of the Right Honourable William Windham, 308.

that in some of the societies referred to, proposals have been received, and that measures have recently been taken, for providing arms to be distributed among the members of the societies." With the same qualification, the committee reported that there had been "some indications of a disposition to concert means for forcibly resisting such measures as may be taken for defeating" the accomplishment of the treasonable purposes. Excerpts and quotations from the papers which had been seized accompanied the report. From these extracts it is apparent that, in spite of the purpose for which the selections had been made, the proposed convention had no other object than to obtain "in a constitutional and legal method" a "full and fair representation of the people of Great Britain."[40] At the conclusion of his speech, in which he perverted and misinterpreted the evidence presented in order to make it support his contention, Pitt moved for leave to bring in a bill to suspend the Habeas Corpus Act so far as it related to persons who were conspiring against the person and government of the king. Fox, in his reply, ridiculed the arguments of the minister, and pointed out that no evidence had been produced of intentions on the part of the societies which had not been publicly known before. But Pitt was certain of his power, and the bill was finally passed at three o'clock on the morning of May 18, in spite of a filibuster by the supporters of Fox. On May 22 the measure was approved by the Lords, though Thurlow said that, in his opinion, the evidence submitted would probably support no more serious charge than sedition.[41]

In the meantime, the negotiations with the Duke of Portland were temporarily interrupted by the illness of his wife.[42] On June 6, 1794, Pitt made to the house a second report from the committee of secrecy. This report attempted to justify the hints, which had been thrown out in

[40] Parliamentary Papers XIV, No. 112. Hansard, Parliamentary History XXXI, 471–497.
[41] Hansard, Parliamentary History XXXI, 497–606.
[42] Baring, Diary of the Right Honourable William Windham, 311.

the first report, of evidence sufficient to show that the societies were arming their members. The further suggestion, that the societies were preparing to oppose by force the measures of the administration, had to be omitted, since there was no evidence to support such a charge. As proof of the first statement, a letter was introduced, said to have been found unopened among the papers of Hardy,[43] which purported to be from an individual at Sheffield, offering to furnish pike blades of a good quality for a shilling each to those who would send the "money with the order." Although the report did not mention that the letter was found unopened, the ministers apparently believed that this fact alone was not sufficient to support the charge which they had made. Accordingly, they brought forward a series of letters bearing dates from May 19 to June 2, 1794, supposed to have been written from Whitehall by Dundas to Pitt, and professing to contain information that evidence had been discovered in Scotland of a treasonable conspiracy which had been undertaken by persons who had been prominent in the British Convention. An appendix contained numerous papers of the societies which had been omitted from the first report.[44] As a result of this report and of a briefer one by the committee of the Lords, addresses to the king were proposed in both houses, in the upper house on June 13 and in the Commons three days later. Naturally they were carried without difficulty.[45]

Whether moved by his fear for the safety of the country, by the seductions of place, or by the persuasions of his friends, the Duke of Portland was now on the point of yielding to the insistent efforts of the ministers. The negotiations had been renewed, and the only question that remained to be settled was the price of the alliance. It was proposed that a third secretary of state should be appointed. Pitt's original intention seems to have been that the Duke

[43] Howell, State Trials XXIV, 667, 1005.
[44] Parliamentary Papers XIV, No. 115. Hansard, Parliamentary History XXXI, 688–879.
[45] Hansard, Parliamentary History XXXI, 909–931.

of Portland should ostensibly succeed Dundas as home secretary and should have charge of the correspondence relating strictly to the affairs of Great Britain and Ireland. Dundas in turn was to become secretary of state for war, and to retain the management of the colonies and the war.[46] After accepting the offer, the duke professed to have misunderstood the proposition, and expressed a determination to withdraw from the arrangement. Thereupon, on July 5, the minister wrote to Grenville suggesting that Portland be given the foreign department, since he did not feel disposed to leave the management of the war to the former Whig nobleman. Grenville, in exchange, was to have the position that Portland had refused.[47] The minister received on the same day a favorable response to his request, and resumed his negotiations with the duke.[48] In a conversation on July 7 Pitt offered to take the colonies from Dundas and add them to the office which had been proposed for Portland.[49] This was a satisfactory solution to all of those concerned except Dundas, who did not quite justify the minister's confident belief in his pliability. On July 9 he wrote to Loughborough that he intended to resign that portion of his duties which would be left to him under the proposed arrangement. The chancellor immediately sent the letter to Pitt, who lost no time in writing to persuade Dundas to retain his position,[50] and even asked the king to unite with him in his plea.[51] A satisfactory understanding was eventually reached.

A week after this had been done, the True Briton, the "authentic vehicle" of the views of the ministers, announced that the internal circumstances of the country had happily, of late, "very considerably improved;" that the union of all good men for the preservation of the con-

[46] Stanhope, Life of William Pitt II, 252.
[47] Dropmore Papers II, 595.
[48] Dropmore Papers II, 596.
[49] Dropmore Papers II, 597. Baring, Diary of the Right Honourable William Windham, 314.
[50] Stanhope, Life of William Pitt II, 253.
[51] Stanhope, Life of William Pitt II, 254.

stitution, added to the energy of government, had tended "to crush the spirit of treason and sedition that had begun to manifest itself, and which created such just alarm in the breasts of all truly and sincerely interested in the welfare of the country;" that the additions made to the ministry, "by the accession of those respectable noblemen and gentlemen who no longer think it prudent to preserve the distinction of party," was such as to give "the most solid satisfaction to the country at large, as the most unequivocal proof, not only that the former measures of ministers, from conviction of their propriety, have produced unanimity, but that the same powerful principle will actuate all future deliberations and resolves of the executive government."[52]

In other words, now that the result which the ministers desired had been attained, the sedition had vanished. Yet the London Corresponding Society was still engaged in its propaganda in favor of annual parliaments and universal suffrage, and was collecting funds for the defence of the prisoners who were confined in the Tower to await trial on the charge of treason. But so far as the ministry was concerned the society had served its purpose. The energetic measures which had been adopted were as effective in arousing new zeal in the supporters of the government as they would have been if a real danger had been disclosed. There was now little prospect that the Duke of Portland and his friends would ever join with Fox in successful opposition to the policies of the government. Pitt was therefore free to carry out his plans on the Continent without fear of hindrances in domestic politics. This was no mean consideration, for it was now apparent that the war would last longer and cost more than he had imagined when he began it.

On July 15, the same day on which the True Briton an-

[52] True Briton, July 15, 1794. On July 29 the same paper said:—"We heartily wish that our affairs on the Continent had as favourable an aspect as our affairs at home.—For here we have a union of all that is respectable in politics against a very few discontented; etc."

nounced that the dangers from treason had vanished, Pitt set down in the form of a minute his plans for the future. These plans had to do in part with military operations to come and in part with measures for securing the conquests which had been made.[53] They only serve to confirm the opinion presented in an earlier chapter of this study as to the purpose of the English minister in promoting the war.

While arrangements were being made for carrying out these plans for foreign conquest, which were destined to meet with indifferent success, delayed justice was being

[53] Dropmore Papers II, 599. This document is described as a "Minute of Mr. Pitt in reference to military Operations against France."

AUSTRIA.

"To represent the necessity of concerting vigourous measures for the protection of the Dutch frontier, and for keeping up the communication with Condé, Valenciennes, Quesnoy, and Landrecies, and to state the force applicable to those purposes.

"To insist on a change of commanders.

"To concert further measures for increasing the Austrian force on the side of Flanders, if possible, in the course of this campaign, and at all events, before the opening of the next, to at least 100,000 effective.

"To agree on the acquisitions to be made by Austria, without which no peace shall be made but by their consent, provided they agree to keep up the stipulated force, and not to make peace without our consent, or without our retaining the acquisitions which we have now or shall have made in the East and West Indies, and provided they also agree to the cession desired by the Dutch.

"If these points are settled, to offer either to conclude immediately a treaty of defensive alliance, or to agree to conclude it at the end of the war.

"To agree on a concert of measures with the Princes, and on taking steps to assist the levies of French troops, as well as on the recognition of the French King, and the Regent, as soon as any footing shall be gained in the interior of France.

"To ascertain whether any pecuniary arrangements are necessary and practicable to enable Austria to prosecute the war vigourously for at least two campaigns after the present.

PRUSSIA.

"To insist on the immediate march to Flanders of the army under M. Möllendorf; and on its being completed, without loss of time, to the number stipulated by the treaty.

"To express a readiness to enter into a full explanation as to the acquisitions to be made by Austria and to engage to form a mutual guarantee of our respective possessions as they may stand at the peace.

"To propose, as soon as the present force is completed to its stipulated amount, to subsidize an additional body of 30,000 men."

meted out to those who had been accused of treason. On October 8, 1794, Hardy, Tooke, and Thelwall, three of the prisoners who had been confined in the Tower, were tried before a Commission of Oyer and Terminer on the charge of high treason. They were acquitted, and consequently the remaining prisoners were dismissed without trial. Those who had been charged with the same offence in Scotland had a different fate. Robert Watt seems to have been an ignorant, ambitious, religious enthusiast. He had connected himself with the reform societies as early as 1791, and, with a view of securing advancement for himself, had communicated with Dundas for the purpose of giving him information concerning them. These communications had continued until August or September, 1793, according to Watt's confession. He had taken part in the British Convention, and, subsequent to the dispersal of that body, had, on his own initiative, organized a small committee which proceeded to take several curious measures. He had caused a few pikes to be made, which, he said, were both for sale and for distribution. Forty-seven of them were found. With these arms, and the five or six men who were involved, he proposed to take Edinburgh, and afterwards London and Dublin. He affected to have believed that as soon as his program was begun, "persons in various ranks of society would carry it on." The only defence which he offered on his trial was his correspondence with Dundas and the lord advocate in 1792 and 1793. Watt and David Downie, who had been engaged with him, were convicted and received the rigorous sentence of the Scotch law.[54] Downie was

[54] True Briton, September 12, 1794. The following sentence was pronounced:—

"You, and each of you, prisoners at the bar, are to be taken from the bar to the place from which you came, from thence to be drawn upon a hurdle to the place, there to be hanged by the neck, but not till you are dead; for you are then to be taken down, your hearts to be cut out, and your bowels burned before your face, your heads and limbs severed from your bodies and held up to public view, and your bodies shall remain at the disposal of his Majesty; and the Lord have mercy on your souls!"

The king ordered that the sentence be mitigated, and that the severing of the head be the only mutilation.

Morning Post, October 11, 1794.

afterwards pardoned, and the only one to suffer was he who, though from questionable motives, had formerly been zealous in behalf of the government. Perhaps his punishment was just, yet it is impossible not to remember that he had previously been in communication with the ministers, and that his harmless plot came to light at an opportune moment for assisting them in producing the evidence which they sadly needed. It was also alleged that he had been urged by a visitor to change his confession after he had written it.[55]

[55] Morning Chronicle, November 28, 1794.
For information concerning all of these trials, see Howell, State Trials XXIII, XXIV, XXV. See also numerous pamphlets of which the titles will be found in the appended bibliography. Full reports and numerous paragraphs of comment appeared in the contemporary newspapers.

CHAPTER VI.

Pitt at His Zenith.

Since 1792 William Pitt had been ruling England according to the dictates of his own will. He had not obtained his power by any usurpation of functions which did not properly belong to his office. He did not retain it by opposing his wishes to the desires of a majority of the governing body. His method was to manipulate the men on the political chess-board in a manner that would give him the appearance of acting in accordance with the popular wish while in reality he was carrying out his own plans. From this distance it may be difficult to agree with the wisdom of his policy of attacking France in 1792, though the attendant circumstances probably made his estimate of his prospective enemy a natural one. His conduct of the war after it was begun may be open to serious criticisms, but it is easier to form judgments after events have occurred than it was to make plans for situations of which history afforded no previous examples. Yet even under adverse conditions Pitt maintained the government of England during a most critical period of European affairs. In 1797 he admitted that his plans abroad had been defeated, and yet there was no other person thought of to take his place. From the point of view of the people and the nation, his measures had resulted in little but ill. In the maintenance of his own power, he had proved himself a master hand at the political game.

In May, 1793, George Rose, his secretary of the treasury, had told Pitt that the attack upon France would not be received in England as favorably as would his defending of Holland unless it should be attended with brilliant success.[1] The minister was now confronted with the danger against

[1] Auckland MSS. XXXIX, 437, Rose to Auckland, May 10, 1793.

which Rose had warned him. From the beginning of the war the government had resorted to loans to finance the operations, but it had also been compelled to impose new taxes, and, in February, 1795, the True Briton announced that "there never was in this country so large a sum raised in one year by taxes as that which is intended in the present."[2] Obviously, it was necessary to maintain the enthusiasm of the people in order to gain their support for projects which required such impositions. The problems confronting Pitt were as follows: to conduct a continental war, relying for support on powers which were kept in the struggle chiefly by the force of English subsidies; to devise loans and taxes sufficient to provide the funds for satisfying the demands of his allies, in addition to the expenses which attended his own operations on the Continent and in England's more peculiar domain; and lastly, to convince the people who must provide these funds that there were any good and sufficient reasons for such an extensive outlay. Any one of these obligations was sufficient to overtax the ability of an ordinary man. The object of this chapter is to explain the means which he used for accomplishing the last of these undertakings. Never does the minister seem to have lost sight of the fact that, if he was to play successfully the rôle which he had attempted, he must keep the people firm in the belief that they were opposing real dangers, against which they ought to bring all of their strength. Furthermore, none of his other measures met with as great success as those which he instituted for the purpose of preventing complaints from the taxpayers on whom the burdens of the war rested most heavily.

After 1792 the clergy of the established church were among the most active agents for indoctrinating the people with a belief in the necessity of the governmental measures. Their part in the events of that year has been mentioned. After the war began, fast days were appointed on which they were expected to discourse on political topics, and the

[2] True Briton, February 26, 1795.

celebration of the martyrdom of Charles I was also revived.[3] But, in many cases, the clergy did not await an appointed day for discussion of the political situation. The doctrines of these patriotic divines were in harmony with the principles of the British constitution which they believed to be divinely inspired and were wholly antagonistic to the principles of the corresponding French institutions which they viewed as proceeding from a radically different source. Consequently to them the war was almost a holy contest, and the measures of the ministers were deserving of their loyal support.[4] Such views were not, of course, the results

[3] True Briton, January 30, 1793:—

"It has not been very customary of late years for much observance to be paid to the anniversary of the 30th of January; but we are inclined to believe that this day will be more particularly distinguished, from the peculiarly afflicting circumstances of the present times. We understand, and we hear it with satisfaction, that there will be a very full attendance of both Houses of Parliament."

The date was also celebrated at other places. The titles of some of the sermons preached will be found in the appended bibliography. In view of this celebration, it is interesting to observe the attitude that had sometimes been taken toward the celebration previous to the discussions which arose subsequent to the French Revolution. It was related that one humorous divine took as an appropriate text the passage: "O give thanks unto the Lord, to Him who hath smote great Kings." Another, still bolder, chose the suggestive statement: "By this time he stinketh."

Public Advertiser, February 1, 1790.

[4] It will be possible to cite only a few passages from some of these sermons. The titles of others will be found in the appended bibliography.

"Blessings Enjoyed by Englishmen," etc. "Sermon preached in Greenwich Church April 19, 1793, by Andrew Burnaby." After reciting the blessings of the British constitution, the preacher continued:—

"France, a prodigy of every crime and enormity under heaven—after overturning the altars of her god;—after imbruing her hands in the innocent blood of her sovereign;—after trampling upon the most sacred rights;—after violating every principle of virtue, truth, justice and humanity; and after devastating every city and province in her own territories;—France, after exhibiting the most dreadful spectacle to the world, which must strike horror and dismay into every, both present and future generation, is endeavouring in defiance of repeated professions, and in open violation of the most solemn treaties, to rob and despoil us of the blessings here enumerated."

On the same date, W. Gilbank, in his sermon on the "Duties of Man," said among other things:—

of any direct injunctions or requests of the ministers. The appeal to the clergy was of a more subtle character. Their fears were excited and their ambitions ministered to under the cloak of inspiring them to patriotic exertions.[5] The

"We have, therefore, most sincerely to beg of God to continue us in the possession of a constitution, which in its principles, at least, seems to be at the summit of political perfection." Further on he concluded: "The time would fail me to enumerate all the blessings which the lower orders of this kingdom possess and the numerous causes which they have to be quiet and mind their own business."

James Scott, D.D., in a sermon preached at Park Street Chapel on the same day, spoke of the reform party, which he described in this way:—

"That unnatural faction, who openly declare themselves the advocates for Gallic anarchy, and under the plausible pretence of reform would introduce here the same scenes of confusion, blood and horror. Influenced by motives equally sordid and dangerous, have we not seen them conspire against the honour of their sovereign, the majesty of the constitution, and the happiness, and I had almost said the very existence of the country. It is a fortunate circumstance, however, that in all their agonies and contentions for power, they have betrayed such a shameless contempt of character, such a bare-faced and profligate prostitution of principle, that they are become the detestation and horror of all good men."

Rev. John Gardiner on the same day preached a sermon at St. Mary Magdalen, Taunton. He concluded his description of the French with these words:—

"Such then are the characters—barbarous regicides, infidels and atheists, plunderers and assassins, monsters in philosophy—savages in cruelty—such are the characters against whom Great Britain has been compelled to unsheath the sword."

That the enthusiasm did not wane as the war went on, witness a quotation from a sermon preached in the same church in 1795:—

"Alas, if the Ministers of God were to be silent on this subject—if they did not again and again resound in your ears, that in the present extraordinary war the interests of religion, as well as humanity, are at stake—the stones of these walls, the vaults from under your feet would cry out."

Finally, in 1796, Alexander Hewatt, D.D. (the author of a history of South Carolina), in discoursing on "Religion essential to the Being and Happiness of Society," found occasion to say:—

"Times were, when we were taught to believe that the Rulers of the people could do no wrong. Now the case is reversed, and the doctrine of the new school is, that the people can do no wrong. Their voice is blasphemously pronounced to be the voice of God. But woe to that nation, where the people's voice is the supreme law; and to that individual whose life is at the mercy of a popular tribunal."

[5] The case was well stated by the Rev. J. H. Williams, vicar of Wellsbourne, in his introduction to the two sermons which he preached on the fast days of 1793 and 1794. These sermons had been unfavorably criticized by the supporters of the administra-

effects of these pulpit discourses and of subsequent publications were of too complicated a character to admit of satisfactory analysis here. The general attitude of the people toward the church, the esteem in which the individual clergymen were held in their respective communities, the political functions which they were accustomed to assume, and many other similar conditions would have to be ascertained before a rational estimate could be made. Therefore, it is only possible to say that, to a considerable degree, the ecclesiastical organization seems to have been a factor

tion, and were published as a justification of the preacher. In his introduction he said:—

"Though some of us may think that we are more properly at our post, when we are standing upon the watch-tower and giving notice of the approach of moral or religious foes; yet a crafty statesman soon contrives methods to bring us down into the field. By the allurements of honour and reward, by the delicate operation of character, by an artful and delusive connection of his own ambitious measures with the order of civil society, which our conscience tells us we are bound to support, he leaves us no neutral point to stand upon; he makes us combatants, often without our knowledge, and sometimes against our will. But there is nothing more mortifying to an ingenious spirit, than to feel the supernal pressure, in matters which belong more peculiarly to ourselves; or in plainer words,—the not being suffered to do our own business in our own way. Now the whole and sole business of a parish priest is this, by the influence of his example, and by the frequency and soundness of his instruction, to promote the general cause of virtue and religion, and to increase the number of real Christians and good men. This is the vineyard that he is hired to labour in, and this labour is worthy of its hire; for a real Christian and a good man can never make a bad citizen. But in this even path of his vocation he is not always suffered to proceed. It is not sufficient, in the opinion of his secular masters, that he strive to make men good Christians, and by consequence, good citizens and good subjects; he must form his flock into good politicians also; he must teach them that secular orthodoxy, to which he himself has never subscribed; he must show them those signs of the times which he himself is unable to discern. For this purpose the trumpet is blown in Sion, and a War-fast is proclaimed. Thus the infallible authority of fallible men which the church had once so shamelessly enforced, is in her turn retorted upon herself, at a period when her reason is less able to acquiesce in it, and she is required to persuade a pious assent to the justice and necessity of a war by the united voices of all her ministers; some of whom may possibly object to its justice, many of whom may be unconvinced of its necessity, and almost all of them, by being happily excluded from the cabals of the factions and the cabinets of the authorities, must be deprived of all solid judgement, either as to the actual grounds of its provocation, or the real objects of its prosecution."

in keeping before the people a favorable view of the measures of the government.

Meanwhile, events had been occurring which made it more necessary than ever that the ministers should continue their efforts to preserve good feeling among the people. It had become impracticable to defend the Dutch any longer, and, on November 18, 1794, it was decided at a cabinet meeting to inform the stadtholder that England would not object if Holland should accept the French proposals for peace.[6] On April 17, 1795, news reached England that peace had been made with France by Prussia.[7] In August of the same year came information of a similar action on the part of Spain.[8] The aid given to the loyalists in France had been productive of no apparent results, except to impose additional burdens of expense upon England. The expedition to Quiberon, which had promised so much, had been a failure. Though treaties were concluded with Russia in February, 1795,[9] and with Austria in May of the same year,[10] the latter carried a provision for a loan of four million six hundred thousand pounds, which the ministers had to provide for and at the same time defend in Parliament. The ministerial measures were certainly not prospering as well as might be wished.

In the spring of 1795 a difference of opinion came perilously near causing a serious breach in the cabinet. Pitt, though he had refused to pay the subsidy promised to Prussia in the treaty made in 1794, on the ground that the conditions had not been complied with, now came forward with a proposal to do so. Grenville thought that such a proposal would endanger the negotiations then in progress with Russia and Austria, and would bring no real benefit to England, even if successful. He believed that the attempt to make such a treaty would "weaken if not destroy

[6] Dropmore Papers II, 646. The treaty with Holland was signed May 16, 1795. Martens, Recueil de Traités VI, 92.
[7] Dropmore Papers III, 57.
[8] Dropmore Papers III, 93.
[9] Martens, Recueil de Traités VI, 10–23.
[10] Martens, Recueil de Traités VI, 64–87.

any hope of obtaining the support of Parliament for another campaign." Therefore he refused to agree to the measure, and tendered his resignation. In spite of this embarrassing circumstance, Pitt proposed to go ahead with his own plans, when the conclusion of the treaty between France and Prussia, at Basle, put an end to the project, and made it unnecessary that the disagreement between the ministers should become public.[11]

The administration was able to derive as little satisfaction from the internal affairs of England as from those abroad. There had been a serious drouth in 1794.[12] Supplies from the Continent had been interfered with by war, and as a consequence the price of corn in the summer of 1795 was double what it had been in the previous year.[13] Meetings were held and remedies for the scarcity discussed. Sometimes agreements were made to abstain from certain varieties of food, and instructions for preparing palatable dishes without the use of corn were published. A considerable tax was imposed on the use of hair-powder, which, it was supposed, would lessen the quantity of flour used for that purpose.[14]

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[11] Dropmore Papers III, 25–31, 50. For a more detailed discussion of this incident, though from a somewhat different point of view, see E. D. Adams, Influence of Grenville on Pitt's Foreign Policy, 31–36.

[12] Morning Post, July 19, 1794:—

"From every part of the Kingdom we hear of the uncommon heat, and the want of grass for cattle; many thousand farmers in Devonshire, Oxfordshire, Warwickshire, and other highlands have turned them into the hay fields instead of mowing the grass."

Morning Chronicle, June 23, 1795:—

"To such a degree is the scarcity real, that according to the opinions of the persons best acquainted with the subject, if the rains had been but a fortnight later in setting in, London must have been in absolute want for bread; for such would have been the melancholy prospect of a general failure of a crop, that no man who had wheat in his possession would have thought it safe to part with it at any price."

[13] London Gazette 1794, 1795, contains regular quotations of the price of grain. On September 27, 1794, the average price of wheat in England and Wales was given as 50s. 10d. per quarter. By August 15, 1795, it had risen to 115s. 7d.

[14] Gentleman's Magazine LXV, 523. This is an account of a Court of Common Council of London held June 17, 1795, at which a committee was appointed to look into the means for reducing

When Parliament met in the autumn of 1795, the minister himself moved that a select committee be appointed to take into consideration the high price of corn.[15] The Privy Council had previously taken steps to ascertain the cause and extent of the scarcity and to alleviate it.[16] The situation was clearly the result of circumstances that could not be immediately remedied; but hungry people do not stop to reason, and there were serious bread riots in a number of towns.[17]

These conditions, which seemed to be in part a result of the war, did not serve to render less obnoxious the burdens of taxation which had to be borne. The public mass-meetings of the London Corresponding Society were attended by increasingly large numbers. At several of these

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the high price of provisions, and to take into consideration means for relieving the poor from the hardships resulting from the high price of bread.

Gentleman's Magazine LXV, 542. Some persons at Birmingham agreed to abstain from the use of wheat bread at any meal except breakfast, and to use only a moderate quantity at that time. Vegetables were to be substituted for it. This was to be done in order that the poor might have more bread.

Gentleman's Magazine LXV, 563. It was suggested that the government prohibit the making of biscuits, rolls, cakes, or pastry, or any other bread except household bread, etc.

Gentleman's Magazine LXV, 697. The members of the Privy Council signed an agreement to use in their families no bread of a greater fineness than the standard wheaten bread, and recommended that others do the same.

Morning Chronicle, July 15, 1795. The merchants, bankers, and traders of London, in a meeting, suggested that steps be taken "to promote the general use of that sort of bread which is made of the whole produce of the wheat," and to set on foot other remedies of a similar nature.

See the appended bibliography for the titles of pamphlets relating to this subject.

[15] Hansard, Parliamentary History XXXII, 235.

[16] Morning Chronicle, March 18, 1795. Gentleman's Magazine LXV, 611.

[17] Gentleman's Magazine LXV, 343. London Packet, June 24–26, 1795. Morning Chronicle, July 11, 1795; August 12, 1795. The Oracle, June 26, 1795; July 1, 1795; July 10, 1795. The Telegraph, June 25, 1795.

The Oracle, which supported the administration, said on July 1:—

"The tumults which prevail in the interior parts of the country, on account of the dearness of provisions, are much more general and alarming than the public are at present aware of."

The remedy proposed was that the people eat less.

meetings food was distributed, a feature which probably served to swell the attendance. The petitions to Parliament and the king and the addresses to the nation at large now included a prayer for peace, as well as appeals for "annual parliaments and universal suffrage." The high price of food was attributed to the war, and was urged as a reason why the petition should be granted. Yet, in spite of these circumstances, even the papers which supported the administration were obliged to admit that these immense meetings were conducted in an orderly manner, and broke up without any disturbance of the peace. It would seem to be a significant comment on the character of those who were the leaders of this popular movement that they were able to conduct assemblies estimated as numbering from ten to one hundred thousand men in such a manner that no disorders resulted. As there were ample reasons for asserting that the affairs of the nation were being mismanaged, and as a scarcity of food does not tend to increase the affections of a people toward their government, such moderation bears eloquent witness to the loyalty of the mass of the common people toward the existing constitution.[18]

The London Corresponding Society was not the only organization of this character favoring a peace. Meetings were held at other places under different auspices, and resolutions were adopted which signified the same desire.[19] But the ministers, through their newspapers, still insisted that, "by a little perseverance, we shall ultimately obtain our great objects—indemnity for the past and security for the future; without both of which, peace, we should dread,

[18] Morning Chronicle, June 30, 1795; July 1, 17, 1795. The Oracle, June 30, 1795; October 27, 1795. The Telegraph, July 1, 1795. The Times, June 30, 1795; October 27, 1795. Gentleman's Magazine LXV, 609, 874.

Much information concerning these meetings may also be found in the Francis Place Manuscripts in the British Museum. The titles of broadsides, pamphlets, etc., will be found in the appended bibliography. The meetings were held after public advertisement, and the proceedings were given as wide publicity as was practicable.

[19] Morning Chronicle, January 31, 1795; July 14, 30, 1795; September 12, 1795. Debrett, State Papers III, 340–347.

would be the certain death blow of the independence of the British nation."[20] It was, however, evident that if the administration was to stem the growing popular disapproval of its measures and to obtain sufficient funds wherewith to preserve its aggressive attitude, other expedients must be devised for arousing the people at large to a proper pitch of indiscriminating enthusiasm.

Accordingly, it was arranged that, in the king's speech at the opening of Parliament on October 29, 1795, the hope should be expressed that the existing situation in France might terminate in "an order of things compatible with the tranquility of other countries;" but that at the same time it should be clearly stated that the best way to accelerate that end was to prepare for prosecuting the war, and that, therefore, exertions were being made to improve England's naval superiority, and to carry on vigorous operations in the West Indies.[21] In reply to criticisms from the supporters of Fox, Pitt asserted that, "on a general review of the state of the country ten months ago, and at the moment he was speaking he felt no small degree of satisfaction." The argument which he put forward to sustain this contention was that by the depreciation of the assignats France had been reduced to such a condition as to render it almost impossible for her to continue the war. He believed, therefore, that the proper course for England to pursue was to continue the war for a short time longer, thus forcing the French to sue for peace.[22]

But, on the day that Parliament assembled, before the king's speech was discussed in the House of Lords, Grenville brought forward another matter which for the moment served to distract the attention of the people from the financial burdens of the war. This new distraction was an alleged attack upon the person of the king. We need not charge the ministers with instigating such an act in

[20] True Briton, December 25, 1794; January 26, 1795. The Sun. November 3, 1795.
[21] Hansard, Parliamentary History XXXII, 143.
[22] Hansard, Parliamentary History XXXII, 182.

pointing out that they used it to serve their policy, but the circumstances deserve careful consideration. That feature of the attack which received the greatest attention occurred while the king was on his way to attend the opening of Parliament. It seems that a somewhat larger crowd than usual had assembled to witness the progress of the king as he went to perform his official duty. While on his way, a missile of some description, directed from an unknown source by an undiscovered hand, struck the glass door of the coach. This missile was described by one of the attendants as a marble thrown with considerable violence, and by another as a half-penny the force of whose flight had been spent before it struck the glass. Others suggested that it might have been a shot from an airgun. Further report said that persons in the crowd which had assembled cried out, "Peace!" "No War!" "Bread!" One witness professed to have heard in addition the cry "No George!" but another, with an equal opportunity for observation, insisted that he had not heard such an exclamation. It is interesting to note that in the afternoon of the same day the king was permitted to return from St. James without any guards. Four persons were taken into custody at the time of these disorders. One of them was afterwards convicted of saying, "No George." Although a reward was offered, no record has been found of any further information as to the person who threw the treasonable missile.[23]

[23] For accounts of these events see: The Oracle, October 30, 31, 1795. Morning Chronicle, October 30, 31, 1795. The Times, October 30, 31, 1795. History of Two Acts, 12. Hansard, Parliamentary History XXXII, 145–154.

While the Oracle, which had changed owners a short time before, still supported the administration, it was perhaps less likely to color its report of such an occurrence in order to make it conform to a political purpose than either of the other papers which have been examined. Therefore a quotation will be given from the account which it contained on the day after the attack:—

"His Majesty's procession to the House of Peers was yesterday through the greatest concourse of people ever remembered on a similar occasion. The Park, from the Stable-yard to the Horse Guards, was completely filled, as were also the streets from thence to the House of Lords. His Majesty was insulted with groans and hisses, and with a cry of 'No War!' 'Bread!' 'Bread!' 'Peace!'

When the Lords reassembled at five o'clock in the afternoon of the day of the attack on his majesty, they postponed a consideration of the king's speech, and proceeded immediately to examine witnesses with regard to the events which had taken place a few hours before. If the contradictions in this testimony be overlooked and the statements interpreted in the least favorable manner, no evidence was produced which could justify very serious measures. Out of a multitude, many of whom had suffered because of a lack of food, it was alleged that several had been found who gave utterance to seditious exclamations. By some

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At the end of Great George Street, Westminster, some deluded person had the audacity to throw a marble or bullet through the door-glass of the carriage. On his Majesty's return, stones were repeatedly flying from the mob towards the carriage, many of which bruised the yeoman attendants around it. About the middle of the Park another side glass was broken. At the stable-yard-gate, the carriage turning out into the Park, an elderly man, one of the grooms, attendant upon the near wheel horse, was by pressure of the people thrown down, and, shocking to relate, both wheels of that heavy carriage went over him at the upper part of his thighs, before he could be taken up; he was alive when dragged from that horrid situation. At St. James Gate, entering the court yard, another stone passed through the door glass, the splinters from which flew in his Majesty's face. The carriage returning empty to the Mews, was pelted with mud and stones, and every glass in it broke; the coachmen, grooms and horses, received many violent blows with large stones, aimed probably at the carriage. His Majesty, returning about four o'clock from St. James's in his private coach, *without any guards,* was followed by a mob, and assailed with a shower of stones. A party of horse, returning to the Horse Guards, luckily within sight down the Park, were sent for and arrived fortunately in time to protect the King from personal injury."

This report should be compared with the evidence before the House of Lords, which is given in the Parliamentary History. A witness who was in attendance near the carriage testified as follows concerning the return:—

"Anything on the return?—On returning, I heard several somethings come against the state coach.

"What things?—I do not know. I did see one stone, and that about as big as a large walnut.

"Did you go with the coach till it got back to the palace?—Yes.

"Was there a glass broke then?—Entering the stable-yard, I heard something come against the glass."

It will be observed that, subsequent to the pelting which the coach was said to have received after the king had left it, there was no possible way to determine the nature of the damage which it was supposed to have received while he occupied it.

person or persons ineffective missiles had been hurled at the royal equipage. There was not the slightest evidence that any one had conspired to harm the king. Certainly, if such a project had been planned, there could hardly have been a more inane method chosen for putting it into execution. Yet, at the conclusion of the testimony, Grenville moved an address to the king, and invited the Commons to join the Lords in presenting it. He expressed abhorrence of the "daring outrages" which had been offered, and stated, very significantly, that Parliament was confident it would be joined in its address by "all descriptions of your Majesty's subjects." On its face, this address seemed harmless enough, though Lord Lansdowne said in a speech at the time that he believed that "it was no more than a counterpart of their [the ministers'] own plot; the alarm-bell to terrify the people into weak compliances."[24]

On November 4, 1795, the day on which the reward was offered for the apprehension of the persons who had attacked the king, a proclamation was published against seditious writings and practices.[25] In all respects this proclamation was similar to that of May 21, 1792, and similar results followed. Meetings were held in almost every county and borough in the kingdom, and addresses were sent to the king congratulating him on his escape and expressing abhorrence of the attack.[26]

But mere professions of loyalty by people who had never given expression to different sentiments were not sufficient for the purposes of the ministry. It was necessary that there be a specific remedy directed against a tangible danger. The large attendance at the meetings of the London Corresponding Society undoubtedly gave the ministers concern and justly aroused in their minds a desire to curb the growth of a power which might in time threaten the existence of their administration. Therefore it was not strange that Pitt, following the plan which he had formerly found so

[24] Hansard, Parliamentary History XXXII, 154.
[25] London Gazette 1795, 1204.
[26] London Gazette 1795, 1179–1479.

useful, should again make terror the "order of the day," and, that he might increase the popular excitement, should propose regulations which would enable him to repress at his will the proceedings of the societies that advocated reform.

On the day before the publication of the proclamation against sedition, a newspaper which represented the government asserted that the London Corresponding Society had inspired the attack on the king. To support this charge, it appealed to the intuition of its readers, who had been fed daily on highly colored misrepresentations of the purposes of the reformers. On the basis of such evidence, the paper urged that the exigencies of the occasion demanded harsher laws,[27] and in this it spoke for the ministers who had no other excuses or arguments to give in defense of the bills, which they immediately brought forward.

On November 6 Grenville proposed in the House of Lords "An Act for the Safety and Preservation of his Majesty's Person and Government against treasonable and seditious Practices and Attempts." Four days later Pitt moved for leave to bring into the lower house a bill entitled "An Act for the more effectually preventing seditious Meetings and Assemblies." Both bills became statutes, on December 18, 1795, after warm and elaborate discussions both in and out of Parliament. The Treasonable Practices Bill was chiefly designed to give statutory form to the common law practice of interpreting the clauses in former statutes in such a way as to extend widely and often very unjustly the meaning of treason. One section, to remain in force for three years, made it a high misdemeanor to publish or speak anything to incite hatred or contempt of the king, the government, or the constitution.[28] The Seditious Meetings Bill was designed to prevent public assemblies of more than fifty persons unless they were held under the supervision of the government. In order to accomplish this result, the following categories of regulations were provided.

[27] The Sun, November 3, 1795. [28] 36 Geo. III, c. 7.

Before any meeting of more than fifty persons could be held, "for the purpose or on the pretext of considering of or preparing any petition, complaint, remonstrance or declaration or other addresses to the King, or to both houses, or either house of Parliament, for alteration of matters established in Church or State, or for the purpose or on the pretext of deliberating upon any grievance in Church or State," it was necessary that public notice be given by seven householders of the vicinity in which it was to be held. These seven persons had to include in their notice their addresses and descriptions of themselves. These notices either had to be published in a local paper or given to a local clerk of the peace at least five days before the proposed assembly. Meetings of such a nature without notice were unlawful assemblies, and had to be dispersed. If more than twelve persons should remain of such a meeting after it was ordered to disband, they were to be adjudged felons and to be punished by death. If, in the notice or in the meeting, anything should be proposed which provided for altering any established matter otherwise than by the authority of the "King, Lords and Commons in Parliament assembled," or which tended "to incite or stir up the people to hatred or contempt of the person of his Majesty, his heirs or successors, or of the government and constitution of this realm as by law established," it was the duty of the officers of the peace to disperse the assembly in the same manner, although notice had been given. In addition to this, any place where lectures, discussions, or debates on public or political matters were held, and where admission fees were charged, was to be considered a disorderly house, unless those who had a part in its management had secured a license. The officer of the peace could demand entrance to any place at which he suspected that such meetings were being held, and if he was refused admission the house was to be deemed disorderly, regardless of whether the license had been secured. Naturally, exceptions were made in favor of the official meetings which were held in the course of the local administration, and also in favor of universities

and schools. But it was made practically illegal to hold any other public meeting at which an officer of the law was not present, and, a matter of great importance, it was left largely to the discretion of these officers to determine the character of the opinions which it was permissible to express on such occasions.[29]

It is not strange that the reformers in Parliament endeavored to prevent, by every means at their command, the passage of these two acts. Meetings were held for that purpose in all parts of England. The Duke of Bedford presided and Fox spoke at the one which was called in Westminster. The London Corresponding Society held a large meeting at which addresses were voted to Parliament and the king, and a few days later published a broadside explaining the principles of the society. The result of all this agitation was a popular opposition to the policies of the administration more threatening than any which had occurred since the outbreak of the war. Thurlow and Leeds refused to sanction the Seditious Meetings Bill, but, for the most part, the opposition came from the people at large. In Parliament the ministers were as supreme as ever, and the measures which had been proposed were designed to enable them to suppress opposition in any other quarter.[30]

The adherents of the administration were equally determined in their efforts to secure popular approval for the acts. In some instances they arranged that the loyal addresses, called into being by the attack on the king, should contain requests for the passing of such laws, though in at least one instance the personal intervention of the minister was necessary before such request was embodied.[31] It was

[29] 36 Geo. III, c. 8.

[30] Hansard, Parliamentary History XXXII, 244–556. Morning Chronicle, November 17, 19, 20, 25, 26, 1795; December 5, 1795. The Sun, December 3, 1795. The Courier, November 19, 1795. The Oracle, November 13, 17, 23, 25, 1795. The Times, December 8, 1795. History of Two Acts.

See also titles of other pamphlets and broadsides in the appended bibliography.

[31] The Oracle, November 20, 1795; December 3, 1795. The Times, December 4, 1795. Dropmore Papers III, 144–147.

evident from the first, however, that the opposition was conducting a hopeless fight.[32] With the strong support which Pitt had at his command in Parliament, revolution was the only means by which his measures could have been successfully opposed. Such a step had been hinted at as possible by both Fox and the London Corresponding Society, but had been seriously advocated by neither,[33] so that

[32] Morning Chronicle, November 9, 1795. This paper, which warmly supported Fox, said concerning the "Two Acts:"—

"By this bill Ministers declare that his present Majesty, for some unexplained reason, requires that restraints upon liberty, unknown to the constitution of England since the happy revolution, shall be laid upon the people during his life, but that the same restraint will not be necessary afterwards! They call this supporting the King! If this law shall pass, no body of men can assemble either for the redress of grievance, or the repeal of a tax; for the nomination of a candidate or the discussion of a turnpike bill, without being subject on the slightest inaccuracy, or heat of expression, or rather on the base and malignant misconstruction of a couple of Treasury spies, to the penalties of misdemeanour; and this they call maintaining the constitution! Yet this bill will pass into law."

[33] Hansard, Parliamentary History XXXII, 385. On November 23 Fox repeated what he had already said:—

"If the majority of the people approve of these bills, I will not be the person to inflame their minds, and stir them up to rebellion; but if, in the general opinion of the country, it is conceived that these bills attack the fundamental principles of our constitution, I then maintain, that the propriety of resistance, instead of remaining any longer a question of morality, will become merely a question of prudence. I may be told that these are strong words; but strong measures require strong words. I will not submit to arbitrary power, while there remains any alternative to vindicate my freedom."

The London Corresponding Society, in a broadside which was dated November 23, and addressed to the Parliament and the people of Great Britain, said in part:—

"This society have always cherished, and will ever be desirous to inculcate, their most decided abhorrence of all tumult and violence. Anxious to promote the happiness, and therefore jealous of the rights of man, they have never failed to propagate nor to practice the constitutional doctrine of opposing by every peaceable and rational means the encroachments of power and corruption. But they have never countenanced, nor ever will, any motive, measure or sentiment tending to excite commotion—to inflame the mind with sanguinary enthusiasm—or to extinguish the emotions of tenderness and humanity which ought particularly to characterize a free and enlightened nation. At the same time, they do not wish to be understood as giving by this declaration any sort of countenance to the detestable and delusive doctrines of passive obedience and non-resistance," etc.

the minister was now more securely intrenched in his position than ever. He had the support of an overwhelming majority of those who could participate in the government; and he had also the authority to suppress any opposition to his policies which others might arouse. Thus as far as home affairs were concerned his task was reduced to convincing those who had to furnish the means for carrying on the war that such war was not only necessary but also likely to bring a return for what was being expended. To that problem he now gave his attention.

The financial difficulties which presented themselves were sufficient to tax the ingenuity even of Pitt, who had been accustomed to glory in that aspect of his administration. Since the beginning of the war he had made large increases both in the debt and in the amount raised by taxation. On December 7, 1795, when he brought forward his budget for the year, he estimated that a supply of £27,662,000 would be needed. He had previously secured a loan of £18,000,000, but when he brought this fact to the attention of the house, the charge was made that the rate of this loan was unfavorable to the government, and Pitt himself confessed that it had been negotiated in a somewhat irregular manner. To aid in securing the remainder of the necessary amount, increased levies were proposed, including an additional duty of ten per cent. on the assessed taxes, a tax on legacies which were not inherited by lineal heirs, and an increase in the duties on horses kept for pleasure, on tobacco, printed cottons and calicoes, and salt. Resolutions incorporating these items were introduced in the house by Pitt at the conclusion of his speech, and were severally agreed to.[34]

On the day after his financial suggestions had been ratified, Pitt brought forward a message from the king, which announced that the government of France was now such that it was capable of making peace, and that England was ready to begin negotiations for that purpose.[35] In vain

[34] Hansard, Parliamentary History XXXII, 556–569. Morning Chronicle, December 9, 1795.
[35] Hansard, Parliamentary History XXXII, 569.

Sheridan pointed out that four members of the Directory had had a part in sending Louis XVI to his death, and that the ministers had no certain evidence to prove that the government of the Directory would keep its treaties any better than had the government which preceded it. In reply to such criticisms Pitt and Dundas affirmed that France had exhausted her resources, and was therefore at a point where it was to her advantage to make peace, while England on the other hand had made even more important conquests than could have been expected at the beginning of the war, and had ruined the marine and destroyed the commerce of her rival.[36] It may have been true, as Sheridan asserted, that if this announcement of pacific intentions had been made before the negotiation of the loan, it would have resulted in an advantage to the government of nearly a million pounds. But it is very probable that the minister acted more consistently than the opposition orator realized. The policy which Pitt now inaugurated offered two possibilities, either of which would have been of material assistance in obtaining the ends which he had previously pursued. What those ends were, it is not necessary to repeat. Even when he was busiest in his efforts to induce a counter-revolution in France in favor of the dethroned house, he had been careful at all times to refrain from identifying his cause with the fate of the French monarchy. He had admitted that the restoration of the Bourbons would be a most satisfactory termination of the war, but he had never made it one of his chief contentions. He regarded aid to the royalists as merely a justifiable method of warfare. His purpose was to weaken his enemy, though he confessed that he would be glad if the result should be a return of the exiled family. He had not departed from the program which had been announced to Holland before the outbreak of the war, that if the republic in France should

[36] Hansard, Parliamentary History XXXII, 570–608.
For an account of the purpose of the ministers in the king's message, see Grenville's letter to Wickham, December 25, 1795. Wickham, Correspondence of William Wickham I, 228.

become permanent, England would follow the other powers in acknowledging it. His purpose at this time was similar to that which had led him to embark in the contest. He desired to reduce the power of France and to aggrandize England. He now believed that the French had been brought to such a state of exhaustion that they would, in a large measure, submit to any terms of peace which he might see fit to impose.[37] If this should prove to be true, England had only to make the announcement which was contained in the king's message to insure a speedy negotiation. Should such a negotiation terminate successfully, all criticism of his measures would be overwhelmed in the general satisfaction at the conclusion of a successful war. On the other hand, if France should refuse to take advantage of such an opportunity, it would yet serve an equally useful purpose, for the fact that the announcement had been made would enable the administration to command a heartier support for the financial measures which had been brought forward. That the alternatives were not dissociated in the mind of the minister may be inferred from the terms of the king's message. But should the French refuse to make peace then one and perhaps two more campaigns would be necessary, and for these the means had to be procured. This announcement opened the way for more direct proposals to the French, and it was highly probable that such advances would be useful in making it clear to Englishmen that further sacrifices were necessary before a satisfactory peace could be concluded.

Thus Pitt had begun a game in which it was impossible for him to lose, since either position which the French might take would necessarily further his purposes. Regarded from this point of view, the succeeding events are easy of explication. The question which has to be considered is

[37] Dropmore Papers III, 80–86. This memorandum on the state of France, made in the summer of 1795 and based on the reports of English agents, is an interesting addition to the evidence concerning the opinions of the English ministers with regard to the exhaustion of that country.

not whether the English minister desired peace, or was sincere in his efforts to attain it, but rather the nature of the terms which he insisted on demanding.

When it became evident that the French were not eager to accept England's offer of a negotiation, the administration newspapers announced that, though the ministers wished to obtain peace, the time had not arrived when it was wise to make too great sacrifices to secure that end. The True Briton stated explicitly that France must renounce her conquests and indemnify England before peace would be desirable.[38] Even though the French should be disposed to agree to such terms, the paper continued, their newly adopted constitution interposed obstacles which it would be difficult to overcome; for it gave constitutional support to the incorporation in the Republic, one and indivisible, of acquisitions which, according to the demands of England, had to be given up before a peace could be established. In fact, however, the attitude of the French government seems to have been the same as that of the English ministers. The Directory, in announcing on the 12th Nivôse (January 2) their readiness to negotiate for peace, added that the obstinacy of the powers with which they were at war had redoubled their means of conquest.[39] Again, the same body in its message to the Council of Ancients, on the 5th Pluviose (January 25), requesting a tax in kind, asserted that the enemies of France had spoken of peace merely in order to cause the French to relax their preparations, and that they would never know peace until they had rendered it impossible for their foes "to pursue their disastrous projects."[40] This was regarded in England as a tacit refusal by France to make peace except on her own terms, and the partizans of the ministers so accepted it and urged it as a justification for continuing the war.[41]

[38] True Briton, January 23, 26, 1796.
[39] Debrett, State Papers IV, 253.
[40] Debrett, State Papers IV, 184.
[41] True Briton, February 2, 1796.

The measure which was now proposed by the government was not inconsistent with the sentiments already expressed in the True Briton. England and her allies had nothing to lose in making the first advances to France, if that power had determined not to make peace on terms acceptable to them. The English ministers even conceived that they would gain popular support if such a proposal should be rejected by the French. On the other hand, if peace should result on the terms which they were prepared to demand, the project would certainly have proved worth while. Such, at any rate, were the arguments which Lord Grenville used to justify the proposal to the king, and they accord so closely with what would have been expected that there is no reason to doubt that they represented the real views of the ministers.[42] Although the other powers did not join England in this attempt, it was with their consent that Wickham, the English minister in Switzerland, on March 8, 1796, transmitted a note to Barthélemy, the French minister to the same country. In this note the French were requested to give written answers to three questions: whether there was a disposition in France to send ministers to a congress for reestablishing a general peace; whether there was a disposition to communicate to Wickham the grounds of pacification which would be acceptable to France; and whether France had any other method to propose for arriving at a general peace.[43] The reply of the Directory was delivered to Wickham on March 26. In substance, it said that the French ardently desired peace, but were in doubt as to whether the English ministers had the same wishes, since a congress such as had been proposed would necessarily render the negotiations endless

[42] Dropmore Papers III, 169, Grenville to George III, January 30, 1796, referring to a despatch to the British minister at Vienna in which this project was proposed.

Stanhope, Life of William Pitt V, Appendix, 30. In a letter to the king, on January 30, 1796, Pitt had used arguments of a similar nature to support a negotiation.

[43] Debrett, State Papers IV, 254. Wickham, Correspondence of William Wickham I, 269–293. Dropmore Papers III, 172–174.

and seem to indicate that England merely desired to get the benefit of the favorable impression which the first overtures would give. However, the reply went on to say, the Directory was ready to consider any proposals which did not involve a breach of the existing laws of the republic.[44]

The English ministers thus occupied a somewhat anomalous position. They had made the adoption of the new constitution the qualifying act which rendered France capable of carrying on a peace negotiation, yet they now demanded, as a sine qua non, terms of pacification which disregarded the express provisions of that constitution. For this reason it does not seem likely that the ministers seriously anticipated any immediate success in their proposal for a congress. Indeed, Lord Grenville confessed as much when he said in his note to Wickham that the Directory played the game of the English administration even better than had been hoped.[45] The next move was to publish these two notes with an announcement that the state of affairs which they disclosed made the continuation of the war absolutely necessary. This was done on April 10, when the answer of the Directory reached London.[46] The

[44] Debrett, State Papers IV, 255. After expressing doubt of the sincerity of England, the note of the Directory continued:—

"However that may be, the Executive Directory, whose policy has no other guides than openness and good faith, will follow in its explanations, a conduct which shall be wholly conformable to them. Yielding to the ardent desire by which it is animated, to procure peace for the French Republic, and for all nations, it will not fear to declare itself openly. Charged by the Constitution with the execution of the laws, it cannot make, or listen to any proposition that would be contrary to them. The Constitutional act does not permit it to consent to any alienation of that, which, according to the existing laws, constitutes the territory of the Republic.

"With respect to the countries occupied by the French armies, and which have not been united to France, they, as well as other interests, political and commercial, may become the subject of a negotiation, which will present to the Directory the means of proving how much it desires to attain speedily to a happy pacification."

[45] Wickham, Correspondence of William Wickham I, 343. Grenville to Wickham, April 15, 1796.

[46] True Briton, April 11, 1796. Debrett, State Papers IV, 256. Omitting any estimate of the propriety of the action either of the

True Briton made haste to deny that Pitt had departed from his demands of indemnity for the past and security for the future as necessary conditions of peace.[47]

The diplomatic movements which now follow must be studied in the light of various circumstances that were favorable to the policy which Pitt was evidently pursuing. First, it was believed in official circles that if the people of France could be convinced of the responsibility of their government for the continuation of the war, their influence would assist in securing the terms of peace which England was willing to accept;[48] and it was thought that formal communications would supplement the efforts which England still continued to make to foment internal discontent in France. Second, the later financial measures of Pitt were not meeting with his customary success; the circumstances which had attended the award of the loan had not increased the respect of the financial interests for him, with the exception, perhaps, of the lenders; the admitted irregularities which had been involved in its negotiation had been dignified by a parliamentary investigation, which, at Pitt's own suggestion, had been intrusted to a select committee, instead of to the whole house, as Sheridan requested; and it was not difficult for the report to be manipulated so that the chancellor of the exchequer should be acquitted of any more serious offence than carelessness, though the evidence which was brought forward did not place the affair in a very creditable light. The natural result was that it became more difficult for the government to secure a loan except through the same firm, from which £7,500,000 had been obtained on April 15, 1796,[49] and thus

English minister or of the French government, it would seem in any case that Pitt would have acted in a manner inconsistent with his previous policy if he had undertaken to negotiate a treaty on the conditions which the Directory offered.

[47] True Briton, April 20, 1796. Reply to an editorial in the Morning Chronicle.

[48] Wickham, Correspondence of William Wickham I, 343. It has already been shown that Grenville and Pitt expressed this idea in the letters to the king preliminary to Wickham's note.

[49] Hansard, Parliamentary History XXXII, 763–831. Journals of the House of Commons I, 310–360.

the voluntary subscription measure of the following December was made necessary.[50] But it was not only with his loans that Pitt was encountering difficulties. Parliament refused to agree to both his tax on legacies in land and that on prints and calicoes. This opposition evidently came from the landed and commercial classes, and, as a consequence, it became exceedingly important for Pitt to convince them that an honorable peace could not be obtained.[51]

From these facts it is apparent that Pitt had many objects which he hoped to attain by manifesting a readiness to go more than half way in a negotiation, even though he should not succeed in effecting an immediate peace. So long as the French persisted in adhering to the provisions of their constitution, the English minister was safe in offering them any terms provided he demanded at the same time that France give up territories that had already been incorporated in the Republic. It may be urged that such a policy would only encourage the French to persevere in maintaining their equally impossible demands. But our object is simply to ascertain the purpose of the English minister, not to determine its wisdom or propriety. The fact seems to be that for the reasons which have been described he now made another attempt to treat with France.

Pitt was possibly influenced, in the measures which he now adopted, by the declaration of principles put forth by his supporters in the parliamentary election of 1796. The platform of the administration party had been "Peace with honour," but, under the existing system of election, popular sentiment in only a few instances had any effective influence in determining the choice of the representatives. It is not probable, therefore, that the minister was much concerned to give further proof of sincerity in thus assuming an attitude ostensibly favorable to peace. It is more reasonable to conclude that the primary considerations which determined his course of action were the state of the English

[50] True Briton, April 16, 1796.
[51] Hansard, Parliamentary History XXXII, 1032–1041.

exchequer and the situation on the Continent. He thought that Austria would probably embrace a favorable opportunity for making peace with France, and in order to prevent such a step, proposed to offer additional financial aid to the emperor. Nevertheless, he did not think that a policy of subsidy could be successful with Austria for more than one campaign, after which he believed that England would be left to fight France and Holland, and probably Spain, single-handed. He felt confident, however, that his country could successfully oppose them all. In the meantime, he was willing to have Lord Grenville attempt a reconciliation of Prussia with Austria and thus bring about a new concert of action between the three powers, though he owned that he did not think such an effort would meet with success. From his point of view, therefore, the item of chief importance was to keep Parliament in a mood favorable to his financial projects.[52]

Lord Grenville's program was not well received by the king, and still less so by the Court of Berlin.[53] Therefore, the ministry determined, September 2, 1796, to send through the Danish ministers a request for a passport for a British agent to go to Paris. The purpose of this mission was, of course, to open a way to a pacification, if suitable terms could be obtained. In reality, however, this was not anticipated, and the result at which the minister aimed was to put on record the fact that his administration had made every reasonable offer, and that the French alone were responsible for the continuation of the war. If the Directory should consent to enter into a preliminary discussion of terms, the English agent was to insist that France could not retain the Austrian Netherlands. On the other hand, although England had agreed not to conclude the war until Austria had been secured in the possession of the territories which belonged to her at the commencement of hostilities, it was well known that the emperor did not desire to retain

[52] Dropmore Papers III, 214. Pitt to Grenville, June 23, 1796.
[53] Dropmore Papers III, 215–243.

the Austrian Netherlands, but was anxious to exchange them for some other principality, preferably Bavaria. It is evident, therefore, that Pitt did not yet feel that peace was imperative, unless terms which were agreeable to him could be obtained. Since France was not to be allowed to retain the Austrian Netherlands it may reasonably be inferred that the English ministry expected to make material concessions in other directions to France. In a measure, this was true. As an ultimatum, "not to be offered without fresh instructions," the English government was ready to restore all the conquests which had been made from France, and would permit the French to retain Savoy, Nice, "all the conquered countries on the Rhine not belonging to Austria, and the Spanish part of St. Domingo." In addition, the Dutch were to receive back the Spice Islands and other East India possessions. England would retain only "Ceylon, the Cape and Cochin," which her minister described as "the most valuable of her conquests." It will be noted, however, that the English agent was not empowered to agree to these proposals, or even to suggest them as an ultimatum, except by express instruction from his government. But even if this should be done, and the French should accept these terms, it would be necessary that Austria be consulted before the final agreements were reached.[54]

The Danish representatives readily agreed to act as intermediaries, but the Directory again played the game of the English minister better than he expected, or even desired. It sent no reply to the British communication, but De La Croix, the French minister of foreign affairs, verbally informed the Danish representative at Paris "that the Executive Directory of the French Republic would not, for the future, receive nor answer any overtures or confidential papers transmitted through any intermediate channel from the enemies of the Republic; but that if they would send persons furnished with full powers and official papers, these

[54] Dropmore Papers III, 239–242. The plan is detailed in a minute which was submitted to the king and several members of the cabinet before it was put into execution.

might, upon the frontiers, demand the passports necessary for proceeding to Paris."[55] This decision was transmitted to the English ministers on September 23, 1796. If it meant anything, it implied that the Directory believed itself to be in a position to dictate the terms of peace. Under those circumstances the French government could not be expected to disregard that provision of the constitution upon which it had formerly insisted so vigorously. At this juncture Pitt was about to launch his financial measure which depended for success in no small part upon his ability to convince the men of means in England that he had used every reasonable method to secure peace. Therefore, in order, as far as possible, to secure unanimity at home, and at the same time to convince the people of France that their government alone was responsible for the continuance of the war, he decided to press the matter to an issue with the French Directory.

Grenville, in a letter to his brother, September 24, substantiates this view of the situation:—

> The Directory has sent us the most insolent answer that can be conceived; but as the substance of it is in some degree ambiguous with respect to the main question of granting or refusing the passport, it has been thought better not to leave a loophole of pretence to them or their adherents here, to lay upon us the breaking the business off. Another note is therefore to be sent today, by a flag of truce from Dover, in which the demand of the passport is renewed in such terms as seem most likely to bring that point to a distinct issue, aye or no. In other times this last step would not only have been superfluous, but humiliating; in the present moment, the object of unanimity here in the great body of the country, with respect to the large sacrifices they will be called upon to make, is paramount to every other consideration.[56]

The French readily sent the desired passport, and, in order to give the attempt greater dignity, Lord Malmesbury was substituted for F. J. Jackson, minister of legation at Madrid, whom the British government at first intended to

[55] Debrett, State Papers V, 169–171.

[56] Buckingham, Court and Cabinets II, 350. Auckland, Journal and Correspondence IV, 358. Pitt gave expression to similar views in a letter to Auckland.

send to Paris.. The details of the negotiations which ensued are not within the scope of this study. It is sufficient to say that each government endeavored to induce the other to make some demand that would definitely fix the blame for terminating the discussion. From its own point of view, each was successful. The terms which England proposed were substantially those which had been agreed upon by the cabinet before the communication was made through the Danish ministers. Again the French refused to consider the surrender of the Austrian Netherlands on the ground that the Republic was one and indivisible. Thus each party was able to appeal to its constituency with plausible arguments. In reality, matters remained about as before. When a point of importance arose, Malmesbury insisted on communicating with his court before giving a decision. This insistence, as appears from his correspondence, was due in part to the desire of the English ministers to secure all information possible concerning the internal condition of France, and to arrange that Malmesbury should provide for a continuance of such information through other channels after the termination of his mission. The French government seemed to suspect something of this sort, and, on December 19, notified the English envoy that since he was acting merely as a transmitter of despatches, he was performing a useless function. They, therefore, ordered him to leave Paris in forty-eight hours, intimating at the same time their willingness to carry on the negotiation by means of couriers.[57]

The details of this affair were given to the public as soon as the notes were passed, and after the dismissal of Malmesbury the entire correspondence was published in both countries as a justification of their respective shares in the negotiations. But, in the meantime, Pitt had successfully carried through one of the measures which formed a very vital part of his plan. On December 1, 1796, the govern-

[57] For information concerning this mission see Debrett, State Papers V, 171–214. Malmesbury, Diaries and Correspondence III, 260–366. Dropmore Papers III, 258–290.

ment authorized a voluntary subscription of £20,000,000. For each hundred pounds the subscribers were to receive five per cent. stock with a face value of one hundred and twelve pounds and ten shillings. The loan was to run for three years, but might be paid off two years after the conclusion of peace.[58] Within less than a week the entire amount had been subscribed.[59] It must not be assumed that every subscription was made from purely patriotic motives. Pitt, Grenville, and the other members of the cabinet were said to have put themselves to some inconvenience to take the ten thousand pounds which they each received. Still, Lord Sheffield wrote to Auckland while the subscription was in progress: "The terms appear, on a slight view, so favourable and so exempt from risk, that I cannot think there will be much difficulty in finding subscribers, although there may be great uncertainty in finding the money. If I had ever engaged in such speculations, if I had any money, or could get any, I should subscribe as a *good thing*."[60] That there was some foundation for this allegation may be inferred from the fact that the Duke of Bedford, one of Fox's warmest supporters and a consistent opponent of the administration, subscribed for £100,000.[61] However, it was perhaps natural that, in a case of such evident necessity, the terms of the loan should be made sufficiently attractive to induce the subscriptions, which were of so great importance for carrying on the operations of government. At any rate, as a result of this measure the ministers could now regard more cheerfully the subsidy which Austria was demanding.

It is not within the province of this discussion to recount the further reverses, both military and financial, which caused the cabinet, on February 26, 1797, to order the Bank of England to suspend specie payment.[62] In spite of this suspension, the ministers went on with their efforts to

[58] True Briton, December 2, 1796.
[59] True Briton, December 5, 1796.
[60] Auckland, Journal and Correspondence III, 365.
[61] Buckingham, Court and Cabinets II, 351.
[62] Ross, Correspondence of Cornwallis II, 325.

secure the advances for which Austria was clamoring. On April 4 Lord Grenville wrote to the English minister at Vienna that the prospect for success in the matter was bright.[63] But, five days later, the cabinet decided to ask the emperor of Russia to intervene for the purpose of negotiating a peace, the chief reason assigned for this step being the embarrassment of public finances in England.[64] However, the reports that Austria was meditating a separate negotiation became more current, and it was finally learned that the preliminaries to a treaty between that power and France had been signed. As a result, on June 1 a note was sent to Paris by the English ministers expressing a desire to renew the negotiations which had been broken off.[65] This time Pitt earnestly desired peace on any reasonable terms, and, as the subsequent negotiations made manifest, was willing to make concessions which he had previously refused. Why he failed to secure a peace and was obliged to continue the war does not concern us here.

The minister had now practically confessed that his measures had been unsuccessful, and that his policy had been a failure. To those who asked for causes, if the True Briton may still be considered as the exponent of the views of the administration, the answer was summed up in the term, "the French Revolution." The plans of the minister had not been in fault. The execution of them was not susceptible to serious criticisms. It was the French Revo-

[63] Dropmore Papers III, 308.

[64] Dropmore Papers III, 310. In part, the minute of the meeting was as follows:—

"It was agreed humbly to submit to your Majesty as the opinion of this meeting, that, under the various circumstances of difficulty and danger in which his Majesty's dominions and those of his allies are placed by the result of the late unfavourable events, and most particularly by the increasing embarassments of the public finances of this kingdom, it is become indispensably necessary that steps should be taken for making a joint application on the part of his Majesty and of the Emperor to the Emperor of Russia for his intervention with a view of opening and conducting negociations for peace; and also that measures should be adopted for concuring with the Court of Vienna in any immediate negociation which may be rendered necessary by the urgency of increased pressure from any further progress of the French in Corinthia."

[65] Dropmore Papers III, 327. Debrett, State Papers VI, 207.

lution against which his abilities had been measured, and because of which his efforts had been brought to naught. Such was the verdict of his editorial partizan. But, if the conclusions which have been reached in the course of this study are valid, for once the True Briton was mistaken. The French Revolution, as a political upheaval, dependent on radical doctrines, had been a factor of minor importance in causing the international situation in which England was implicated. France and England had merely been engaged in their old struggle for dominance, and, temporarily, Pitt was beaten at his own game.[66]

[66] The True Briton, March 21, 1797.

CONCLUSIONS.

The object of this inquiry has been to trace the influence of the French Revolution upon the people and politics of England from 1789 to 1797. As a result the following conclusions may be presented as established with some degree of certainty.

In its early stages the French Revolution was regarded favorably by the majority of Englishmen but was considered a subject rather for speculation than as vital to the interests of England. Gradually this favorable view of the revolution gave way to one that was distinctly hostile, due as is commonly supposed to the influence and writings of Edmund Burke. We believe, however, that this change of opinion may be attributed in slight measure if at all to the advocacy of the great orator but was effected by the deliberate efforts of the adherents of William Pitt in order to secure his political advantage. The end which Pitt had in view was the division of the Whig party and the supremacy of his own government. Pitt's first opportunity to weaken the Whig party came with the controversy between Fox and Burke on the subject of the French Revolution, in which Pitt adopted the view of Burke that the revolution was a great menace to England and the world. He upheld this view not as a matter of conviction but as a matter of policy, for owing to his defeat on the Russian program and to dissensions in his own cabinet he was in danger of losing his control. The propaganda which he inaugurated for the purpose of dividing the opposition and of gaining Whig adherents of his policy was continued with increased activity until the autumn of 1792, and to this propaganda, particularly after the spring of 1791, either consciously or unconsciously, Burke lent his aid.

The wasted condition of France and the apparently dis-

organized state of public institutions there, after the downfall of the monarchy, seemed to Pitt to offer a favorable opportunity for the territorial enlargement of England and the humiliation of her old-time rival. The attempt of the French Republic to open the Scheldt in November, 1792, afforded a plausible pretext for provoking war, and immediately Pitt took steps to establish himself more firmly in power at home and to force from France a declaration of war against England and Holland. In both respects he was successful. The French declared war in February, 1793; and, as the result of his efforts during the year 1792, prominent Whig aristocrats promised him open support, and after a campaign designed to arouse fears of revolution in England, they entered into a formal coalition with the Tories in July, 1794.

Having accomplished his immediate purpose, Pitt was next concerned with the important task of drawing the English people to his support and of obtaining the means for carrying out his continental projects. In this task he was hampered by financial crises and bad harvests, which served to increase the political unrest in the kingdom, particularly in 1795 and 1796, and caused the reform societies already organized among the lower classes to increase in numbers. In order to prevent any results from this source injurious to the interests of the administration he caused repressive statutes to be enacted that gave the government control over public meetings. From the clergy of the established church, who aided the adherents of the administration in their propaganda of loyalty, he secured sincere and even passionate support. To the purposes for which he had begun the war he adhered even when negotiating for peace, until the spring of 1797, when military reverses on the Continent and financial difficulties at home forced him to meet France more than half way in order to secure a peace.

The societies for promoting parliamentary reform, which were active in England during this period, do not appear to have found their inspiration, either for organization or con-

tinuance, in the French Revolution, nor do they appear to have advocated anything more than a radical reform in the system of representation in the House of Commons. There is no trace anywhere in England during these years of any considerable bodies of men who upheld or propagated either the republican principles of Thomas Paine or the extravagant doctrines of the French revolutionists.

It is, therefore, reasonable to conclude that the uprising in France played but a minor rôle in the domestic history of England in the years from 1789 to 1797, except as far as it was used by Pitt and his colleagues for their own political purposes as a pretext for reviving the old-time struggle with France for supremacy in the commercial and the colonial world.

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