SENATES AND UPPER CHAMBERS

HAROLD W. V. TEMPERLEY

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"καὶ δικην ἐπίστασαι
νόμοις τε χρῆσθαι μὴ πρὸς ἰσχύος χάριν"

EURIPIDES.

SENATES AND UPPER CHAMBERS

THEIR USE AND FUNCTION IN THE MODERN STATE, WITH A CHAPTER ON THE REFORM OF THE HOUSE OF LORDS

BY

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PREFACE

THE following book had its origin in a series of lectures delivered at different times, at Cambridge and elsewhere, on the subject of Second or Upper Chambers. The views expressed are the results of a study of Continental and Colonial experience in these matters which has extended over some years. Only one lecture and one chapter (V of this book) has been composed with any direct reference to the present crisis. But the manner in which politicians of all parties have sought to apply the lessons of Continental or Colonial experience to the reform of the House of Lords has convinced me that even detailed and academic surveys of the whole subject cannot fail to be of value at the present time.

While this book was being prepared, Mr. J. A. R. Marriott issued his work on *Second Chambers,* the first English essay at a comparative survey of this kind. My own attempt is on somewhat different lines, but I am convinced that, even if planned in exactly the same way, not two but half-a-dozen treatises would be of advantage in educating the public mind and in directing attention to this vast and complex subject.

The aim of this book is to attempt a general survey or synthesis, so far as such a process is possible, of the Upper Chambers of the English-speaking world and of the Continent. The object is

to find out how far these institutions are comparable to our own, and to discover what lessons their experience can teach us. It may be objected that no valuable comparisons can be instituted, as no foreign Senate or Colonial Upper Chamber exactly resembles the House of Lords; but, even if only contrasts were established, this work would, I believe, be worth the doing. To establish definitely, for instance, that an Upper Chamber in a Federation cannot be properly compared to that of a Unitary State seems to me an important service at the present time. But more positive results can be obtained, for, amid many differences, there are certain broad similarities between the Upper Chambers of Unitary States, and certain general lessons are to be derived from their experience. For example, many Englishmen consider that the reform of the House of Lords, by adding or substituting an element of Nominated Life-Peers, is the true solution of our present difficulty. But the practical working of this principle in those Colonial and Continental Senates (whose conditions most nearly resemble our own) shows that the *Elective* and not the *Nominative* principle is the true way of strengthening or reforming an Upper Chamber. This is a lesson only experience can give, and one that is all-important for us at this moment. Again, the gradual decline in the importance of the Upper Chamber before the advance of democracy, during the last generation, is a phenomenon full of instruction and significance. There are, in addition, a whole host of lesser matters; the provision of methods for adjusting deadlocks between the

Chambers, the value of direct against indirect election as a method for constituting an Upper Chamber, or the possibility of the Referendum, and on none of these things can the experience of other lands be neglected. During the last generation the rest of the world has been a political laboratory, in which experiments have been conducted that should be of the greatest importance and value for England to-day.

So far as is possible, I have sought to maintain an attitude of impartiality, for no one who wishes in any way to be considered an historian should plunge even into politics with a blind devotion to a single party. But impartiality is perhaps not possible for past history, and is certainly impossible for present politics. It may therefore be more candid for the writer to admit that his sentiments incline to Liberalism, though he cannot approve of the Liberal Resolutions in their existing form. However, one object of his book is to show that single-chamber government, though possessing many advantages, is condemned because it offers no security to the rights of minorities. This view forces him to stand aside from a merely partisan view, and to attempt to hold the balance between what appear to be the views of the different parties. His personal views may, however, give a bias, of one kind or another, to his handling of these subjects in the text. To enable the reader to form his own judgment, irrespective of this tendency, a large amount of information has been concentrated in the Appendices and Notes, which consists either of illustrative extracts from all kinds of different

sources, or of purely descriptive matter. It is hoped that the reader will be able by this means to decide on the merits of the whole question, without paying undue respect to the bias of the writer. Specific details as to the composition and powers of the chief Upper Chambers of the world are given in Tables I–IV, and the reader is recommended to use these in connection with the statements advanced in the text.

To be of real value a study of Upper Chambers at the present time must insist on the practical working and status, rather than on the legal or theoretical aspect, of these institutions. My aim has been to discover "what is," not because I think that "whatever is, is right" in this or in anything else, but because I think that until we know what is, we shall not discover what can be, or even perhaps what ought to be. How far my aim has been realized the list of my acknowledgments will tend to show.

For special information as to the working of the Senates of American State-Legislatures, I must record my obligations in past years to Professor A. Bushnell-Hart of Harvard University, and to Professor Thompson of Princeton University, the latter himself a practical politician. On the Upper Chambers in the English Colonies, which in many ways supply the experience most vital for our instruction, I have to acknowledge assistance and information given me on Canadian politics by the Right Hon. Sir Charles Tupper, ex-Premier of Nova Scotia and of the Dominion of Canada; with regard to South Africa I must acknowledge a similar debt

to Sir Richard Solomon, High Commissioner of South Africa. On the affairs of Australasia generally I am indebted for information to the late Mr. Alfred Dobson, Premier and afterwards Agent-General of Tasmania, whose kindly encouragement gave me my first interest in and knowledge of Colonial politics. For the Continent the Parliamentary Paper of 1907 supplies valuable and authentic information as to the practical position of each Upper Chamber at the present time, but in certain cases this information has required to be supplemented. Professor Joseph Redlich of the University of Vienna, whose work on English Parliamentary Procedure is well known, and who is himself a member of the Austrian Reichs-Rath, kindly furnished me with information as to the position and importance of the Austrian Upper Chamber. The same service was rendered me with regard to the Upper Chamber of Hungary by Professor Marczali of the University of Budapest, whose wide knowledge of Hungarian history and politics was placed ungrudgingly at my disposal. For information as to the Upper House of Portugal I am indebted to the Marquis de Soveral, Portuguese Ambassador to Great Britain. My account of one of the most interesting among modern Senates, that of Brazil, was authenticated by M. Oliveira de Lima, Brazilian Ambassador to Belgium, and well known as the historian of his country. Mr. E. A. Benians, Fellow of St. John's College, Cambridge, made some valuable suggestions with regard to Chapter II, and my brother, the Rev. E. W. P. Temperley, read through the proofs and assisted me with valu-

able criticism. I should like also to acknowledge the assistance of Mr. G. H. Perrott, whose unwearied secretarial assistance has rendered the present volume more complete for purposes of reference than it otherwise could possibly have been; and there are others also to whom this work owes much. But, while I am deeply conscious of the burden of my obligations to friends, both named and unnamed, I trust that no one will try to fix on them any weight of responsibility for the statements contained in this work.

HAROLD W. V. TEMPERLEY.

Postscript.—The Conference, which is now (August 1910) sitting for the purpose of producing agreement as to measures for reforming the House of Lords, may reach such conclusions as to modify or invalidate some of the statements advanced in Chapter V. The author, while fully conscious of this fact, decided not to refrain from expressing his opinions in that chapter, because such expression may tend to reveal bias rather than to obscure it. Of the other four chapters—with the Appendices and Notes—he would fain say with Browning—

> "This is the bookful; thus far take the truth
> The untempered gold, the fact untampered with,
> The mere ring-metal, ere the ring be made,"

and, so doing, leave each reader to forge the ring in his own fashion.

H. W. V. T.

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CORRIGENDA AND ERRATA

Page 15, line 3, and page 28, par. 2, line 3, for "forty-five" read "forty-six."

Page 15, line 4, insert "relatively" between "some" and "as."

Page 18, line 6 from bottom. N.B.—The numbers of the Hungarian Upper Chamber (264) given here and on page 88, line 5, include 15 royal archdukes; elsewhere these latter are excluded and the number is given as 249.

Page 24, par. 2, lines 7–8. "In England," add "and Hungary."

Page 57, par. 1. N.B.—The franchise for Cape Colony was educational and occupational till 1910, but the *same* for both Chambers.

Page 117, line 9, for "more" read "less."

Page 125, lines 2–3, after "constitutional amendment" add "and election of the President."

Page 312, line 7, for "Elementen" read "Elemente."

Page 312, note 2, line 2, for "auf dem" read "auf den."

Page 321, for "Eötvös, Baron Joseph. Die Herrschenden," etc., read "Der Einfluss der Herrschendenden Ideen des Letzten xix Jahrhunderts auf den Staat."

Page 326, for "Darneste, P." read "Dareste, P."

Index, page 331, under "Acton" add "318, n. 11, Chap. V."

SENATES AND UPPER CHAMBERS

I. INTRODUCTORY

THE NECESSITY AND THE DANGER OF ANALOGIES FROM OTHER LANDS

In 1792 all France rang with the cry "the country in danger," and all true Frenchmen rushed to arms to defend her; in 1910 England is ringing with the cry "the Constitution in danger," and yet Englishmen remain strangely calm. Were it the calm of strength it would be well, but it is the calm of indolence, impassivity, worst of all of ignorance. A Frenchman has always worshipped his country in preference to his Constitution, and not unnaturally, since he has had ten of the latter in a century. Englishmen, who have had but one Constitution in ten centuries, have often considered it to be of more importance to them than their country, or at least than their empire. When we suffered defeat in battle and the loss of half a continent of territory in the past, we preserved our Constitution, and in that alone preserved sufficient vitality for the future. It was owing to the strength, the inspiration, which our Constitution gave us, that we were enabled to

defy the most powerful of modern revolutionary ideas and the greatest of modern conquerors, and that in the struggle we regained an empire richer in possibilities and in extent than that which we had lost. Thus our Constitution is more precious to us than our country or our empire, for, while the latter may be lost and regained, the former, once destroyed, can never be recovered. Yet to-day when the slightest hint of injury to our national pride or security is sufficient to raise a whirlwind of panic throughout the country, the most serious menaces to our Constitution can hardly stir us from our indifference. No true statesman willingly encourages panic, but when such issues are at stake, when the wisdom of generations, the nice adjustments of time and the soft mouldings of experience, when all that mass of traditional wisdom, known as the Constitution, may perish at the gamble and hazard of the ballot, at such a time there is more safety in panic than in lethargy. Foreign opinion, which is often held to anticipate that of posterity, at least is not deceived as to the gravity of the crisis. Foreign nations look with amazement upon England, famed as the most politically moderate and stable of all countries, and behold the scattering of her traditions and the challenging of her age-long political conventions. De Tocqueville once said of the English Constitution that "it did not exist," foreigners are beginning to wonder whether his saying was not true in a different and far more ominous sense than he then implied. Whatever our politics, whatever the

party in power during the next few years, no one can doubt that some of our political ideas and institutions will be either overthrown or transformed beyond all recognition. This plain and potent fact, so obvious to all the world beside, has not roused the people of England, and in proportion as our political system declines in credit the popular lethargy seems to increase.

In view of the present abasement of our institutions, it is well to turn back to the third decade of the nineteenth century, and to regard the political position occupied by England under Canning. During that time and for two generations afterwards England gave the law to the world in political matters; her Constitution was the model for all nations, her institutions a by-word for stability and strength. At the present moment and in our present position the contrast is not a little ironical. To what nation can we give the law when we dispute as to the very existence of our Constitution, and to what country can our institutions be recommended as stable? None the less "in this now sterile and unpromising soil was deposited the seed of that security, whose branches now overshadow mankind."[1] England did once give political stability to other nations, perhaps she can now receive it back from them. It is evident that we must turn to them for political guidance, and must mould our future by their examples. Heavy indeed is the responsibility of those who have turned English statesmen from teachers into pupils, and have cast shame on the Mother of Parliaments. Hitherto we

have always been the first in the political field, and our experience has been a guide to others, now we are forced to seek instruction elsewhere than in our own institutions. Our political eminence may not, indeed, be wholly or permanently lost, so long as we reform ourselves aright and draw profit from the lessons of other countries. Continental opinion watches with eager eye the success or failure of English institutions in the minutest detail; there is not a municipal scandal, not a defect in our local administration, which does not produce effects far beyond the immediate influence of the district or the country. We mould opinions, we inspire legislation far transcending our present aim or knowledge; we are playing a world-game, and the success or failure of our institutions, both local and national, is perhaps the most important factor in the political advance of Europe, so that, even while we are learning to recast our own institutions, we may not be teaching ourselves alone.

The British Constitution is already different from what it was two years ago, for the relative positions of the two Houses of Parliament are no longer the same, and, as the circumstances of the present may be altered but cannot be undone, a return to the *status quo* has become impracticable. It is impossible to decide as to the change, for change has already occurred; it is only possible to determine the nature and extent of the change. Reform in some shape or form appears to be admitted as a necessity on all hands, but—and here is the most vital necessity of all—the Reform *must*

be one which shall be permanent and final. To secure either permanence or finality such a reform must be both a compromise with the past and an anticipation of the future, it must be based not on the division of the parties, but on the agreement of the nation. If a settlement of this type, a settlement likely to be permanent in its character, is delayed, Single-Chamber government must almost inevitably supervene. But this result will only be brought about after years of continuous friction, and such a settlement—if inevitable—ought to be made at once. It would be far better to accept Single-Chamber government at once for such advantages as it offers, than to be driven into it as a refuge from endless disputes. The question of reform is one that cannot be evaded, and, if we face it boldly and reject a Single Chamber, we must be prepared to examine and to inquire into the proper way to reconstitute a second one.

In reforming our Upper Chamber we must ask ourselves the two questions—what is expedient and what is desirable? Neither can be answered entirely from our own experience, because our own Upper Chamber is obviously condemned by the proclamation of the necessity for its reform.* Casting our eyes beyond the limits of our island and seeking precedents and examples from the Continent, we find it of singular interest that, while

* The use of Upper, and not Second, Chamber is preferable, because in several States (*e.g.* Holland) the Upper Chamber is known as the First Chamber.

foreign countries have imitated us in many details of their constitutions, there is no institution in which they have diverged so widely from our model as in constructing their Upper Chambers. This fact may be significantly associated with the collapse of our own institution, in order to prove the value of the instruction we are likely to receive from foreign example. A study and a record of Upper Chambers in Europe, America, and the Colonies shows us many failures but some successes, and provides a quarry from which materials for reconstruction may be drawn. These records instruct us both in the purposes these Upper Chambers were designed to fulfil, and also—what is of more importance—in the objects which they have actually achieved. A great historian of the Continent once told me that no political institution had ever conformed to the original ideas of its creators, and of no institutions is this saying so true as of Upper Chambers. In different countries these have subserved first one set of ideas and then another, and have continually changed their purposes and forms beneath the pressure and impulse of circumstances. The result is a series of political experiments of great value in teaching the political architect both what to imitate and what to avoid. The world at large has not only an interest in the settlement of our great problem, but it is also able to come to our help in its attainment. It would be the sheerest folly to ignore the practice of European nations and English-speaking peoples, in regard to a matter in which we have confessedly failed and

in which some other nations have admittedly succeeded.

In regard to the composition and functions of an Upper Chamber there is then an immense field of observation and a vast amount of accumulated and diverse experience. Unfortunately for this country the ignorance displayed on the subject by its prominent statesmen and politicians is of a character that is even more dangerous than is the lethargy of our people as to the fate of the Constitution. Lethargy—especially of a people—may under certain circumstances be a virtue; ignorance—especially of politicians—must always be a vice, but under no circumstances can it be such a vice as when ignorant politicians set out to reform historic institutions, by neglecting experience and misrepresenting history.

Prevailing Ignorance as to Foreign and Colonial Upper Chambers.

A few selections—chosen almost at random—may be sufficient to establish what it would be infinitely tedious to prove in detail. One of the most brilliant and learned of our younger politicians informs us that "Prussia is an Upper Chamber appointed for life, and what the right hon. gentleman (Sir W. S. Robson) would call an irresponsible Chamber" (Lord Hugh Cecil, *Times*, April 1, 1910). The sense in which irresponsibility is meant is refusal to submit to the dictation

either of King or Lower Chamber. Yet so late as 1872 the Upper Chamber in Prussia—because it tried to oppose a bill sent up by the Lower Chamber—was humiliated and weakened by the King, and twenty-four new members were created to "swamp" it. The noble lord's statement is therefore in contradiction with the fact, which proves exactly the opposite of what he wishes to establish. *Ex uno discite omnes.* Nothing can more illustrate this universal ignorance than the fact that it is in no way confined to one party, and that in this sense we find an unprecedented agreement between Upper and Lower Houses. Thus in the House of Lords—Lord Morley informs us that "the Senate, or Upper Chamber, in Canada and Australia, is purely a nominated Chamber" (March 14). In reality, Australia is the most striking example in the world of an elected democratic Senate. The Premier—Mr. Asquith—administers a severe rebuke to his Cabinet colleague by denying altogether that Federal comparisons are applicable to Unitary States, and then administers a severe rebuke to himself by subsequently introducing one of them by way of such comparison (March 30). In opening an epoch-making discussion Lord Rosebery—the life-long apostle of reform of the Upper Chamber, to whom at least we might look for accuracy—spoke thus: "There are two exceptions to the general protest of all civilized communities against being governed by a Single Chamber. I will name them. They are Greece and Costa Rica." Now no one has made more reckless refer-

ence to Federations than Lord Rosebery, and, if we were to imitate him, we could discover not two, but fifty-three "exceptions to the general protest of all civilized communities." Let us, however, disregard altogether those examples, in which Federal governments have affected the existence of Upper Chambers in the component stages of their union; even so we find that Single Chambers existed in six states of the German Empire and in sixteen of the Swiss Union before Federation was a power.* Even, after excepting these, Lord Rosebery has still forgotten three Unitary States in Europe and four in Latin America which possess Single Chambers. If his facts are so bewildering in their inaccuracy, we shall not find his deductions more happy. If one Latin-American state does duty for five, and if three European states have escaped his observation, it cannot be rash to question his conclusions. His implication is that a state with a Single Chamber is necessarily anarchical, but that suggestion is directly contradicted by the instance of Bulgaria, which has only one Chamber and which is probably the most stable of the Balkan States. The association of Single Chambers with stability does

* Sixteen of the Swiss Cantons have only a Single (representative) Chamber, six have a single direct Assembly of all citizens; all of these had Single Chambers before the Federation existed in any real form. Sixteen of the German States have Single Chambers, six of which existed before Federation was a reality. Six provinces of the Dominion of Canada have Single Chambers. Of Latin-American States Costa Rica, Panama, Honduras, Salvador and San Domingo have Single Chambers; in Europe, besides Greece, are Bulgaria, Montenegro and Norway.

not end here. The Report presented to the Commons in 1907, which describes the Constitution of Norway, begins as follows: "In the Norwegian Parliament there is, strictly speaking, no Upper House," the so-called Upper House is merely a committee elected out of the Lower. Yet in spite of the "general protest of civilized communities" Norway enjoys an internal peace and stability which any bicameral country might envy. But Bulgaria and Norway do not call up visions of dictators and bayonets, of frenzied mobs, of robbed bondholders and murdered citizens. Costa Rica does, and it must therefore be held up to prove the anarchy inseparably attendant upon states with Single Chambers, and for that purpose it has been everywhere quoted. Mr. Balfour, for instance, thinks it sufficient to condemn the Resolutions for limiting the power of the Upper Chamber by saying that, in case they pass, we should be governed for the first two years of a Parliament like "Costa Rica." If for "Costa Rica" we read "Norway" we should be giving a literal and not a rhetorical example of what would happen; but no one would be alarmed by England's Constitution resembling Norway's, every one is by its resembling Costa Rica's. Yet when this deceptive example is invoked, no single member of the Commons challenges the facts or the accuracy of the deduction therefrom, though the material for refutation lies to hand in the Paper which they themselves ordered to be printed.

There is no desire here to advocate the policy

of the Liberal Resolutions; they are, in fact, open to grave criticism in many respects. All that is desired is to insist that no criticisms should be made on either side which rest on wholly false analogies and which are twisted to wholly false uses. After the already quoted examples, which are chosen almost at hazard from the utterances of the day, the inadequacy of our knowledge of foreign and colonial institutions may be held to be proved. It is not worth while to go further and to show that bad political examples are everywhere supplemented by worse historical ones, and to demonstrate the fallacy of those arguments which summon the shades of Cromwell and Robespierre to deter us from revolution. The appeal to history must not be like the appeal to the Bible, and the text ought never to be torn from its surroundings to hurl at the head of a political opponent. So long as history is a mere quarry for missiles, no valuable results can be obtained. It is just as easy to quote Halifax and Earl Grey against Robespierre and Cromwell to prove that men can accomplish revolutions that are relatively peaceful, as it is to quote Norway and Bulgaria to show that Single Chambers can exist in states that are relatively tranquil. Or, again, it would be just as easy to quote Servia to damn the bicameral system as Costa Rica to condemn the Single Chamber. In short, the chief danger of history lies in its misuse, but that misuse is fortunately sometimes fatal to the rash investigator. It is, in fact, a species of explosive, which, if handled carelessly, is more

destructive to the user than to his opponent. In this case it has played the part of a successful Guy Fawkes to our members of Parliament.

Let it not be thought that these examples have been quoted to ridicule the capacity of our statesmen and writers; had that been so, our political Dunciad would have been more ludicrous. The real purpose is to show how singularly the present crisis is misapprehended, and how immense is the importance of guarding against misuse of foreign analogy and example. For almost the first time our Constitution has failed to adapt itself insensibly to new conditions, and it has therefore become impossible to walk along paths marked out by precedents from the past. For once in our history we cannot be a lamp unto ourselves, but must borrow oil and light from others. Almost for the first time we have to strain our eyes beyond our own narrow horizon for political enlightenment, with a consequence that is natural, though not inevitable. Our political leaders or writers have a new task before them for which their great ability and experience has not qualified them, and in which their unrivalled knowledge of our own institutions is no longer of service. They have to clutch at a few foreign examples, and must endeavour to compare the institutions of the world in a moment, and to assimilate the political wisdom of all other lands at a sitting. In just such a way a century ago French doctrinaires reformed the world by quoting precepts from Plutarch and by imitating the actions of Brutus; to-day Englishmen are too practical to

plunder the classics, but they are not ashamed to quote instances from modern history which are as absurd, or foreign examples which are as misleading. In reckless hands and from imperfect knowledge the stray example becomes the decisive proof, the isolated text, the infallible gospel. For purposes of illustration such texts and examples have their use, but the real binding force of an argument, the real cogency of any appeal to foreign or colonial instances, lies in the drift of more general teaching and in a synthesis of a wider kind. Instead of arguing, for instance, that an hereditary House of Lords should have a financial veto because an elected House has one, it is better to ask why the Upper Chamber is hereditary in one land and elective in another. Why is an Upper Chamber endowed with certain powers in one country and deprived of them in the next? Even the most tentative answers to such questions stimulate to thought, and suggest something of those fundamental forces which create or modify all political institutions. For behind a hundred different forms and masks there lurk certain elements which are inherent and indestructible and common to all developed political organs.

Inapplicability of Federal Upper Chambers for comparison with England.

In attempting a brief survey of the more important Upper Chambers of the world, in trying to dis-

cover the exact amount of analogy that is useful, and of contrast that is stimulating, the utmost caution is needed, for no two countries have the same constitutional development, and no land has a more unique one than England. None the less certain broad principles can be laid down, and certain types of institution can practically be ruled out for purposes of comparison. Of these the most prominent type is the Federal Upper Chamber. England is a Unitary State endowed with strong local government; yet no local institution such as a County Council can for a moment defy the authority of her central Parliament or assert the possibility of concurrent powers. On the other hand, in a Federation, such as the United States, an individual state may defy the authority of the Federal Union. A Federation consists of two parts, the Federal Union and the Component States; between them power is divided and authority is concurrent [2]. The individual state and the Federal Government both owe their independence and authority in their own sphere and its separate rights to the same instrument, the Act of Federation. In the United States, for example, the State legislatures control matters of education, of licensing, of railways; the Federal legislature controls the tariff, the army, and the navy. If a Federal law infringes the powers of an individual state, as defined in the Act of Federal Union, the Federal law is declared inoperative by the law-courts. Thus in a Federation the component states have often immense powers against the Federal Union, and no better

illustration of these powers is to be found than in the composition and functions of the Federal Upper Chamber. The United States comprise forty-five independent states, some as small as Cambridgeshire, others as large or larger than Yorkshire or Wales, yet each state has two representatives, and two only, in the Federal Senate. The reason is obvious; the stipulation which each petty state made, when it entered the Union, was that its interests and rights should not be at the mercy of a numerical majority in the Federal Lower House, elected on universal suffrage, and therefore largely representing the bigger and more populous states. In short, the Senate was constructed to give the states, "though unequal in size . . . an equal share in the common councils," and as an institution necessary "as a defence to the people against their own temporary errors and delusions . . . in order to check the misguided career and to suspend the blow meditated by the people against themselves, until reason, justice and truth can regain their authority over the public mind."* The Federal Upper Chamber guards, in fact, the principle of State-rights against the numerical majority and the will of the people, and its function may therefore be, and frequently is, the exact opposite of that of an Upper Chamber in a Unitary State. In regard to finance, this is especially the case; in a Federation the smaller states always wish to be protected against the larger ones exploiting the

* *The Federalist*, Hamilton, Nos. 62, 63, p. 467, pp. 476–7, ed. J. C. Hamilton. Philadelphia, 1904. (Lippincott & Co.)

Federal finances to their own profit; hence the Upper Chamber possesses powers of financial control that may fairly be called extraordinary, in almost all Federal States. This fact only serves to illustrate the general principle that, while the Upper Chamber exists in a Unitary State only to interpret the will of the people, in the Federal State it may exist actually to oppose it. In no land, perhaps, is this conception more strikingly developed than in the United States, but it exists with great vigour in the German Empire, with less force in Australia, and in a less degree still in Canada, Switzerland, Brazil, and South Africa. Nothing in a Unitary State in the least corresponds to the strength given to Federal Upper Chambers by the fact that they represent State-rights. Whatever value is attached, for example, to the Peers as representatives in the English House of Lords is due to their name, to their family traditions and to themselves, not to the fact that they defend the freedom of parish or of shire against the tyranny of Parliament. Federal Upper Chambers have a natural strength from the circumstances of their position, to which no Upper Chamber in a Unitary State can attain. The whole being and essence of a Unitary Upper Chamber is that it checks or revises Bills sent up from the Lower Chamber only in deference to the will of the people. If the will of the people is clear and ascertained, and agrees with the will of the Lower Chamber, any Upper Chamber in a Unitary State is likely to give way; no Upper Chamber in a Federal State necessarily

would. The sovereignty in one case resides with the numerical majority of electors, in the other it is divided between the numerical majority of electors and the Federal Upper Chamber which represents the States and their rights (2). The conditions and objects of these two kinds of Upper Chambers are therefore fundamentally different, and comparisons between them are in general quite inapplicable, or can only be made with great care and special qualification.*

On the other hand, while the Upper Chamber of the Federal State as a whole is not available for purposes of comparison, the Upper Chambers of the separate component states in a Federation may properly be used for that purpose. The necessity for them is less felt, and their actual dignity is to a certain extent impaired, in a Federation, and in some cases, as in four provinces of Canada, and in the four states of Africa, the Upper Chambers have actually been abolished. But the essential point is that the Upper Chambers in the State Legislatures of a Federation differ in no way fundamentally from those of the Unitary States, and some of our most valuable analogies can be drawn from the examples of the position of Upper Chambers in the minor German States and in the component states of the American Union. With regard to Upper Chambers in general, it may be said that those of the smaller states, such as Würtemberg or Baden,

* Of course some use can be made of Federal analogies, and I have indicated the main points where comparison is possible in Appendix I.

or some of the Colonies, hardly offer sufficient practical experience or deal with sufficiently great or complex problems. They too often bear the same relation to larger political communities as do the dwarf plants and miniature gardens of Japan to the larger growths of England.

The English Upper Chamber in three respects unique.

England herself is not altogether suitable for comparison, since in at least three important respects her Constitution is unique, a fact which
(a) Hereditary must constantly be borne in mind in appealing to colonial, to foreign, or to American example. In the first place, the House of Lords is the only Upper Chamber in the world which is formed almost wholly on the hereditary principle. There are, of course, exceptions to this in the 26 bishops and 5 law lords, but 596 Peers out of 627 take their seats of hereditary right, *i.e.* only *four per cent.* of the House is non-hereditary. Even in Hungary, which enjoys a Constitution as old or older than our own, and for that reason has a large hereditary element in the Upper Chamber, even there the proportion of Life-Peers to hereditary ones is 67 to 264, or roughly about one-sixth of the whole. Of other Upper Chambers only Bavaria assigns to the hereditary element more than one-half of the whole Chamber (3). It is, therefore, inevitable that in England the accusation should arise that the Upper Chamber is the haunt

of caste and privilege, and to this cause may be ascribed much of the friction between the two Houses. The second broad difference between the House of Lords and other Upper Chambers lies in the fact that the House of Commons possesses certain powers which no other Lower House can claim. In almost all other Upper Chambers the powers of the two Houses are always theoretically, and sometimes practically, equal, except in finance. But in England the power of the Crown enables ministers to withdraw many important matters altogether from the Upper House, and to submit them exclusively to the control of the Lower. To take two recent examples in 1906, the grant of Responsible Government to the Transvaal was made by Letters Patent and not by Parliamentary Statute, and thus it came about that ministers submitted and discussed their proposals on this subject before the Commons, while the Lords never received the opportunity of amending or deciding on the measure at all. To give an extreme instance of the power thus exercised by royal prerogative, the King could legally declare war on France one day, and make peace by ceding the county of Kent to it on the next. The minister who advised these acts would be responsible to the House of Commons, but could not be touched by the Lords. The above exercise of power applies to external acts, to foreign or colonial policy; it can, however, be used also for acts of internal administration, to enable the ministers to disregard the wishes of the Lords in a

(*b*) The House of Commons more powerful than other Lower Chambers

similar but more restricted way. Thus what the Commons fail to do by legislation they can sometimes effect by administration, by a process which reminds one of the old illustration of the soldier who makes up for his rifle missing fire by knocking his opponent down with the butt-end. To quote an example, in 1906 the Liberal Education Bill was rejected by the Lords, but a part of the policy therein contained, which related to Secondary Training Colleges, was carried through by administrative Orders in Council issued by the Crown. This proceeding might have been checked by the House of Commons, which could have placed the Government in a minority or passed a vote of censure upon it. But the House of Lords, which had rejected this measure when embodied in a bill, had no further opportunity whatsoever of opposing it. This latter power of effecting some internal changes by administrative decree, instead of by legislation, exists in some Continental countries, as in France, where the ministry can sometimes similarly counterwork the Senate. But English Ministers possess the power in regard to external acts also, and can direct a colonial or foreign policy purely at the will and discretion of the Commons and the Crown, in a way that is practically unique. In almost all foreign countries, over such matters as the declaration of war and conclusion of peace, as the arrangement of foreign treaties and of colonial affairs, the Upper Chamber has an equal, and sometimes a predominant, voice. In England alone is the Commons all-powerful in

such matters, not only in virtue of its own admitted powers, but by reason of its ability to stretch the royal prerogative to cover its acts. This unique power has a very important bearing on the position of the two Chambers in England, and is indeed the sign of the dependence of the House of Lords; elsewhere the Upper and Lower Chamber have theoretically equal powers (always excepting finance), and in practice these powers may be concurrent and approximately the same. In England this situation is impossible; there can be no equality of power under existing conditions, a fact which explains much of the bitterness of the relations between the two Houses. The general situation has lately been sketched by Mr. Balfour with great happiness, though perhaps with a little exaggeration. "The Representative Assembly (in England) is no doubt the primary organ of the popular will. It determines, without appeal, the political complexion of the Government [*i.e.* the Cabinet]. It controls all the Estimates. It initiates all the taxes. In legislation it is the dominating power. Its Ministers direct and sometimes tyrannize over its deliberations. They are, nevertheless, its creatures, and while no veto of the House of Lords can reduce the salary of an Under-Secretary by a single shilling, the most powerful Cabinet is still obliged to bow to the House of Commons." The first of these sentences asserts the unique paramountcy of England's Lower Chamber as against the Upper; the last of them states another, but an almost equally important, truth. It states that the

Cabinet or the Executive Government in England is not really one which is agreeable to the King, nor to the Lords, but one that is agreeable to the majority in the House of Commons. In truth, the foundation of England's modern representative system, the corner-stone of our whole political edifice, is based on the fact the Cabinet is created by the breath and destroyed by the anger of the majority in the Lower House. This is not a feature confined to England; it extends to all Colonial parliaments and to some Continental ones; but wherever that feature fails, the most valuable element of comparison is gone. As the principle that the Ministry depends on the majority of the Lower House is not recognized in the legislature of many German States, or in those composing the American Union, it follows that analogies from the constitutional practice of either must be used with much care.

(c) The English Constitution unwritten

The third main cause of difference between the English and other models is in that unwritten Constitution, which was once the pride and the glory of Englishmen. All other countries, except Hungary with her equally old Constitution, have precisely defined the spheres of influence between the two Houses, and clearly set forth the powers of both. In no other country save in England could a contest like that over the Budget of 1909 have arisen, nowhere else would it have been possible for one party to advocate rejection on the ground that such action was legal, and for the other to

denounce it on the ground that such action was unconstitutional. Elsewhere the distinction between law and custom either does not exist or exists only in a minor degree; elsewhere the Law and the Constitution are as one. It cannot be wrong for an ordinary Senate to take an action which the law justifies, for how could a custom contrary to the law have arisen? It is only in a Constitution of age-long tradition that custom can arise which annihilates law, that disuse can destroy right, and precedent override legal privilege. Foreign and Colonial Constitutions have been framed on more scientific lines, the spheres of action of the two Houses are precisely stated. Confusion cannot arise over the facts themselves, but only over the interpretation of the facts. Here again the mediæval antiquities of our Constitution contribute not a little to embitter the strife between the two Houses.

In two respects an unwritten Constitution in a country constitutes a most serious danger; in the first place custom may be susceptible of two meanings, while law is only susceptible of one, and the interpretation of constitutional custom offers great opportunities to reckless or unscrupulous statesmen. This danger is real enough, but there is another that is greater still; the procedure of the English Parliament is the same in the case of ordinary laws and of laws which are amendments to the Constitution. In all countries where a written Constitution exists the procedure for amending is special, elaborate and cumbrous; in Eng-

land there is no difference between the procedure which sanctions a law for taxing dogs and that which sanctions a law for abolishing Peers. In practice one may be more difficult to pass than the other, in theory there is no difference whatever between the two processes (4).

Everywhere else, except in Hungary, constitutional amendments are regarded as assaults upon the organic nature and framework of the State, and hence procedure is made difficult and slow, in order that there may be time for consideration and that the people may be given an opportunity to realize the magnitude of the changes proposed. In England such opportunity and such grant of time for reflection depends wholly upon the goodwill of the reformers themselves. An unwritten Constitution therefore has serious dangers as well as advantages, and though more flexible is also more unstable than any other. In England it now appears certain that the result of the present crisis, whatever it may be, must be eventually to increase the written element in our Constitution.

In England to-day it has become apparent that our unwritten Constitution can no longer exist in its entirety. The Middle Ages had their advantages, but precision of statement and foresight into the future were not among them. Above all things the present struggle in England has made clear that a settlement can only be reached by entrusting more of the Constitution to paper than our ancestors deemed to be necessary. In this process, indeed, lurks considerable danger; the atmosphere

of the Constitution may be lost if we seek to embody it in words, the letter may imprison or destroy the spirit. An unwritten Constitution is not a building that is reared on scientific principles and constructed with mathematical accuracy; it is rather "a living mystic tree," the processes of whose "secret growth" defy the analysis of the intellect. No part of the whole question of reform is more vital than this, for in none is delicacy of insight, lightness of touch, and moderation of statement so essential. An unwritten Constitution necessarily tends to be fluid and adaptable to new conditions, a written one necessarily to be rigid and impervious to change. But the admitted need of further written definition for our Constitution only makes it more essential to study examples beyond our own island. At the worst they can teach us much to fear, at the best they can give us much to admire.

CHAPTER II

THE UPPER CHAMBERS OF THE ENGLISH-SPEAKING LANDS, THEIR ANALOGIES AND LESSONS

I.—The American State Governments and their Senates.

The history, which is used to prove everything, will eventually end by proving nothing, and the true worth of examples from other nations and countries can only be estimated by observing the materials both for contrast and comparison. The value of studying the institutions of English-speaking peoples consists in the fact that, amid immense differences of form and type and letter, the spirit is everywhere and essentially the same. No better illustration of the fact can be found than in the fact that all English-speaking peoples live under the English Law, a system of case-law and precedents, while all Continental nations as well as the Latin Americans live under the Roman Law, a system of codes and specific general principles (1). The practical English spirit will only be confined by general rules so long as they suit a particular end, the more logical spirit of the Continent consents to general principles without the same regard to particular cases. Thus, to take a ludicrous illustration, the law of the English-speaking world

allows a man to exercise his freeborn right of reducing his family to beggary by willing away his money to hospitals or to mistresses; the more majestic and rigid Roman Law in other lands prohibits full right of testamentary disposition. A people is nowhere more subtly and surely revealed than in its law, for the institutions of a nation may be the work of man, but their law is almost invariably the expression of their nature. Hence we can be assured that, though we find written Constitutions in the Colonies, and strange ingenuities of political architecture in the United States, none the less the study of their Upper Chambers must reveal much of the true ideas of the English-speaking world. The spirit is everywhere identical, and the more unfamiliar the mode of its expression the more valuable the lesson it conveys, for the known fidelity of Englishmen to their political traditions only serves to make any divergence from the old model the more interesting and instructive.

In either the United States or the Colonies it would always have been impossible to reproduce the political conditions of England in their entirety. Infinite physical differences, vast expanses of territory, contact with native races and with novel ideas, release from any effective Imperial control, all these have left their mark on both American and Colonial politics. The conditions of serfage which enabled England to be ruled by barons and prelates, and of her city life which enabled the burgess middle-class to establish a Lower Chamber as a check on the Upper, neither of these could exist in new

countries, nor be transplanted to a virgin soil. If it is difficult to destroy an aristocracy in an old land, it is impossible to create it in a new one. Heredity, the principle on which our Upper House is mainly based, could no longer be the gateway to power and the fortress of privilege, owing to the absence of history and to the presence of a more real equality of social rank in these new countries. Hence their inhabitants were forced to attempt strange experiments in constructing their Upper Chambers and to constitute their representation on entirely new principles.

For reasons already mentioned, the Federal Constitution of the United States calls for no treatment here, but those of its forty-five State Governments demand our attention. Many of them were constructed before the Federal Union, while the states were still under the indolently tolerant rule of the British Crown; some have been created within very recent times under the Federal Republic. But in practice a uniform type of State Legislature has gradually been evolved, not because the Federal influence has destroyed the feeling of State independence, but because the spirit of a militant democracy has everywhere transformed and fashioned the State Senates in its image. The general uniformity of type is, in fact, very great, but the democratic theory has been applied with rigid and mechanical consistency, and has borrowed much from doctrinaire and revolutionary ideas. The doctrines of extreme individual liberty, of checks upon officials, of separation between execu-

tive and legislature exist. In deference to Montesquieu's theory, that the different powers in the State should be separated, the Governor of the American State and his executive council have been sharply split off from both Upper and Lower Houses of the Legislature.* The Governor is elected independently of either of them, he and his council cannot control the action of either Senate or House of Representatives; the Governor can only send messages to them, his Executive Ministers cannot appear or speak in either House, he himself cannot dissolve or even adjourn either Chamber of the legislature without their express consent. There are thus two Houses of legislative critics without practical experience of working the government, and an executive whose members have no necessary relation or agreement with the making of the laws; the legislature and the executive are separated into water-tight compartments. It is a perfect system of checks and balances, each different organ of the State Government acting partly as a spy, partly as a clog on the others.

There is a world of difference between this system and that of England and her Colonies, where substantive power is held by the Executive Cabinet, which depends for its existence on the maintenance of its majority in the Lower House,

* Montesquieu was not the only influence. Puritanism also has helped this doctrine by crediting ordinary man with original sin, and executive man with a double dose of it; hence religious doctrine has strengthened political theory in imposing checks on the action of the executive.

and resigns when defeated by that body (2). In the State Legislatures of the American Union money Bills usually originate in the Lower Chamber, but the majority of that Chamber may be, and frequently is, adverse to the policy of the executive and of the Governor, who is elected by the people as a whole, and who holds his office for a fixed term of years unmoved by votes of censure or hostility from either House. In England and her Colonies the Lower House has maintained its superiority to the Upper one because it practically appoints and actually dismisses the Executive Ministers; in the American State Governments this authority is wholly lacking to it, with the result of converting the Senates of these States into both strong and efficient Upper Chambers.

The State Senates are all elected by universal suffrage on the same terms as the Lower Chambers. There is sometimes a minimum age-limit for candidates for the Senate, and in Delaware there is a property qualification. Two circumstances tend to increase the Senate's power; in the first place its numbers are invariably less than those of the Lower House (usually in the proportion of one half or a quarter to the popular Chamber); in the second place Senators hold their positions for a longer term (usually four years) than the popular representatives, who normally sit only for two years.* The Senate is usually, therefore, more

* In most states the principle that half the Senate retires by rotation is established, which gives more stability to the Upper House than to the Lower one.

stable and more efficient than the Lower Chamber, and in that way it has everywhere gained prestige. In States where political corruption prevails it has been found cheaper and easier to bribe members of the smaller Senate, and hence the illicit influences of wealth have combined with the legitimate ones of political prestige to enhance the superiority of the Senate. The two Houses legally possess equal powers in nearly all the States, and the practice coincides very closely with the theory. In twenty-one of the States money Bills must originate in the Lower House, but in others they can originate in the Senate; and, in nearly all cases the Senate can both amend and reject financial bills just like ordinary ones. Indeed, there is no particular reason why they should not. In all States finance is regarded as the supreme interest of the whole community, and therefore finance is usually considered the special domain of the popular or Lower Chamber. But in the States of the American Union both Houses are equally popular, Senates as well as the Lower Chambers are selected by universal suffrage.* But finance Bills are necessarily drawn up by a few hands; in England they are framed by the Ministers, not by the majority of the Commons, and their efficiency depends on some such practice. Hence it would be actually better that finance bills should originate in the smaller and more efficient Chamber, except for

* Necessarily in somewhat larger electoral districts, but by the same voters. *Vide* Bryce, *American Commonwealth* (1907), vol. i, pp. 481–2.

two serious dangers. In the first place the small size of the Senate renders wholesale corruption of individuals more easy, and the State Senate is too often the haunt of plutocracy; on the other hand a Lower Chamber of 150 members may remain pure under circumstances in which a Senate of fifty would be bribed, and the direction of finance is therefore safer in their hands. A second danger is more serious still, equality in financial power between the two Chambers must lead to equality in all other matters as well. As it is a substantial equality does exist, and anything that tends further to strengthen it must produce legislative paralysis.

It is obvious that, whether the Lower Chamber can claim financial superiority or not, all the levers, by which the Commons can master the Upper Chamber in England, are missing in the American States. Consequently, we find that disputes between Senate and popular House are frequent, and that deadlocks occasionally occur over bills which the Lower House has sworn to carry. In case of dispute, however, great care is taken to accommodate the dispute; conferences between the respective leaders, meetings of committees representative of each House, all the machinery for bringing the two Houses into personal touch and relation with one another, are freely employed. Usually a compromise is settled, but there are cases in which the matter is dropped and the Bill is completely lost. One cause often predisposes to settlement; the fact that both Chambers are elected on the same demo-

cratic franchise renders both susceptible to popular influences embodied in the press and public opinion. If the people are obviously for one Chamber, that Chamber will often win the day. Of late years the State-Senates have been regarded as the haunts of plutocracy and the seats of corrupt influence, and public opinion regards them with suspicion. But corruption and machine-made politics are also frequent in the Lower Chamber, and as a general rule it cannot be said that the latter has asserted its decisive superiority over the Senate (3).

The whole position and relation of the two Chambers differs fundamentally from the English and Colonial models, because there does exist a real equality between the two Houses, owing to the identity of the electoral franchise for each House, a fact which prevents either House from claiming to represent the people exclusively. The balance thus maintained between the Chambers has been confirmed and assured by doctrinaire theory and by corrupt practices.

It might at first be thought that little result is to be derived from a study of these institutions—in many ways so fundamentally distinct from those of England and her Colonies. But one lesson—the most significant of all for our purpose—is at least clear. Nowhere else do we find so striking an assertion of the equality of the two Chambers, nowhere else is the necessity of an Upper Chamber asserted with such strength. Democratic theory in other countries has often advocated Single-

Chamber government; in the United States the check of one Chamber upon the other is regarded as essential to liberty. America has a profound belief in the "never-ending audacity of elected persons," and one remedy and curb for that audacity is the Upper Chamber. In three States—Pennsylvania, Georgia, and Vermont—Single-Chamber government was instituted, and abandoned after a short period of trial. Other countries—England under Cromwell, France in the days of her Revolution—have made similar experiments with similar results.* But these European experiments were made in periods that were remote or revolutionary; the American ones have been made in periods that were peaceful and relatively recent. More important still, the American experiments were made in states where the Federal system might be thought to render such safeguards unnecessary. It is these instances, therefore, and not the European ones which pass the real condemnation on the Single-Chamber system.

* These instances are mentioned by Mr. J. A. R. Marriott, *Second Chambers*, Oxford, 1910, pp. 27–47, 204.

II.—The Upper Chambers of the English Colonies.

England has granted to some score of her Colonies that complete system of local autonomy which is known as Responsible Government. Technically the term means that the Colonial Executive is responsible to the party majority in the Lower or Popular Chamber of the Colonial Legislature, and resigns on being defeated by it; as the colonials themselves elect their Popular Chamber, they indirectly elect and control their Executive Ministry. But this principle implies only Parliamentary responsibility, there is also Cabinet responsibility; the individual ministers of a colonial cabinet are united, and each is responsible for the acts of the other, so that the defeat of the measure of one minister enforces not only his resignation, but that of the whole Cabinet as well. The distinction is an important one for, while Parliamentary responsibility exists in many countries, it is not always joined with Cabinet responsibility. But both exist in all the self-governing colonies; everywhere the Cabinet acts, votes, lives and dies as one man; everywhere its existence depends on the preservation of its majority in the Popular Chamber (4).

The Three Groups.

The English Colonies endowed with Responsible Government may be divided into three groups:

1. *The Australasian*—comprising New South Wales and Victoria—which obtained Responsible Government in 1855; South Australia, 1856; Tasmania, 1856; Queensland, 1859; and West Australia, 1890. All these were united in the Australian Federal Commonwealth in 1901, though each component state retained large independent powers. In this group, for convenience sake, we may reckon New Zealand, which received Responsible Government in 1852, but which has not entered the Australian Federation. It is here that we find the contests between the two Chambers to have been most bitter, and the provisions for avoiding deadlocks to be most frequent.

2. *The Canadian.* By the Act of 1791 the two provinces of Ontario and Quebec were separated, but they were united under the designation of "Canada," and received full Responsible Government in 1840–7; Nova Scotia and New Brunswick also obtained it in 1847, Prince Edward Island in 1851. All these were eventually united in the Federal Dominion of Canada, during the years 1867–73, while the province of "Canada" was again divided into two, Ontario and Quebec.

During the years 1867–73, all these provinces were united in the Federal Dominion of Canada. Since the Federation, all the component provinces have abolished their Upper Chambers, except Nova Scotia and Quebec. Four new provinces have

since been formed in the Federation, and in all of them the system of single-chamber government now prevails.* Newfoundland may be reckoned in this group, though it is excluded from the Federation. It received Responsible Government in 1855, and possesses a two-chamber system. The relations between the Chambers in the three bicameral states of this group have been harmonious since the granting of Responsible Government.

3. *The South African.* The different Colonies received Responsible Government in the following order—Cape Colony (1872), Natal (1893), Transvaal (1906), Orange River Colony (1907). All were united in the South African Federation by the Act of 1909, and as that Act is now in operation, the Upper Chambers of all are abolished. In the Transvaal and the Orange River constitutions the most careful provisions for avoiding deadlocks between Upper and Lower Chambers were made, but in this matter their constitutions reflect less their own experience than that of our first group, the Australasian.

In marked contrast with the American States, the political growth of the English Colonies has been organic and natural. They have shown few striking applications of great political principles, and they have allowed political forces to develop along the line of least resistance, undeterred by

* The new provinces are British Columbia (1871), Manitoba (1870), Alberta and Saskatchewan (1905); each received Responsible Government at the date given. Manitoba tried an Upper Chamber for a short time, but speedily abolished it (1876).

political theories. They do not, for example, like the American States, criticize Single-Chamber government in deference to theories; it is in deference to facts that their endorsement of the bicameral system is a somewhat grudging and ungracious one. For the same reason they abound in instructive concrete examples as to the working of political machinery; they supply instances of Upper Chambers that are badly composed and that are well composed; of how to draw the line of demarcation between the two Houses strictly and how to draw it loosely; and they present two totally different methods for solving the problem of deadlocks between Upper and Lower Chambers. Generally speaking, the resemblance of their constitutions to that of England is extremely close, though their constitutions are everywhere written, and their Upper Chambers are nowhere hereditary. While it has been found necessary to embody their constitutions in definite written instruments or charters, great care has been taken to allow of freedom and flexibility for subsequent development, while powers of changing the constitution from within have usually been granted (5). Wherever Responsible Government prevails in the Colonies, it is now understood, as in England, that the Executive Cabinet depends for its existence upon the numerical majority of the Lower Chamber. The Colonial Governor is the King writ small, the Colonial Ministers are dwarfs copied from the giants at St. James's, the Lower Chamber is a cottage fashioned after the palace of Westminster.

Only in the matter of the composition and of the powers of the Upper Chambers has it been found necessary to break new ground everywhere, and to try new political devices. The fact that it was found needful to create Upper Chambers at all is in itself of significance, for it is no explanation to say that they were established in the Colonies as a matter of tradition. It may, indeed, be that we established them for the same reason as the Italian says *per Baccho*, and that an Upper Chamber in the Colonies is as meaningless a repetition as this two-thousand-year-old oath. But the oldest and blindest habits admit of explanations, and though Upper Chambers in the Colonies may have been established in their outward framework for one purpose, they have been used and justified for another. A succeeding generation has interpreted them according to its own ideas or twisted them to its own purposes, and it is in tracing these deviations from their original objects that the interest of our study lies.

A.—*The establishment of the bicameral system in the Colonies.**

The first necessity is to ascertain the objects of the Englishmen, who were primarily responsible

* The two branches of Colonial Legislature are usually termed the Legislative Council and Legislative Assembly respectively. But as the term Council may suggest an executive Cabinet to English readers I adopt the expressions Upper and Lower Chamber throughout. My plan is to sketch the general types, but specific details as to each Colonial constitution will be found in Tables I.–II.

for the creation of the Colonial Constitutions. The most important period lies between the years 1846 and 1860, during which time eleven Colonies received Responsible Government upon lines approved by the statesmen of Downing Street. The general policy directing these grants was laid down by Earl Grey (Secretary for War and the Colonies, 1846–52), it was inspired to a large degree by Whig and Benthamite traditions, and was not substantially altered by his successors. The period was one differing profoundly in constitutional ideas from those in which we now live, an age in which the statesmen generally showed narrow individualism, adhered rigidly to political and constitutional dogmas, and displayed a great dread and distrust of the "vague, irresponsible multitude." Earl Grey embodied these tendencies in himself and in his policy, and never wearied of proclaiming the danger of yielding to the rash, half-formed wishes and evanescent waves of public feeling. He and his contemporaries had got beyond the conception that an aristocracy was essential to every kind of political community; after the humiliations of 1832, the Upper Chamber in England had been taught by the Duke of Wellington that its existence depended on its acquiescence in the new order of things, and its general subservience to the Commons had become extreme. The House of Lords was regarded as representative of a hereditary class, and therefore as unlikely to interpret the opinion of the whole nation so well as did the Commons. But while both the Whig statesmen

and those of the more advanced Cobdenite school felt that the existing Upper Chamber in England was unsatisfactory in its composition, and held that its powers might well be limited, they were strongly of opinion that it was desirable to have some check on the excesses of the democracy. They greatly feared that the Commons might give way to the pressure of excitable mobs of their constituents, and that revolutionary measures might be forced through the Lower House, to the detriment of the community as a whole. Their ideas were typically Whig—indeed, exactly those of Hamilton, the American, above quoted (p. 15): if there was to be an Upper Chamber at all, they did not desire that it should represent a class or the hereditary interest only, but that it should represent the interests of the whole nation. The Upper Chamber should thus be prepared sometimes to oppose the numerical majority of the Commons or of the whole people, when one or both had temporarily lost their reason; it was then its duty to make them pause till that reason was restored. Under these circumstances, the characteristic Whig method of improving the composition of the Upper House was to create Life-Peers, who should act as a breakwater against the restless and turbulent sea of democracy. This policy the Whig Government of Lord Palmerston actually attempted to carry out in regard to the English Upper House in 1856 by using the royal prerogative to create Baron Parke a peer only for life (6). In deference to the storm of opposition raised and the quotation of

precedents, they dropped the scheme in England, and with it the whole policy of gradually filling the Upper House with Life-Peers. In the Colonies, however, the Whig statesmen had a free hand, and could apply their principles with more consistency and success.

There can be no doubt that Earl Grey and his successors believed a bicameral system to be most desirable in the abstract, but they were open to the arguments of practical experience, and attached considerable importance to the ideas of the colonists themselves. These opinions seem to have varied a good deal in the matter, no doubt under the influence of practical considerations. In the Canadian Provinces the general type of government had been a representative system of two Chambers, but the Governor appointed his ministers independently of either, and retained complete executive control. The only alteration made by Responsible Government was to transfer the control of the executive to the majority in the Lower Chamber. Opinion in the Canadian Provinces does not appear to have been very favourable to the bicameral system though it was divided on the point.* It would, however, have been a strong step for the Home Government to abolish a system that already existed throughout Canada, and Lord Durham, the greatest of all colonial statesmen, appears to have been against so violent a course in North America. In the Australasian provinces, however, the system of government was different.

* *Vide* Appendix IV.

Here the Governor either governed with an executive council as an absolute autocrat, or controlled the executive on the advice of a Single Chamber, known as the Legislative Council. This body was partly elected by a limited franchise, partly nominated by the Governor, and the result was a unicameral system. A number of petitions in favour of retaining this system in a modified form reached Downing Street from the Colonies during the period of constitutional reconstruction, and the argument for a Single Chamber seemed to be strong. Practical experience of the difficulty of constituting Upper Chambers in the Australasian colonies even induced Earl Grey himself to modify his bicameral views (7). He declared their danger to lie in the fact that the division of the legislature into two branches withdrew some of the most able and intelligent men from the Lower Chamber "in a community not numerous enough to furnish more than a few persons qualified for such duties." Even if it did not do this the Upper Chamber might be composed of mere party men without ability, in which case it must become discredited and weak. He was therefore led into a practical advocacy of Single Chambers for the Colonies (8). "*I now consider it to be very doubtful, at least, whether the Single Legislature (Chamber) ought not under any circumstances to be preferred.* If an Upper Chamber could be constituted in such a manner as to have substantial weight and authority, and to be thus capable of exercising a salutary check upon the representative Assembly, while, at

the same time, effectual provision were made against the machine of Government being brought to a stand by differences between these two bodies, the advantage of such a constitution of the Legislature could not well be contested. But to accomplish this is a problem not yet solved by any Colonial Constitution of which I am aware" (9). Earl Grey wrote this in 1852, and he was by no means alone in this advocacy of Single-Chamber legislatures for the Colonies. A Report of the Committee of Trades and Plantations (May 1, 1849) actually recommended the establishment or retention of Single-Chamber legislatures in New South Wales, Victoria, Tasmania and South Australia, in spite of the fact that they thought it "desirable that the political institutions of the British Colonies should be brought into the nearest possible analogy to the Constitution of the United Kingdom" (10). It is true that this plan was associated with a scheme for the possible Federation of Australia, but such Federation could only have been accomplished on petition of at least two of the colonies affected. Hence the Committee was fully aware that their scheme might involve the establishment of Single-Chambered legislature in each of four colonies, which might possibly remain permanently separated and independent of one another. The Constitution Act for Australia of 1850, however, prevented any undue interference on the part of the Home Government, and permitted the various Australasian colonies practically to amend their Constitutions, to endow themselves with Responsible

Government, and thus to shape their own destinies.* It is singular that the first use they made of their freedom was to adopt the bicameral system with unanimity. (New Zealand had already obtained two Chambers by its Act of 1852.) The fact of this complete agreement among the Colonies as to the advantage of an Upper Chamber is the more remarkable because the statesmen of Downing Street, far from influencing them unduly in that direction, may even be said to have discouraged them. When Englishmen abandoned or forgot their political traditions the colonials remembered them. As all the Canadian Colonies already possessed the Two-Chamber System, it is not surprising that they should retain them on the adoption of Responsible Government; but the Australian Colonies and New Zealand adopted two Chambers only after some actual experience of a unicameral system (11). Their action must be regarded as due to a natural distrust of anything advocated by Downing Street, to a vague sense of tradition, and to one of these happy unconscious accidents which settle constitutional problems for Englishmen, rather than to any resolute and avowed belief in the essential need of a bicameral system. Subsequent experience and practice in the Upper Chambers of those colonies, which possess larger populations and more settled policies than these of which Earl Grey spoke, enable us to estimate the true value of his judg-

* Between 1855–9 New South Wales, Victoria, South Australia, Tasmania, Queensland, New Zealand all received Responsible Government on models largely drawn up by themselves.

ment, when he wrote in 1852 that "the attempts, hitherto made to create in the Colonies a substitute for the House of Lords, have been attended with very moderate success" (12). The answer is that much has depended on circumstances, on the method of constituting the Upper Chamber, and on the temper of the people in the different Colonies. Everywhere, however, the dream of creating a serene and dignified Senate, indifferent to party or mob-clamour, has disappeared.

Since the granting of Responsible Government the Canadian Colonies have never shown much enthusiasm for their Upper Chambers, which have been abolished in four of the provinces. In the beginning the Australasian Colonies adopted two Chambers with unanimity, but subsequent experience qualified their enthusiasm. In our third group, the South African Colonies, the attachment to the bicameral system has, from the first, been singularly lukewarm. Cape Colony adopted two Chambers in the early fifties, and appears to have retained them without much protest after the introduction of Responsible Government (1872). But the Cape Upper Chamber, being elective, threatened to challenge the supremacy of the Lower House. Its example and claims were not encouraging, and they seem to have impressed the other Colonies in South Africa. When Natal petitioned for Responsible Government she made a determined effort to get rid of an Upper Chamber altogether, and only yielded to the strong opinion of the Home Government in the matter (1893). It is

quite clear that the Upper Chambers in the Transvaal and Orange River Colony are only temporary ones in their present character, and it is by no means certain that it was not intended that they should be abolished altogether in the future. As for the Federal Senate of South Africa the Constitution gives it no special protection after ten years; and "furthermore (this is an open secret) there was a strong party in the convention in favour of doing without it altogether."* The feeling here shown is more significant than any of the other instances adduced. Whatever may have been thought of Single-Chamber Government in a Unitary State, it had always been previously considered that an Upper Chamber was indispensable for a Federal State. If the collective wisdom of South Africa could for a moment seriously contemplate doing without one in the Federal Constitution, it is quite evident that it absolutely condemns the bicameral system for Unitary States, and in this judgment we see the severest criticism that the Two-Chamber system has hitherto received. But in any case the general testimony of our other Colonies to the worth of the bicameral system must be regarded as a somewhat ungracious one.† Nowhere is the Upper Chamber really imposing in the Unitary Colonies, in few is it actually powerful, in many it is regarded as a rather tedious relic of

* Professor J. H. Morgan, letter in *Westminster Gazette*, April 16, 1910; J. H. Brand, *The Union of South Africa*, pp. 68–9. For Natal, *vide n.* 4 and Appendix IV.

† *Vide* Appendix IV. for illustrative extracts.

a by-gone age. In Canada and South Africa, certainly, it is looked upon as an ancestral relative, whose death would not cause any particular grief to the Colonies in question, though they do not care to terminate his existence by speedier means. The Home Government stands by acting the part of the family doctor, bidding the eager heirs to have patience, and meanwhile doing its best to keep the aged patient alive by cordials and by encouragement.

B.—*Composition of Upper Chambers in the Colonies.*

While in Australasia at least, Home Statesmen did not strive to prevent the creation of Upper Chambers, they interfered considerably in the way of influencing or of settling the method of its composition (13). They generally preferred, and sometimes specially insisted on, nominating colonial Upper Chambers for life. This was partly because they thought that the system would erect a permanent checking Chamber, partly because they thought that, in case of a deadlock between two Chambers difficulties could be overcome by increasing the numbers of the Nominee Chamber, or, as we should say, by "creating peers." This process could not be applied to an Elective Upper Chamber, because its numbers were necessarily limited. Hence the Home Statesmen advocated

the Nominated System, not only to ensure stability, but to give flexibility to the Upper Chamber. Time and experience have entirely upset both calculations, and the instinct of the colonists, which usually preferred Elective Upper Chambers, has confounded the foresight of Downing Street, which advocated nominated ones.*

In the composition of the Upper Chamber in the Colonies three methods were open: (1) That of *Heredity;* (2) that of *Nomination*, whether (*a*) for life, or (*b*) for a term of years; (3) that of *Election*. From what has already been said it will be seen that the Home Statesmen of the fifties had disregarded the first method as impossible. This expedient had been seriously entertained as a method for constituting the Upper Chambers of Canada in 1791, but was laughed out of court when proposed for New South Wales in the fifties ([14]). Between the second and third methods there was, however, naturally much hesitation. The principle of the Governor nominating the members of Upper Chambers for life was adopted in the Canadian group for "Canada" (Ontario and Quebec),† Nova Scotia and Newfoundland; in the Australasian one for Queensland, New South Wales and New Zealand.‡ In the case of any conflict arising be-

* *Vide* Appendix V. *Nominee versus Elective Upper Chambers in the Colonies.*

† In 1867 the province of Canada was divided into Ontario and Quebec, and the Upper Chamber abolished in the former, while life-membership was maintained in the Upper Chamber of the latter.

‡ Since 1891 in New Zealand the term of membership has been limited to seven years.

tween the two Houses there was an obvious danger that the life-members, being irresponsible and irremoveable, would be disinclined to give way. It is clear from Earl Grey's dispatches that he intended that the Governor should nominate the life-members not on his own choice, but "so as to make it (the body) fairly represent the majority of the intelligent members of the community" (15). In other words apparently the Governor, or Lieutenant-Governor, was to nominate Life-Peers on the advice of the premier of the executive council, who himself depended on the party majority of the Lower Chamber. But, supposing that the party, after nominating a majority of the Life-Peers, got defeated and that an opposition ministry were installed. A deadlock must then almost certainly take place, for in the absence of immediate vacancies the members of the Upper Chamber, who belonged to one party, would strenuously oppose the Bills sent up from the Lower Chamber by the other party. Earl Grey laid it down as a principle that "it is impossible to allow the Legislative Council to obstruct permanently the passing of measures called for by public opinion, and sent up by the popular branch of the Legislature." Therefore, though he regarded it as a "serious evil" to "make an addition to the members of this body for the purpose of changing the character of the majority" (in the Upper Chamber), he distinctly declared that such a course would be demanded by "circumstances of clear and obvious necessity" (16). In other words what we should call the crea-

tion of peers for "swamping" purposes was expressly sanctioned by the father of our system of Responsible Government, and was recognized as an inevitable outcome of the system of nominating life-members to the Upper Chamber. It is not a little interesting to see how opinion has altered in this matter and how English constitutional ideas can be twisted into different forms at different periods. In Nova Scotia and Newfoundland, two small communities, whose development was peaceful and gradual, the principle of life-membership in the Upper House has worked well. But in New South Wales, New Zealand and Queensland, where there has been rapid development and where sharp contrasts between rich and poor soon appeared, bitter disputes between the two Houses soon arose. In 1889 twelve new members for "swamping" purposes were created by the Government of New South Wales on the advice of its premier who led the majority of the Lower House ([17]). But though the Home Government sanctioned this particular stretch of power in New South Wales, it has practically laid down the principle for other Colonies that creation of members of the Upper Chamber for "swamping" purposes was to be regarded in future as a stretch of power, which could hardly be justified under any circumstances.* A somewhat similar crisis in New Zealand in 1891 led to the adoption of the principle

* *Vide* Appendix *VI. On the "swamping" of the Upper Chamber in the Colonies, the Colonial equivalent for "creation of Peers."*

of nominating members for seven years, instead of for life. On a deadlock being reached in Queensland in 1907, the Governor refused to increase the number of members of the Upper Chamber, and the Constitution was amended to provide means of adjustment between the two Houses, when their differences were irreconcilable, by means of a Referendum of the whole people (*vide* pp. 69–71). There can be no question that Earl Grey never doubted that a creation of "peers" in an Upper Chamber which held office for life, might be justified under certain circumstances, and equally none that he would never have admitted the possibility of an appeal to the people in the shape of a Referendum. The whole story shows that the infinite adaptabilities of English political practice can be extended to the Colonies.

The principle of composing the Upper Chamber of members, nominated for a period of years only, was adopted in New Zealand in 1891. After a prolonged and painful experience of the system of nominating members for life, they tried that of nominating them for seven years. The result of the change has simply been that the party in power in the Lower House nominates its supporters to the Upper Chamber and, by means of the septennial vacancies, usually succeeds in redressing the balance of power. In 1893 the system of nominating members of the Upper Chamber for a period of ten years was introduced into the Upper Chamber of Natal, the only case for the last half-century where the nominative system was created with the

intention of making it a permanent factor in a colonial Constitution.*

Some difference of opinion as to the efficacy of Nominee Chambers appears to exist between the statesmen of the Colonies and those of Downing Street (*vide* Appendix V.). The former now agree in condemning it, the latter cling to a pathetic belief in its efficacy which no experience can dispel. But in general, omitting the dubious instance of the Federal Senate of Canada, Chambers nominated for life must be admitted to have been complete failures, and to have either proved somewhat impotent or to have required reconstruction in every case. Such Chambers must either be too strong, or too weak, enemies or tools of the party in power in the Lower Chamber, and in either case they are liable to produce serious constitutional dangers. In practice the life-nominated Chamber has always had severe struggles and has usually ended by becoming a mere shadow. The Upper Chamber, nominated for a period of years, offers some advantages in securing stability, and enables harmony of opinion with the Lower House to be eventually secured. For this reason, when Responsible Government is first conferred on a Colony, it may be useful to have a Nominee Upper Chamber in order to give some stability during the early years

* The case here was exceptional and the system was adopted in order to protect the interests of natives (*vide* note 4). *Temporary* provisions for nominating members to the Upper Chamber have been adopted in West Australia (1890–5), and in the Transvaal and Orange River Colony (1906—7).

of confusion and unrest. So long as the system is purely temporary and when provisions are made for altering it, after the Constitution has got into working order, this principle may work well. This has been recognized and applied in the case of West Australia, 1890 ([18]), the Transvaal and Orange River Colony, 1906–7. In the former case the Constitution provided that the nominee system should cease after six years and be succeeded by an Elective Council; in the latter full power was given to the two Colonies to alter the arrangement at the end of four years if they so desired, and the nominee provisions were in each case obviously temporary. Such experience as we have of the short-period Nominee Chamber does not indicate it as a much more satisfactory method for composing the Upper Chamber than the life-nominee system. The effect of its working is to fill the Upper Chamber with mere party nominees, and these men fail to command either interest or respect, for they are directly susceptible to the pressure of one party in the State, and, but indirectly susceptible to the will of the people. An Upper Chamber of this kind is accordingly weak because it fails to represent either detachment from party or devotion to interests that are wholly national.

The methods for constituting the Upper Chambers in the Colonies have been shown to differ widely, but the general principle underlying that constitution has been uniformly the same. It has been to afford securities against hasty or rash

legislation, against evanescent waves of popular feeling, by filling the Upper Chamber with members likely to be more stable, cautious, or prudent than the average elector. This principle was carried out, whether the Upper Chamber was nominated or elected. A concrete illustration will perhaps show the working of the tendency best. In a letter concerning the Constitution for Van Diemen's Land (Tasmania), of November 15, 1854, its Lieutenant-Governor, Sir William Denison, wrote to the Secretary of State for the Colonies as follows—

"The Legislative Council is to consist of fifteen members, who are to be *elected* by persons having a freehold estate worth fifty pounds per annum; certain other persons, who are supposed from their position to be entitled to rank as the educated class of the community, can claim to vote as electors without being possessed of such freehold estate.

"Having thus provided for the *respectability* of the electors, the only limit placed upon their power of selection is, that the candidate should be thirty years of age, and a natural-born or naturalized subject of her Majesty."

This example is typical, the expression "providing for the *respectability* of the electors" more typical still. It was a genuine conviction of the Home Statesmen of the fifties that the Upper House ought to be based on a different principle from that of the Lower. The hereditary principle was discredited because heredity in England meant the power of a class, and of a class that could not be

reproduced in the Colonies. But the principle of representing property in the Upper House was not only not discredited, but in the ascendant; the security of private property was the corner-stone of Whig and Cobdenite freedom. To compose the Senate out of men, who should guard that sacred right, was to create a really strong and representative Upper Chamber. It seemed quite right to defend property and to form the Upper House out of property-holders; it was only wrong that property-holders should possess a hereditary seat in the Upper House, or consist of holders of one kind of property only—*i. e.* land. The property-holders, who ought to be most represented, were the trading and commercial classes, men whose intelligence had been proved by the acquisition of wealth and by success in business. In addition to these worthy citizens, the Upper House might be thrown open to men who had passed a good educational test—school-masters or officials or others of approved intelligence. Such were the general conceptions. The Upper House, when nominated, was to be filled with superior persons, possessing superior intelligence or business knowledge; if it was elected, the electorate was to consist of respectable persons, small shopkeepers, village school-masters, or the wealthier of the working men. The idea was always to represent the rights of property or the privileges of education in the Upper House, to oppose *bourgeois* respectability to democratic intensity, and the caution of age to the fire of youth. These principles have often been modified in prac-

tice; for instance, the property qualifications for electors to the Upper Chamber has been lowered in Tasmania since 1856, and in certain other Colonies as well. But such qualifications have never been extinguished altogether, and it still remains true that the rights of property have their champions and the educated *bourgeois* their representatives in the Upper House, and to this rule there is no exception in a Unitary Colony.*

C.—*Powers of the Upper Chambers in the Colonies.*

From the composition of Upper Chambers, we turn naturally to their powers, and we find that the broad plan of distributing authority between the two Chambers is the same in the Colonies as in England. The first and most important common principle is that the Lower House initiates money Bills; bound up with it is the second almost equally important principle that, in the ultimate and last resort, the Lower House is the Superior House. A revising Chamber, a checking Chamber, a Chamber which can sometimes apply the brake with suddenness and vigour, that the Upper House in the Colonies may claim to be; but it has never been asserted that it is on an absolute equality with the Lower House. It is not only a Second Chamber,

* An exception is to be found in the Senate of the Australian Commonwealth, the most democratically elected Upper Chamber in the world, but that is in a Federal State, not in a Unitary one.

but a secondary one. The two principles here mentioned are recognized and implicit in the law and the custom of Colonial Constitutions, but are by no means so obvious as in the English model. For instance, Colonial Lower Chambers practically do not possess that power of using the authority of the Crown to dispense with the necessity of legislation, which the ministers in England frequently exercise without paying the slightest attention to the House of Lords. Again, Colonial Constitutions are written, but the laws dealing with the financial powers and relations of the two Chambers are often obscure and equally often very different from the English practice. One rule is universal that, while finance Bills must *originate* in the Lower House, they can both legally and actually be rejected by the Upper House. Apart from this, there is an almost infinite difference of detail. In some Colonies the Upper Chambers have an actual right of amending finance Bills, in others they possess powers which practically amount to those of amendment. In nearly all cases money Bills must be presented *seriatim*, and each must be separately accepted or rejected by the Upper House; in all the power of rejecting finance Bills is maintained and can be exercised in regard to all money Bills (except in the case of those Appropriation Acts, which provide for such annual supplies and votes as are of a non-controversial character). In the matter of the power of the Upper House to amend money Bills, there is no uniform practice, and the provisions of the constitutions are frequently so obscure in this

particular that the question has produced the most serious disputes and deadlocks in the past. But in so much as the disputes have raged not so much over the facts as over their interpretation, a settlement has gradually been effected in almost every case. The Home Government has frequently mediated in such disputes, and has yet more often acted as interpreter of the right in question. In finance, as in other matters, the Nominee Upper Chambers have naturally fared much worse than the Elective ones. A recognized constitutional practice has deprived the Nominee Upper Chamber of Newfoundland, a law has deprived that of Natal, of the right to amend money Bills; and the Home Government has pronounced the legal opinion that the financial powers of the Upper Chambers in New Zealand and Queensland are not on an equality with those of the Lower House. Compared with the Nominee Upper Chambers, the Elective are in a much stronger financial position, and have frequently secured the right to amend money Bills.* In both classes, however, the right of rejecting finance Bills (except in the case of annual Appropriation Acts) is fully maintained, and in the Elective class it is often drastically used. This power is doubtless even more effective than appears, for the

* The Colonies with *Nominee* Upper Chambers for life are New South Wales, Queensland, New Zealand, Quebec, Nova Scotia, Newfoundland; *Nominee* for a period of years—Natal, New Zealand (since 1891), Transvaal, Orange River Colony; *Elective*—Victoria, South and West Australia, Tasmania, Cape Colony. *Vide* Tables I., II., III.

knowledge that it can be made use of no doubt sometimes deters the Lower Chamber from bringing forward certain kinds of financial proposals. The Home Government has at last learnt to avoid all danger of ambiguity in defining the financial privilege of the two Chambers, and in the Charters of the Transvaal and Orange Free State, the most recent and the most democratic of our colonial constitutions, the right to amend money Bills is withdrawn, though the right to reject them is fully upheld. This appears to be the true constitutional doctrine, for even where Colonial Upper Chambers retain the amending right, its use is open to great misconception. In fact, their own interests are probably best served by dropping it altogether in practice, for this method may help them to preserve unquestioned the valuable and important right of rejecting individual money Bills.

English history shows that it was the control of the purse-strings which gave the Commons their supremacy in ordinary legislation; in the Colonies the position is somewhat reversed, the Lower Chamber is generally less the master in finance, and more so in ordinary legislation. Of course, control of finance is necessarily the most important of all powers, and the Nominee Upper Chambers, which are financially in an inferior position, are proportionately inferior in other respects. On the other hand, the Elective Upper Chambers generally retain very considerable financial powers, though it can hardly be said that they can amend, revise, or veto ordinary laws to the same proportionate extent.

It may be well to take a concrete example of an Elective Upper Chamber, and to show the general relation between it and the Lower House. Here is the record of the Upper Chamber in Victoria till 1878: "The Council" (*i. e.* the Elective Upper Chamber) "has on many occasions waived its well-founded objections, and has passed Bills contrary to its own wishes, because the state of public opinion at the time seemed to require the sacrifice. It has surrendered free trade. It has accepted manhood suffrage. It has conceded the abolition of state-aid to religion. It has permitted the sacrifice of that great public estate with which her Majesty's bounty had endowed the Colony. It has allowed a partial and unjust land tax to be imposed on one section of its own constituents. On one important subject only, that of mining on private property, has it prevented the legislation that was proposed to it. On several occasions the Council has happily been able to protect the public from mining Bills, to the principle of which serious objections existed." * The statement surveys the years 1855–78, during which the fiercest disputes had raged between the two Chambers. Though written with some bias, this is a substantially true statement, and roughly indicative of the general relations between an Elective Upper Chamber and a Lower House in the Colonies. Generally, power seems to

* W. E. Hearn, *The Government of England*, second edition, London 1886, pp. 584–5, Statement written by W. E. H. and adopted by the Legislative Council for the information of the Secretary of State, November 21, 1878.

be enjoyed by the Upper Chamber, in proportion as its composition is democratized. For example, the Upper Chambers of Victoria, Queensland and West Australia have all consented to reforms which liberalized and democratized their composition, but in return for these reforms they have generally exacted a price. In each case the Lower Chamber was compelled to concede the actual or virtual right of amending money Bills to the reformed and improved Upper Chamber. The same tendency appears elsewhere, for it is generally admitted that Nominee Upper Chambers are far inferior in power to Elective ones, and the reason is to be found in the profound colonial conviction that a man or a body is only to be trusted, when it is freely and directly chosen by the people as a whole ([19]).

Apart from this general rule, no definite statement as to the respective powers of the Chambers in each Colony can be made. None the less, the presence or absence of provisions for adjusting the difficulties between them will show their respective positions with relative certainty.

D.—*Provisions for adjustment of differences between the two Chambers in the Colonies.*

In reviewing the different methods of adjusting differences, one cannot fail to be struck by their number and variety, and by the fact that they all originated in the Australasian group. Why does this extraordinary diversity of methods prevail, and

how is it that they have all sprung up on Australasian soil? Conflicts between the two Chambers in the Colonies were certainly inevitable, because the moderating influences of tradition and history were absent, and because physical and economic conditions demanded legislation, which might not be wise but which had to be sudden. But, since the granting of Responsible Government, there has been relative harmony in the Canadian group between Upper and Lower Chambers, because these provinces are imbued with more of the historic sense, have an older and more settled population, and have had relatively few burning questions to settle. Neither in Quebec, Nova Scotia, nor Newfoundland do we find special methods of adjustment to have been necessary. South Africa hardly offers sufficient material for experience, because the Cape is still the only colony there which has attained its constitutional majority. In the Transvaal and Orange Free Colony provisions have indeed been made for adjusting differences, but they are framed on experience from Australia.

Colonial assemblies are usually concerned with land policy, tariff questions, measures dealing with railways or public works, or with industrial or social legislation, and none of these are measures about which people can afford to wait, in a new country where economic development is everything. There is no country where the land question and the problems of taxation and of tariffs have been more vital and burning than in Australasia. Under a tropic sky legislatures and men alike seem feverish and

excitable, and their laws—the outcome of both—bear this impress. In such a country, therefore, controversy runs high, the Upper House is eager to reject a Bill, the Lower eager to force it through, each is uncompromising, and rests satisfied only with a complete defeat of the other party (20). The result has been that none of those extreme remedies, which strain the constitutional resources to breaking-point, have been absent from Australasian politics. To overcome the obstinacy of the Upper Chamber, the somewhat discreditable expedient of "Tacking" has been frequently employed, and the far more revolutionary courses of "creating peers" for "swamping" the Upper House and of a total refusal of supplies have both been used. On several occasions the Governor of New South Wales has "created peers"; in Victoria, at the beginning of 1878, the premier played the part of a Roman tribune, dismissed every public servant in the Colony, and brought the whole business and commerce of the country to a standstill. But these were heroic days, and the age of constitutional chivalry has fortunately ended in the Colonies. Since 1892 Governors have ceased to sanction such revolutionary courses, for it has been recognized that such settlements of deadlocks threaten a most serious danger not only to the Constitution, but to the actual existence, of the Colony in question. Hence the cooler heads both in Australia and in Downing Street have displayed great fertility in devising expedients for moderating these evils.

1. *"Swamping" the Upper Chamber—the Colonial equivalent of "creating peers"* (NEW SOUTH WALES).

The first method of adjusting disputes is the colonial equivalent of "creating peers," the policy of "swamping" the Upper House, or, as the more cautious official phrase has it, the "policy of increasing the members of a legislative council in order to secure a majority for a measure previously rejected by them." This method, though an exceedingly bad one, is unfortunately not obsolete, for it could certainly be used in New South Wales in the future as in the past. The objection to it is that it is the last of all constitutional resources, and is therefore much more effective as a threat than in action. It may, indeed, carry certain legislation, but it can only do so by transforming the character of the Upper Chamber; in such case, a further creation may be desired by the opposition party when it comes into power. The Governor is then placed on the horns of a dilemma; either he refuses to "swamp" the Upper Chamber further, in which case he incurs the charge of partiality; or he consents to do so, in which case he weakens it still more. Even the first "creation" must seriously injure the dignity and power of the Upper Chamber, a second similar act reduces it to an absolute shadow. The policy of "swamping" is a sort of constitutional firework; it can only be used once with effect. The evils of the whole method have been made unfortunately too clear by the example

of New South Wales.* The power of such "creation," of course, only actively exists in colonies with Upper Chambers of Life-Nominees (New South Wales, New Zealand, Queensland, and Newfoundand), for it is only in these cases that the charter leaves the numbers of the Upper Chamber unlimited. In New Zealand, the reform of 1891 substituted the system of nominating members of the Upper Chamber for seven years instead of for life, and thus practically removed any further necessity for a policy of "swamping." In Queensland a constitutional amendment in 1907 instituted the Referendum as a deciding force in case of dispute between the two Chambers, in order to avoid a resort to this same policy (*vide* pp. 69–71). In Newfoundland the need for "swamping" the Upper Chamber has been removed in the most curious way of all, not by a definite statute, but by the growth of a constitutional practice. The Upper Chamber is limited to fifteen, and the Governor is forbidden to increase it further, though the Crown retains the power to do so. In practice, King George is as little likely to override the powers of his Governor in a Colony as to override the advice of his Prime Minister in England. It is only in New South Wales, therefore, that the clumsy and dangerous contrivance known as "swamping" the Upper House can be said to be a living and active instrument of the Governor's prerogative in a Unitary Colony, and it is to be hoped that a consti-

* *Vide* Appendix VI., for a full discussion of the whole policy of "swamping."

tutional amendment will soon render it unnecessary even in that Colony.*

2. *Dissolutions, Single or Simultaneous* (VICTORIA, SOUTH AUSTRALIA).

The solution by dissolution was the most favourite expedient in the earlier days of colonial government ([21]). Here, the prerogative of the Colonial Governor is curiously dissimilar, whether in use or abuse, from the corresponding power possessed by the English King. The constitutional doctrine in England appears to be that the King must grant a dissolution of the Commons if requested to do so by the ministry in power; in the Colonies the Governor has been frequently known to refuse such a dissolution if he thinks it against the interests of the community. But the matter does not end here —against the *Nominee* Upper Chamber in the Colonies the only weapons of the ministers are a dissolution, or "swamping," and a dissolution is less often refused in *Nominee* Colonies than in those which have an *Elective* Upper Chamber. In the latter case, the Governor may be empowered, under certain circumstances, to dissolve not only the Lower House but the Upper one as well. Such a power is indeed very desirable, for the Upper Chamber, having its numbers limited by law,

* In South Australia, by the Act of 1908, power is given, under certain circumstances, to the Electors to the Upper Chamber to "swamp" that body (*vide inf.*, p. 68-9). A restricted power of "swamping" exists in the Federal Constitution of Canada (*vide* Appendix I.).

cannot be "swamped," and therefore the enforcement of a simultaneous dissolution of both Houses is the only way to overcome the opposition of the Upper one. In two Colonies—Victoria and South Australia (which possess *Elective* Upper Chambers)—provision has therefore been made for the premature or "penal" dissolution of the Upper Chamber, though the methods slightly differ in each case. The Victorian Act of 1903 provides that, if the Upper Chamber fails to pass a Bill sent up by the Lower one, the Governor can dissolve the Lower House, "declaring such a dissolution to be granted in consequence of the disagreement between the two Houses to such a Bill." If the Upper Chamber again fails to pass the Bill, the Governor may then (if he wishes) grant a simultaneous dissolution both of Upper and Lower Chamber together.* In this way, one dissolution of the Lower Chamber is followed by a second simultaneous dissolution of both Chambers, which secures settlement by referring both disputants to the judgment of the hustings. The South Australian Act of 1908 is slightly more elaborate; the procedure applies only if a Bill is rejected by the Upper Chamber in the first place, and if, after one dissolution of the Lower Chamber, the Upper Chamber again rejects the Bill. In such case it is lawful, but not obligatory, for the Governor either to grant a simultaneous dissolution of both Chambers, *or* to issue writs for the election of *nine* addi-

* This whole procedure does not apply to certain constitutional amendments.

tional members for the Upper Chamber. The last alternative is curiously interesting, since it practically gives to the limited electorate, which chooses the Upper Chamber, the power to "swamp" that body. In either case, the vote of the limited electorate for the Upper Chamber has a chance of making itself felt, the more so as the whole matter is not decided solely by the vote of the numerous electors to the Lower Chamber.

3. *The Referendum* (Queensland).

In the cases just quoted, the second or simultaneous dissolution of both Chambers is a sort of informal and indirect Referendum. But the application of the Referendum proper is confined to Queensland, and must be considered as exceptional. There the nominee character of the Upper Chamber rendered settlement of disputes peculiarly difficult, especially as the power of "swamping" has been practically ruled out as *ultra vires* since 1892. In 1907, Kidston, the Premier of Queensland, appealed to the Governor in consequence of a deadlock, and requested him to "swamp" the Upper Chamber. The Governor refused, the Premier resigned, the leader of the opposition took office and asked for a dissolution. The general election went against him, so Kidston returned to power, and not only carried the disputed measures, but others which provided against deadlocks in future. The Home authorities in England upheld

the Governor's refusal to consent to the "swamping" process, but assented—with some alterations—to Kidston's Bill providing for a settlement of future disputes by means of a Referendum. The Act of 1908 makes the arrangement as follows: In case a Bill has been rejected in two successive sessions by the Upper Chamber, at the close of the second session the Governor directs by proclamation that the Bill so rejected shall be submitted to a Referendum. The Referendum poll is to be taken only on this Bill, and the electors voting are the ordinary electors. "If the Referendum poll is decided in favour the Bill shall be presented to the Governor for His Majesty's assent, and upon receiving such assent the Bill shall become an Act of Parliament in the same manner as if it had been passed by both Houses of Parliament, *and notwithstanding any law to the contrary.*" This is perhaps the most curious and interesting of all colonial devices to settle disputes between the two Chambers, but as yet we have no practical experience of its working. It appears, however, to be open to two objections; first, there is no chance of the limited electorate of the Upper Chamber having a real say in the dispute; next, the result of bringing the whole people to decide is that the Bill in question must either be directly accepted or directly rejected. After the Referendum has decided, the Bill cannot be substantially altered, and, as compromise in the matter is impossible, a popular verdict given against the Upper Chamber must tend most seriously to weaken that body and to

destroy its influence. Once again, therefore, it is proved that wherever a *Nominee* Upper Chamber exists in the Colonies, it is subjected to humiliations which do not befall *Elective* ones. It is evident, therefore, that a fourth method of adjusting disputes is desirable.

4. *Joint-Session* (Federal Australia *and* South Africa; Transvaal, Orange River Colony).

4. That method is the method, not of simultaneous dissolution, but of Joint-Session of the two Houses. One of the most salutary of all methods for adjusting difficulties between the two Chambers in the Colonies has been the method of conference by special committees from each House. In this way the leaders of each Chamber are brought together, unnecessary friction is avoided, and compromise becomes possible. Even the fiercest contests known between two colonial Chambers, those in Victoria in 1865 and 1878, ended by some modification in the original demands of the Lower Chamber, and therefore preserved some dignity and respect to the Upper one in the very hour of its abasement. This result was certainly due, in some degree, to the system of conference and committee. The principle of settling disputes by joint-session of both Chambers is only an extension of the system of joint-meetings and conferences between the leaders of both legislative bodies. The process was first applied to the Federal Government of Australia in 1900 and has since been embodied in

the Federal Constitution of South Africa, 1900 (22). The provisions in question were largely borrowed from the practice of Norway, which is a Unitary State, but they were hardly altered in their application to Federal conditions. It is, however, better to take the provisions for joint-session from the constitution of the Unitary Colonies; that is, from those of the Transvaal and Orange River Colony.* The Letters Patent of 1906 and 1907 respectively make identical arrangements for the two Colonies. In the case of the Upper Chamber refusing to pass a Bill, sent up in two successive sessions, the Governor may convene a joint-session of the two Houses at the end of the second session. The members of both Houses present at the joint-session may deliberate and must vote together. Amendments may be proposed at the joint-session and may be carried, so that even at the last moment the door is left open for compromise and agreement. When the decision finally comes the Bill must be carried by an absolute majority (*i. e.* by more than half) of the total number of the members belonging to both Houses. A Bill so affirmed becomes law in the ordinary manner. Both in the Transvaal and the Orange River Colony it is pro-

* We see a most striking difference in the fact that Federal finance Bills of the nature of Appropriation Acts must be settled by the principle of joint-session at the end of the *first* session and not the second. This significant provision appears in the Federal Constitution of South Africa, but is omitted from the Unitary Constitutions of Transvaal and Orange River Colony.

vided that, instead of a joint-sitting, the Governor may resort to a dissolution of the Lower Chamber only, or to a simultaneous dissolution of both Chambers.* Such dissolution, however, must not in either case "take place within six months before the date of the expiry of the Legislative Assembly (Lower Chamber) by effluxion of time."

On the dissolution method alone we need spend no more time; that of joint-session, with or without dissolution, is more interesting and unique. In fact, it seems to be the sum of political wisdom in the matter, according to the views both of the Colonies and of Downing Street. The Federal Constitution of Australia was shaped by able statesmen with profound colonial experience, who were not ashamed to borrow from the Continent of Europe; in that of South Africa still abler constitution-makers, imbued with Dutch and Roman ideas of law and government, had their share; in those of the Transvaal and Orange River Colony, English as well as Colonial statesmen influenced the shaping of its provisions. In all these there is general agreement as to the principle of the value of joint sessions, but there is a fundamental divergence between South Africa and Australia on the question of consulting the electorate in case of dispute. There is high authority for stating that the value of the

* Only the first method of dissolution is possible while the legislative council remained *Nominee*. As it was obviously intended that it should eventually become *Elective*, the second alternative of simultaneous dissolution may be taken to be the real method recommended in the Transvaal and Orange River Colony.

joint-session method of adjusting differences is rated so highly that it is likely to become a permanent part of every Colonial Constitution in future, and some of us may yet live to see the white inhabitants of Uganda or of Nigeria enjoying Responsible Government and settling the differences of their two Chambers by joint-session. Whether they will give great powers to the Lower Chamber by preventing dissolution as in South Africa, or to the electorate by allowing it as in Australia, remains to be seen.

At any rate this joint-session method is the one that is most favoured, and that is believed to promise best for the future; and, though experience has not as yet proved its value, it seems possible to make certain inferences about it. In the first place, the principle of joint-session is only applicable, or at least is only likely to produce good results, when the character of the two Chambers is similar. Where one is *Elective* and the other is *Nominee*, joint-session does not produce the same harmony and understanding, and it was this reason, as much as any other, which drove Queensland to substitute for it the process of Referendum. The second point is that joint-session allows full powers of discussion and modification, and therefore of fair compromise up till the very latest moment, an advantage which it is difficult to overrate, and which no other method can possibly secure. A third is that it practically ensures that the Lower Chamber will pass its measures at the end of the second session, provided that it has a substantial

majority. Everywhere in the Colonies the Upper Chamber is very small in numbers as compared with the Lower House, in no case more than one-half so many; hence so long as the majority in the Lower Chamber is a good one, it is bound to prevail in the joint-session. The small numbers of the Second Chamber secure this result, and the advantage is that the general superiority of the Lower House is decisively secured without necessarily weakening the Upper one. In this respect, not only the joint-session method, but the simultaneous dissolution method also, is very much superior to the Referendum. The Referendum process either censures the one House or the other; in the first case it temporarily annihilates the influence of the Upper Chamber; in the second case it so seriously injures the dignity of the Lower Chamber as to make possible the illusion that the two Houses are equal in power. The Referendum process is therefore simply a balance of opposite dangers. But in the simultaneous dissolution method the limited electorate, which chooses the Upper Chamber, can exert some influence on the decision. Again, by the method of joint-session the members of the Upper Chamber themselves have an opportunity of making their voices heard, though they cannot endanger the supremacy of the Lower House. In deciding upon the relative merits of these two processes we have, therefore, to make a choice not between opposite evils, but between opposite benefits. If we prefer the joint-session method, we must remember that it has two forms, *the South*

African—or joint-session without dissolution, which implies supreme confidence in the legislature; the *Australian*, or joint-session with dissolution, which means supreme confidence in the electorate.

The general analogy of Colonial Constitutions to English development is so close that we are in danger of thinking it identical. Such an assumption would lead us into serious error. The use of the royal prerogative in "creation" of peers, though threatened, has not been employed in England for two hundred years, it was employed in the Colonies but a score of years ago; again, the right of dissolution is refused by the Governor in the Colonies under circumstances when it would be conceded by the King of England (22). In short, the royal prerogative has been, and still is, more actively used as an escape from difficulties in a colony than has been the custom in England. Again, in reviewing the different colonial methods of passing Bills over the heads of the Upper House, one important consideration must not be omitted. These various methods of procedure generally apply only to ordinary laws, and not to amendments to the Constitution. To ensure political harmony, it may be well to allow certain rash and hasty measures, concerning matters of temporary importance, to become law in defiance of the Upper House. But such procedure ought not to apply to measures affecting the frame and organic nature of a colonial constitution.

Nor does it in point of fact so apply, for even where no distinction is drawn between ordinary legislation and constitutional amendments, one last resort remains. The King and the Home Government, by their instructions to the Colonial Governor, can usually retard, and can always veto or disallow, a colonial statute. This power would hardly ever be used to defeat ordinary laws, but it might be used in the case of drastic constitutional amendments. Thus, in this respect the Colonies enjoy an advantage that enables them to adopt procedure for forcing through legislation which England herself cannot adopt. By this means the Colonies secure an impartial judge, a calm Olympian, who can interfere to save their constitutions from a mortal wound. The only case in which a similar power could be exercised in England would be if the King's veto were revived for constitutional amendments, and exercised by him as a personal act without reference to his ministers. As this revival must be regarded as inconceivable under modern conditions, it follows that the methods of joint-session or dissolution (simultaneous or otherwise) can only be applied to England with modifications. A longer period than the end of the second session would have to be chosen, and more safeguards would have to be provided against constitutional amendments being hastily forced through by such means.

The methods of composing Colonial Upper Chambers, and the expedients for adjusting differ-

ences between them and the Lower Houses, are in themselves only pieces of constitutional machinery. But they are the index and evidence to those deeper and more hidden forces which have moulded colonial institutions. The failure of the Upper Chambers, whether nominated for life or over short periods, shows that the principle, which was believed to ensure permanence and strength to the Upper House, ended by discrediting and weakening it. The reason is that the genuine forces in the Colonies have been democratic, and these forces, though often checked and moderated by other influences, have tended more and more to prevail. No *Nominee* Chamber ever appears to be democratic, for a nominated representative either represents himself or his party or a certain amount of private property, and in each case he will be permanently out of sympathy with a large section of the electors. The logic of events, therefore, reduces the *Nominee* Upper Chamber to relative impotency. In the case of the *Elective* Upper Chamber, the way in which new forces have transformed the old ideas is singularly interesting. For example, the committee drafting the Constitution of Tasmania, gave it an *Elective* Upper Chamber to act as a check on the Lower House, "whose action would always be conceived in the interests of the people."* Later experience has shown this assumption to be false. It has proved that interests of the Lower House may easily be separated from those of the people,

* Keith, *Responsible Government in the Dominions*, London, 1909, p. 107.

and that the power, to which the *Elective* Upper House really yields, is not the popular Chamber but the nation as a whole. The two chief modern expedients—dissolution and the Referendum—have both been adopted in order to ascertain that the wish of the people coincides with that of the Lower House. Directly that wish is ascertained, the resistance of the Upper House collapses. This fact was markedly shown in the Queensland case of 1907, where the Upper House refused to give way until the dissolution. After the election had decided against them, however, the members of the Upper Chamber not only yielded the immediate points in dispute, but consented to the constitutional amendment of the Referendum, and made the people the direct judges in all such disputes in the future. Had the idea present to the constitution-makers of Tasmania—the identity of the views of the Lower House with those of the people—been correct, any prolonged fight between Upper and Lower Chamber in the Colonies must have resulted in the defeat and probably in the extinction of the former.* As it is, the *Elective* Upper Chamber now retains its powers because it is supposed that it can prevent the majority of the Lower House from passing measures obnoxious to the majority of the people.

* This desire for a Single Chamber seems, to a certain extent, apparent in the South African Colonies. There the dislike of an Upper Chamber seems to be much more real and universal than elsewhere (*vide supra*, pp. 46–7). But at present the experience in South Africa hardly permits us to judge with certainty on the subject.

The idea that the Upper House represents property, the rights of the *bourgeois* against the democrat and the socialist in the Lower House, seems to be passing. A vague theory seems to be arising that the party majority of the Lower Chamber cannot be expected to do justice to the interests or rights of minorities, except under the influence and the pressure of the people in the mass. The people, the nation as a whole, comprises something greater than the party majority, and has a more balanced and tolerant judgment. Even if this is not so, the nation still claims to prevail over everything else. Even when it does not respect the rights of minorities (which are the essence of true liberty), the nation claims another and a more false liberty. A nation in the Colonies claims that liberty, which John Stuart Mill desired for the individual, the liberty to control its own destinies even at the cost of its own welfare. The Upper Chamber has thus become a Chamber which revises and amends in detail measures submitted to it by the Lower Chamber, but which does not oppose large measures when it has ascertained that the voice of the Lower Chamber coincides with that of the nation. The most modern conception of a Colonial Upper Chamber is that of a revision Chamber, which crosses the *t*'s and dots the *i*'s and explains the meanings of the Bills sent up by the Lower House. Further than that, it can, and sometimes does, exercise a suspensive veto. Than this view nothing could be more different than the conceptions of the earlier constitution-makers, with Earl Grey at their

head. To them the Upper House was a breakwater or a bulwark against democracy. The Upper Chamber was to be composed of men who were wise and stable, because the Lower Chamber was always liable to pass rash and hasty measures at the bidding of their constituents, who were the "vague, irresponsible multitude." The fear of the democratic mob, whose million divergent impulses and wishes could only be fused into momentary union by a passion of anger and rapacity, hovered ever before them.* It would, indeed, have seemed fantastical for the Upper House to act as a kind of telephone-receiver to a mob that could have sober moments, or which could think and will as one man. The conception of a nation, above and beyond the Lower Chamber, influencing and regulating the differences of both Houses by a steadfast assurance or a uniform purpose, would have seemed the most ridiculous of dreams. Yet it is the illusion which has prevailed over all mechanical forms and over ideas deep-rooted both in the minds of the men and in the framework of the institutions of our Colonies.

* This fact explains why nearly all even of the Popular or Lower Chambers in the Colonies were originally not elected on the basis of manhood suffrage, but on that of a more or less restricted franchise.

CHAPTER III

THE SENATES OF THE CONTINENT

Introductory.—In the middle of the fourteenth century every country in Europe had Assemblies of Estates which acted as a restraint on the King, and the *régime* of Parliaments extended from Portugal in the West to Poland in the East. Towards the end of the eighteenth century every Parliament was a corpse or a shadow, and every King on the Continent had become an absolute ruler (1). In the twentieth century every country again has a Parliament, and the only absolute ruler is the Prince of Monaco (2). In Europe as a whole representative Assemblies are at best the growth of a century; in fact, in several cases they originated in the Revolutions of 1848, and are but sixty years old. It is, therefore, only to be expected that the long reign of absolute despots in all these countries should have deeply marked their institutions. Wherever an absolute despot ruled he broke down every power opposed to him, and mercilessly crushed out not only the mediæval national Parliaments, but the budding organs of local self-government. In their stead he organized a tyrannical civil service to execute his arbitrary commands, and established a vast hierarchy of

officials absolutely dependent on himself. Upon this vast bureaucratic system a Parliamentary Government by two Chambers has now been superimposed. But to this day all Continental lands (except Hungary) have retained so deep an impress from bureaucratic traditions and from a centralized system, that all their efforts to create local organs of self-government have met with but partial success. The result has been that, while Parliament in England finds the chief limits to its power imposed by local self-government, Parliament on the Continent finds those limits imposed by the centralized bureaucracy. The practical effect has been greatly to reduce the control of the Lower Chamber over internal affairs, but still more greatly to reduce those of the Upper one. We have already shown how the ministers responsible to the Commons in England can use the power of the Crown in order to defeat the Upper Chamber when it tries to control foreign and colonial policy (pp. 19–21). We have also shown that they can use this power of the Crown in internal affairs as well; and this latter system of legislation by administrative decree has been pushed much further on the Continent. (3). In most European States ministers can exercise great influence by such means in purely internal affairs, and can often nullify or counteract the wishes of the Upper Chamber. The exercise of this power by the ministers may depend sometimes on the good-will of the Sovereign and his bureaucrats, sometimes on the favour of the Lower Chamber; in neither case does it depend upon the

Upper Chamber. Thus the first effect of the difference between the centralized Continental system of government and the English one is to weaken the Upper Chamber; other differences cannot be said to have the same result.

In many Continental States it may be said that Responsible Government is established, in the sense that ministers depend on the majority of the Lower House for their continuance in office. But the arrangement is not universal; for example, it can hardly be said to be recognized in either Austria or Prussia, or in the majority of the lesser German States, where the direct and personal powers of the Sovereign remain immense.* The parallel with England is only complete when Cabinet responsibility is added to Parliamentary responsibility, when Ministers are not only accountable to the popular Chamber, but are responsible for one another, when they form one body and rise or fall together. A Cabinet must not be a fortuitous concourse of atoms, it must be an electron—an indivisible body. This is the English doctrine, and it has been established because in the main England has had only two parties, Government and Opposition; and of that dualism of parties the unity of the Cabinet is begotten.

* The active interference of the monarch in the government of these states is so unlike English ideas of constitutional monarchy, that I have relegated the main discussion of the powers of the Austrian and Prussian Upper Chambers, and of those in the five chief minor states of the German Empire to Appendix II.

Two parties in the popular House are at least as great a security as two Chambers in the legislature, and each is an equal strength to the English Parliamentary system. On the Continent there is nowhere a two-party system, the Lower House usually consists of half-a-dozen small groups, and this fact produces coalition ministries and necessarily impairs the unity of the Cabinet. In the English system, however, Cabinet responsibility is an indispensable adjunct to Parliamentary responsibility, for it is by the union of these two principles that the relative inferiority of the Upper Chamber is produced and maintained. Hence the best parallels to the House of Lords are found in those countries where the two principles of Cabinet and Parliamentary responsibility are most active. Of these the three most important are Hungary, Italy and France. All of them accept both principles and have tried to adapt them to their special conditions with some success. As each constitutes its Upper Chamber in a different way, their examples have great interest and importance for English readers. Hungary gives the best instance of an Upper Chamber on the Continent with a large *Hereditary* element; Italy that of the Senate of *Nominated* Life-Peers; France that of the purely *Elective* Upper Chamber.

A.—*Composition of Upper Chambers on the Continent.**

(1) *Hereditary principle* (a) *in Hungary.*—The only Upper Chamber on the Continent, which is mainly hereditary in character, is that of Hungary, and the cause of that feature is to be found in its remote antiquity. Hungary traces its Constitution to the earliest dawn, and in the ninth century its Parliament or Assembly included all nobles, who had the right to attend in person or *viritim*. It was not till 1608 that the Legislature was split into an Upper Chamber or Table of Hereditary Magnates and of Bishops who attended personally, and a Lower Chamber consisting of representatives of the lesser nobles. In 1848 Responsible Government was granted to Hungary and again withdrawn, but, after a period of revolution and martial law lasting twenty years, it was finally re-established in 1867. The King of Hungary now became an ordinary constitutional monarch, and a Ministry responsible to the majority in the Lower House, and a Cabinet, accountable for its own deeds and at unity with itself, were both established. These facts at once produced a change in the position of the Upper Chamber. Before 1867 the Austrian Emperor, in his capacity as King of Hungary, had been the chief power in

* An attempt is here made to sketch general types and outlines; full details both of composition, powers, and methods of adjustment in each individual state are given in Table IV.

the Hungarian State and the Lower Chamber had been a house of irresponsible critics. The popular House had struggled against the Crown with little or no aid from the Upper Table, or House of Magnates; some of the Magnates lived at Vienna and ranked among "the King's friends," others had autocratic and reactionary ideas. On seventeen occasions between 1832–6 they threw out the Bill sent up from the Lower Chamber for liberating the serfs; on twenty-one occasions they rejected the Bill for making Magyar the official language of Hungary. But from 1861 onwards the situation altered; the Magnates joined the patriotic party and hence became more sympathetic towards the Lower House; finally in 1867, when Responsible Government was fully conferred, the working of the Parliamentary and Cabinet system began to assert the superiority of the Lower House. The feeling gained ground that a reform in the composition of the Upper House was an urgent necessity, if it was to harmonize with the new conditions. The number of the Magnates was not only too large (800), but the question of definition of powers between the two Chambers had also become a pressing one. Hence in 1885 a reform of the Upper Chamber was effected.

The change was in no sense a drastic or revolutionary one (for this the Magnates were strong enough to prevent), but it was a real attempt to liberalize the composition of the House. Above all the reform is interesting because it was the act of an almost purely hereditary House, which

reformed itself with relatively little pressure from outside. The number of Hereditary Magnates allowed to sit was reduced and confined to those possessing a high property qualification (they now number 264). Newly created nobles were to be excluded in future from the Upper House, except in case of special privilege from the King. A second and new element was added, consisting of *ex officio* Life-Peers sitting in virtue of office or rank; such as certain high officials, judicial representatives, and the heads of the different religious bodies. A third and also new element was constituted out of Life-Peers nominated by the King, their number not to exceed fifty and not more than five being allowed to be appointed in a single year.* At present the Hereditary Magnates number 249; the Life-Peers, whether *ex officio* or nominated, 70. The general result of this very interesting experiment may be indicated here, though the more detailed discussion of it may be reserved until the powers of the Hungarian Upper Chamber are discussed. The reform has been really too conservative, and the principle of nomination has not tended on the whole to strengthen the Assembly in the eyes of public

* There is also a fourth and an elective element consisting (*a*) of the elected representatives of former Magnates excluded in consequence of the reorganization of 1885. The number of these was originally fifty, but is rapidly decreasing, as the vacancies occurring are not filled up. The other elective element (*b*) is infinitesimal, consisting of three nobles elected to represent Croatia-Slavonia.

opinion. The power of creating peers is not limited in the case of the Hereditary Magnates, though it is in that of the nominated Life-Peers. The threat of creation has been recently used by the King to overcome a deadlock between the two Houses (1895). The threat alone was sufficient but, as is inevitable, the result has been seriously to weaken and to discredit the Upper Chamber.

(2) *The Hereditary principle* (b) *on the Continent generally*.—Hungary is the only Upper Chamber on the Continent which is in the real sense historic and hereditary, but a number of States have a hereditary element in their Senate. An English Parliamentary Paper of 1907 (4) describes seventeen Upper Chambers of the Continent, and in ten of these we find a hereditary element.* Hungary has the largest share of hereditary peers, but in all the German States *representatives* of the hereditary landed class appear, in proportions varying from two-thirds to one-quarter of the whole Chamber. In Spain the

* This estimate includes Hungary and nine other European States—Portugal and Spain, Austria, Prussia, and five minor German States. In Baden, Bavaria, Saxony, Hesse-Darmstadt and Würtemberg—there is a hereditary element in the Upper Chamber, consisting usually of representatives of the hereditary landed class chosen by themselves or nominated by the King. In only one case (Bavaria) does this element amount to more than one-half of the total numbers of the Chamber, the rest being either nominated or elective. [These calculations exclude the infinitesimal hereditary element supplied by royal Princes who sit in an Upper Chamber *ex officio*, *e.g.* the Heir-apparent in Belgium. For further details see Table IV.]

hereditary Grandees number about one-third of the Upper House, in Portugal hereditary peers still form a proportion of the House, but provision has been made for superseding them by nominated Life-Peers. The hereditary element is entirely excluded by seven States—France, Italy, Belgium, Holland, and the three Scandinavian States. Of the ten States which support the hereditary principle five are very small, and all are swayed by reactionary and feudal influences. But the matter does not end here, for in none of them do the hereditary peers sit as of right and in person, they sit only as *representatives* of their class by whom they are often elected or chosen. Moreover, in none of these ten States, except Hungary, has any approach to the English Parliamentary system been made. This consideration is a very important one because, so long as the executive does not depend on the Lower House, it is safe to endow the Upper Chamber with very large powers and to arrange its composition without much reference to the wishes of the people as a whole. It is still more significant that none of the nine States has adopted the hereditary principle in its entirety, and that every one has assigned to it a secondary or even a tertiary part in the Upper Chamber.

A startling condemnation of the hereditary principle seems to be apparent in the composition of these Chambers, and this fact is to some extent reflected in their powers. No general rule can be laid down as to the power exercised by the hereditary element in these ten States; in Spain,

for instance, "the nobility have but slight influence, and the Senate in which they sit usually follows the action of the House of Deputies." * In Austria and Prussia the circumstances are wholly exceptional, and in the small German States the hereditary element is not aggressively to the fore.† On the whole, the hereditary element in the Upper Chambers of these ten States may be said to use its influence with discretion and restraint.

Whether the hereditary principle has been used as a convenient method for composing the Upper Chamber, or merely in order to give due weight to the aristocracy of birth, the Continent, as a whole, cannot be said to have favoured it unduly. It must be remembered that many of the constitutions of Europe were granted in the storms of 1848, when Kings were trembling before red-handed Demos, and were not unwilling to secure their own political privileges by sacrificing those of their nobles. But many of the constitutions were subsequently revoked, and opportunities were certainly given to the rulers to revise the constitutional charters in the hereditary sense, before finally re-issuing them. Hence there is really no escape from the general conclusion of Continental rulers and statesmen as to the best way of arresting future instability or revolution. Their method has been either strictly to limit or totally to abolish the hereditary element in the Upper Chamber. Cavour was well known for

* J. W. Foster, *Diplomatic Memoirs.*

† *Vide* further, Appendix II.

his admiration for England, and was suspected of favouring her Hereditary Upper House, but he openly declared that "to imitate Great Britain in this respect would be a fatal error, and would introduce into the (Italian) Constitution the sure germs of future revolution! To attempt to institute a peerage similar to that of England would be the height of folly" ([5]). Elsewhere on the Continent statesmen found different conditions and aristocracies more firmly established than in Italy, and were not so outspoken or decisive in utterance. But in action they were singularly unanimous, and confined the hereditary element within narrow limits. Their decision is all the more interesting, because it was almost always based on the interests, and not on the wishes, of the statesmen concerned.

(3) *The Principle of Nomination for Life.* (a) *Italy.*—The Constitution of Italy possesses a great similarity to that of England, for no Continental country has more loyally accepted the English Parliamentary conventions. The three Italian Kings have modelled themselves almost exactly on the English constitutional monarch, and have never attempted to inaugurate the reign of personal government; and the premiers and the ministries have assiduously copied the English example. The principle that the ministry depends on the Parliamentary majority of the Lower House has been so recognized as a custom, that it is now claimed as a law of the Constitution ([6]). Every attempt has also been made to recognize and adopt the principle of Cabinet unity and responsibility,

though this has been rendered difficult by the existence of half-a-dozen groups instead of two parties in the Parliament. But, on the whole, no better analogy to England's Parliamentary system can be found on the Continent, and Italy's experiment with Life-Nominated Peers must be regarded as one of the most vital for our instruction.

The Italian Senate consists of members nominated for life by the King, and is not limited in point of possible numbers. Senators must be over forty years of age, and must belong to certain categories enumerated in the Constitution.* Choice is limited to persons of distinguished official service, of recognized literary, scientific, or other intellectual attainments, or "persons who have for the last three years paid a sum equivalent to £120 in direct taxes in respect of their property or in income-tax." In theory, no better principles could have been adopted. Party considerations are not, indeed, absent for determining choice, but age and property are necessary qualifications, and eminence, whether intellectual or official, always has a strong claim to senatorial rank. If ever a Life-Nominated Chamber was to secure power, the Italian Senate would surely have secured it, and would have become renowned for stability and efficiency. Yet in practice the general result has coincided with the experience of *Nominee* Upper Chambers in the Colonies, and for precisely the same reason.

* There is an infinitesimal hereditary element—Princes of the Blood sitting by right, entering the Senate at the age of twenty-one, and being allowed to vote when twenty-five.

Appointment by the King has meant in practice appointment by the premier commanding the majority of the Lower House. The premier ends his political existence in a few years, but leaves his creations behind him in the Upper Chamber, and the Life-Peers of the Senate are confronted with a new premier and a new Lower Chamber. The Pharaoh, who knows them not, has appeared, and he calls on them to choose between the most strenuous opposition or the most complete submission to him. In the first case the Senate brings the Parliamentary machine to a deadlock in the present; in the second it mortgages and barters away its own power for the future. Between these two cruel alternatives the Italian Senate has been unable to steer. Premiers of the Lower Chamber have not hesitated to advise the King to "create" Peers, and the process of "swamping" has more than once been adopted, most notably in 1890, when the large number of *seventy-five* additional senators was created. The authority of the Upper Chamber has thus been considerably weakened; since that date there have been hardly any serious contests, and it may be said in general that the Senate performs the functions of a revising, not of a checking Chamber. It sometimes manages to secure important amendments in detail, but it very seldom opposes the great measures on which the Lower Chamber is resolved. The Italian *Statuto,* which constituted the nominated Chamber, was framed in 1848, in the days when the Palmerstonian ideas of a Senate of Life-Peers were in the ascendant. Italy shows

the failure of the nominative method to guarantee impartiality or strength to the Upper Chamber, and the history is the same elsewhere. For, though Italy is the best example of the *Nominated* Senate on the Continent, the same characteristics are also seen in the Senate of Spain, in that of Portugal (where the *Nominated* element predominates), and, to a less extent, even in Prussia and in the minor German States.*

(4) *The Elective Method.* (a) *France.*—The greatest and wisest statesman of modern Italy was both "a noble and an enemy of democracy," yet he wished to give her an *Elective* not a *Nominated* Senate, in all probability because he believed that this method would ensure greater permanence and stability (7). Cavour's foresight has been singularly justified by the relative weakness of the *Nominated* Senate of Italy and the relative strength of the *Elective* Senate of France. The French Parliamentary system resembles that of England, in recognizing that the Sovereign (*i. e.* the President) must rule constitutionally through his ministers, that the executive depends ultimately on the party majority, and that the Cabinet should possess unity and responsibility. But these two latter principles have been seriously impaired by the unfortunate that the executive depends ultimately on the party system in the Lower Chamber. The result of the weakness of a popular House is always to increase

* The special circumstances making the Austrian Upper Chamber somewhat inapplicable for comparison are related in Appendix II. On Spain v., p. 103 note.

the strength of the President or of the other House of the legislature; in this case it is the Senate which has gained fresh powers. Further, the adoption of the *Elective* principle for composing that body has tended, as in the English Colonies, to strengthen the Upper Chamber, to enable it to withstand the attacks of the popular House, and occasionally even to appeal to the people against their own direct representatives.

The method of constituting the French Senate is as follows: a number of senators is assigned to each department in proportion to its population.* The Electors or Electoral College for choosing the senators in question is constituted of the following: (i) Members of the Lower Chamber for that department; (ii) the prefect of the department and his councillors; (iii) sub-prefects of the respective arrondissements and their councillors; (iv) delegates elected by the municipal (*i. e.* urban and rural) councils of the department. The rough English analogy would be as follows: (i) the M.P.s for the

* The first administrative division of France—corresponding roughly to our county—is the department; each department is split into several *arrondissements* or districts; and each *arrondissement* into *communes* or parishes. The head of the department is called the Prefect, who is chosen by the Government, and who presides over a council of six elected members; the head of the arrondissement, who is chosen by the Government, and who presides over the elected arrondissement council; the head of the commune is the maire, who is elected by electors of his commune or parish, voting by universal suffrage. Thus all of these officials are chosen directly or indirectly by universal suffrage.

county; (ii) the Chairman and members of the County Council; (iii) the Chairman and members of the District Councils; (iv) delegates elected by the Urban and Parish Councils. The last and fourth element is really the important one. The other three elements of the Electoral College (Deputies, Departmental Councillors, *Arrondissement* Councillors) "may be, and no doubt are, personally influential; but they are enormously outnumbered by the delegates of the municipal councils, which in education and social standing are more like our rural parish councils than our county or town councils" (8). Thus the general character of the Electoral College for senators must be considered to be democratic in the full sense of the word, and, though their election is indirect, the senators know and feel their responsibility to the people. The Senate is, in fact, as Gambetta epigrammatically put it, the "Grand Council of the Communes of France," or, as we might say, the quintessence of Parish Councils. In the earlier period the Senate frequently opposed the Lower House and sometimes, as in 1896, with startling success (*vide* p.113). Since that date no conflict seriously involving the relations of the two Chambers has arisen. "The reason usually ascribed to the absence of disputes between them is that the political composition of the Senate has tended during recent years to become more and more similar to that of the Chamber of Deputies." * The assimilation has taken two forms,

* *Parliamentary Paper*, 1907, p. 25. At the present moment

the same kind of man now tends to be elected by both Chambers, and deputies often subsequently become senators. The first fact tends to make members of both Chambers agree in their interpretations of the views of the electorate; the second tends to establish a mutual harmony between the two Chambers themselves.

When we add that superior efficiency is given to the Senate by its smaller size, and greater stability by the fact that its members are chosen for nine years, and that one-third of them only retire every third year, the reasons for the authority exercised by the French Senate become apparent. But all these influences are probably less powerful than the *Elective* principle, which constantly reminds senators of the tenure on which they hold power, and as constantly induces the democracy to repose in them a confidence with which few Upper Chambers are familiar.

(5) *The Elective Method.* (b) *Other Countries.*— The powers of the French Senate have been described as exceptional and cannot be regarded as generally true of an Upper Chamber on the Continent. Elective Senates can be formed either by indirect or by direct election. In the first class may be reckoned Sweden, Denmark and Holland, in addition to France; in the second, Belgium, Norway and Spain.* The indirect elective method

there are more ex-ministers in the French Senate than in the Lower Chamber, and the former give the Upper House an actual superiority of official experience.

* Denmark has twelve nominated members out of a total of

does not always prove a moral strength to the Upper House, because it gives the plutocrat a chance to capture it, and the demagogue an opportunity to abuse it. The direct elective method is not open to the same objection, but it can hardly be seen in full working order in any Continental Upper Chamber. That of Norway is really a revising committee co-opted out of the popular House, while in Belgium one-fourth and in Spain one-half of the Senate is not elected directly. It is, however, significant that the Elective half of the Spanish Senate carries more weight than the Nominated or Hereditary half. Further, it is of importance to notice that the recent democratization of the electorate for the Belgian Senate has tended to strengthen that body against the popular House, and that the same kind of reform has produced the same kind of effect elsewhere on the Continent, notably in Baden, Würtemberg, and Hesse-Darmstadt. It is of importance to notice, in this connection, that the democratization of the Senate on the Continent is nowhere complete. In all an age limit, and in almost all a small property qualification, is demanded of the candidate for senatorial honours. Consequently, even where the electorate is completely democratic, its choice of senators is still limited in respect both of age and property.

The foregoing statements will already have

sixty-six. Spain 180 elected members out of a total of 360. In Belgium eighty-three members are chosen by direct election, twenty-seven by indirect election; the Belgian franchise for the Senate is universal suffrage tempered by the plural vote.

shown the extreme complexity of conditions on the Continent, and the difficulty of obtaining trustworthy data as to the general movements of the democracy. It is impossible to lay down with precision any law as to the superiority of *Elective* to *Nominated* Senators on the Continent, because some Upper Chambers have both elements in about equal proportions. So far, however, as signs and tendencies appear really to be instructive, the teaching of the Continent does not seem to differ from that of the Colonies, and weakness grows upon the *Nominated* Senate, as strength accrues to the *Elective* one. It would, indeed, be surprising to expect anything else, for a people can hardly be expected to trust their Upper Chamber the most, when they choose it the least.

B.—*Powers of Upper Chambers on the Continent.*

(1) *Financial Powers of Nominated and Hereditary Upper Chambers.*—In financial matters the rule may be taken as established almost universally, whether by law or practice, that money Bills must originate in the Lower House (9). The theoretical right of rejecting them is maintained by all Senates, and is actually exercised in the majority of them, for Bills are generally presented individually and voted on *seriatim*. The right of amending financial Bills is preserved almost everywhere by law, and is usually exercised in practice. The financial powers of the Upper Chamber are closely connected with its com-

position. Wherever *Heredity* or *Nomination* plays a considerable part in the constitution of the Upper Chamber, that body appears to consult its security best by showing great moderation and by shunning conflict with the Lower Chamber.* In most cases a financial *entente* between the two Houses has been reached. Important amendments in detail are sometimes possible, but a total rejection of the financial proposals for the year is practically out of the question. Such rejection is only possible in the case of individual Bills, and of separate items composing the Budget. Care is taken to secure that annual Appropriation Acts, dealing with general supplies of a non-controversial nature, should be passed every session; while the Upper Chamber usually treats the Budget (which generally includes most, though not all, of the new financial taxes) with considerable respect ([10]). In some cases, as in Hesse-Darmstadt, discussion for proposed amendment of the Budget may take place between the two Houses, but the whole Finance Bill must be finally voted *en bloc;* in other cases, as in Würtemberg, the Budget is decided by adding together the majority of the votes of the two Houses, and thus settling the matter (*vide* p. 125 n.). Here again there is an infinite difference in detail, and in several states the whole question is still unsettled. Generally speaking, however, the main principle is that

* These statements may be taken as applying to Italy, the five small German States, Portugal and Spain, and with modifications to Prussia and Hungary. The case of Austria (*vide* Appendix II.) is exceptional.

the Lower House not only possesses by law the power of originating money Bills, but has established by practice a relative superiority in finance.

An absolute financial superiority has been established by the Lower House in Prussia and Hungary, the reason being that the imitation of England has here been most close and conscious. In Prussia money Bills must be introduced in the Lower House, and they must be accepted or rejected *en bloc* by the *Herren-Haus* (Upper Chamber), so that the right to amend in finance is legally withdrawn, though that of rejection is legally preserved. In Hungary the case is still more interesting, because the Hungarians understand how to distinguish custom from law, possess an unwritten Constitution, and have a unique knowledge of English Parliamentary traditions. In 1867 they sought to embody in the custom, though not in the law, of their Constitution what they believed to be the English financial practices (11). A well-known manual of "Public Law" in Hungary states the rights of the Upper Chamber over finance and the Budget to be "restricted," though in theory they are complete. Szilágyi—one of those statesmen who did much to adopt the custom in 1867—has expressed the opinion that the rejection of the Budget by the Upper Chamber would be "unparliamentary" (12). Three years ago an ex-minister declared that "the English example is binding over the Budget," meaning that the exercise of a financial veto by the Upper Chamber was inconceivable. The financial superiority of the

Lower House in Hungary does not exist by right but by custom, and the rejection of the Budget of 1909 in England would appear to show that these learned and distinguished foreigners were in complete error as to the financial customs prevalent in the English Parliament. At any rate it has placed Hungary in a singular situation, for its statesmen, who have laboured to establish a custom based on English practice for forty years, must now either abandon their ideas as to what that practice was, or must draw up written constitutional provisions for themselves. In short, the events of 1909 in England have endowed the Upper Chamber with unsuspected financial powers in Hungary, causing its deputies to wring, and its magnates to rub, their hands. It is only another illustration of how universal is constitutional progress or reaction, and how deeply English customs react upon the other Parliamentary countries of the world.

(2) *Financial powers of Elective Upper Chambers.** — A general survey of those Upper Chambers, which are purely *Elective* in their compositions, shows that these bodies, as a whole, preserve a much more decided financial equality

* The six *Elective* Upper Chambers are France, Belgium, Holland, and the three Scandinavian States. Twelve out of the sixty-six members of the Danish Upper House are nominated, and that of Norway is a committee co-opted out of the Lower Chamber. Spain has exactly half of its Senate elected, and so occupies an intermediate position between *Elected* and *Nominated* Senates.

with the Lower House. This fact is very natural and corresponds to what has been observed in the practice of the State Legislatures of America. Wherever members of both Chambers are elected, whether directly or indirectly, by universal suffrage, there cannot be the same objection to the assertiveness of the Upper Chamber as in the case of one that is nominated or hereditary. In the three Scandinavian States the financial battle has raged with great fury but, though the Lower House virtually has the key to the Exchequer in Denmark and Norway, victory inclines to the Upper Chamber in Sweden (13). In Belgium the Lower House has a superiority but not a very decided one, and in Holland, though the Upper Chamber cannot amend money Bills, it has fully preserved its power of rejecting them. In France, however, the financial powers of the Senate are very considerable, especially in the modification of details and in the introduction of important amendments. Even Gambetta, that fiery champion of the Lower House and its rights, conceded to the Senate "the right of making remonstrances to the (Lower) Chamber, to point out that this or that tax, this or that credit or suppression of credit, is unjust or inopportune, or to suggest a modification of the whole of the Budget. But the right of the Senate ends there. The Chamber of Deputies must have the last word, and its decision must be final." Loubet, speaking on behalf of the Senate, as President of its Budget Committee on April 9, 1895, said, "We" (the Senate) "have the right of

examining the Budget Law, and we do each year with scrupulous attention. We can introduce amendments in it . . . *but it is impossible to entertain a complete new set of Budget proposals;* they must first be passed by the Chamber of Deputies before they are submitted to the Senate" (14). From what Gambetta concedes to the Senate and what Loubet allows to the Lower Chamber —the general position becomes fairly clear. Large powers of amending and modifying the Budget, the right either to amend or to reject other money Bills, these two statements may sum up the practical control of the French Senate over finance. Its recent action over the Old Age Pensions and Income-tax Bills shows its real authority to be great, but even in France the system obtains that the Lower Chamber "has the last word" in finance, despite all amendments. The powers of the *Elective* Senate of France are considerably greater than those of the *Nominated* Senate of Italy, much greater than those of the practically *Hereditary* Upper Chamber of Hungary. Broadly speaking the other States of the *Elective* class follow the French model, for the financial powers of the Upper Chambers of Holland, Belgium and of two Scandinavian States may be described as stronger and not weaker than those chosen chiefly on the *Nominee* or *Hereditary* principle.*

* Modifications in detail are infinite. In Holland the Upper Chamber cannot initiate or amend money or other Bills; hence its power is limited by being confined to the serious measure of rejection only. This power has, however, been exercised, *e.g.*

A word is perhaps necessary to prevent too sudden an application from the financial practice of Continental countries to that of England. It is true that their practice is fairly uniform and based on that of England, but England's Constitution is in some respects inimitable. Even the Colonies, imbued as they are with English traditions, have not been able to copy her financial practice with exactness; in the Continental States exact imitation has proved even more impossible. For example, we can see a direct imitation of English Parliamentary practice in the law of Prussia and in the custom of Hungary, and we must regard their testimony as decisive as to what that practice was at the moment at which they adopted it. None the less the finance minister of Prussia and Hungary is a very different official from the Chancellor of the Exchequer (15). If this has been the result where imitation was most direct and detailed, the variation is necessarily considerable when the imitation is only of a general character. For instance, almost every Continental Constitution allows the Upper Chamber to amend money Bills. The practice, unless very carefully defined and

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over the Army Estimates in 1907. In Belgium the Upper Chamber is timid, but its right both to amend and reject money Bills is generally conceded. In Norway the Upper Chamber is only a co-opted committee of the Lower House, and acts with it in finance. In Sweden fierce struggles have taken place, and the questions are now settled by a system of joint-session, which gives a somewhat preponderating influence to the Upper House (*vide* pp. 124, 126).

regulated, is probably an unwise one. English practice established and preserved the principle that the Lords had no right to amend money Bills, at a time when Englishmen were universally acknowledged as supreme masters of finance and business, and their insistence on that practice in no way belies that sagacity. The proof is not far to seek. Suppose that a Lower Chamber on the Continent sends to the Upper Chamber a Bill imposing a duty on a certain class of foreign manufactures. It is easy to imagine the Upper Chamber carrying an amendment to this, and extending the duty to another and quite different class of foreign manufactures; it is quite possible that such amendment would be accepted by the Lower House. Yet this is in fact the initiation of a new financial proposal, and the Lower House, by accepting it, really abdicates its unquestioned right to be the sole originator of money Bills. By means of the right to amend money Bills, therefore, the Upper House possesses a constant and insidious power of proposing amendments, which are not, in fact, amendments at all, but original financial measures which encroach imperceptibly on the prerogative of the Lower House. This danger can only be provided against by a provision that the Upper Chamber may not vote an amendment to a money Bill, which *increases* the cost or amount of such financial proposal. When such an article exists the initiating rights of the Lower Chamber are preserved, but, in the universal absence of this provision on the Continent, the amending right of

the Upper Chambers must be regarded as a serious and insidious danger to the financial rights of the popular House.* The fierce disputes over the question of financial rights, which have arisen both on the Continent and in the Colonies, have doubtless been much inflamed by this subtle but powerful irritant. The refusal to allow any such amendment has therefore much to be said for it, and in establishing this practice our ancestors did not belie their reputation for financial wisdom. On the other hand the universal Continental practice, which allows money Bills to be rejected in the piece and *seriatim*, is much sounder than the English one. In England the consolidation of the whole financial legislation of the year into one gigantic money Bill either prevents rejection altogether, or enables it to be exercised only at the price of financial chaos. If the right of rejection is to be maintained at all it must be applied to Bills in detail and not *en bloc*, and, as this practice is universally observed on the Continent, the financial powers of the Upper House are there exercised in a way that is often in the highest degree salutary and effective.

(3) *Ordinary legislation.*—Different as is the theory and practice of Parliamentary government on the Continent, all States agree as to certain broad principles in the matters of money Bills, and, with a single exception, all assign to the Lower

* Except, of course, in Hungary, Prussia and Holland, where the Upper Chamber is legally deprived of the right of amending money Bills.

Chamber the power of initiative and a certain superiority of financial control. But in the question of ordinary legislation, as distinguished from what is purely financial, the practice is entirely different, and in this respect several States become inapplicable for comparison with England. The only States really suitable for analogy are those which recognize not only the principle of a unified council of ministers, but also the principle that the Cabinet is practically appointed and actually dismissed by the majority in the Lower Chamber, which, in other words, admit both Cabinet responsibility and Parliamentary responsibility. The reason is obvious, for where the ministers are not united the Cabinet cannot really be made responsible for any policy financial or legislative, and if the Lower House cannot make the Cabinet responsible, it has lost its best chance of asserting control over the Upper Chamber. If the ministers are not servants of the Commons but of the King, as in Prussia or Saxony, the Upper Chamber may unite with the King or with the ministers to defy the Lower Chamber. In any case it has opportunities of initiating and passing ordinary laws, and of playing off ministers against the Lower Chamber in a way that is impossible, where Cabinet and Commons majority are at one. The moment ministers lose their hold on the Lower House, the Lower House loses its hold on the Upper one. The more that the Cabinet and the Commons contend with one another for supremacy, the greater the opportunity for the Upper Chamber to increase

its power, and to imitate Æsop's jackal and carry off the prize for which lion and tiger are fighting.

The conditions requisite for comparison are absent in Austria, Prussia and the five minor German States, and therefore we shall not here treat of their practice in ordinary legislation.* But the conditions named are satisfied by Hungary, Italy, Portugal, Spain, Belgium, Holland, the three Scandinavian States and France. The first four of these have Senates in which the *Nominated* or *Hereditary* element is dominant, and the whole tendency of the Cabinet and Parliamentary system is to reduce the power of the Upper Chambers accordingly. All four have had a chequered Parliamentary career in the past, but in all four of them it may now be said, that the Lower House is, in practice, the chief power which shapes and initiates the ordinary laws; and that in disputes between the Chambers, the Upper one usually suffers ([16]).

With regard to the six States, in which the Upper Chamber is *Elective*, the case is very different. In two of them, Norway and Holland, the Upper Chamber is legally inferior to the Lower in matters of ordinary legislation; the ordinary legislative powers of all the others are fully equal to those of the Lower Chamber. The right of the Upper Chamber to veto foreign treaties and commercial agreements is usually also preserved, and in these respects their powers greatly exceed those of the English House of Lords ([17]). In practice these

* *Vide* Appendix II. for further discussion.

powers are balanced by the fact that the number of senators, who sit in a Continental Cabinet, is usually far less than the number of peers who sit in an English one. But, in any case, the inexorable logic of Parliamentary events and the turn of the Cabinet screw considerably reduces the powers of the Upper Chamber, even when it is *Elective*. Definite statutory laws have made the Upper Chambers of Holland and Norway legally inferior to the Lower Chamber, and the growth of custom has placed the Senate of Belgium on an almost equally low plane. In Denmark the Upper House has preserved much greater powers in ordinary legislation than in finance, and has vetoed important Bills in quite recent times; and in Sweden, while the Upper Chamber has shown more caution, its powers remain considerable. In none of the Elective States is the inferiority of the Upper Chamber in ordinary legislation so pronounced as in the case of money Bills, nor has the attempt to reduce and to emasculate these other powers been anything like so evident. All the *Elective* Senates illustrate the general truth that, so long as a people is satisfied as to the democratic origin of the Upper House, it is not very particular about restricting its powers.

C.—*The Reform of* Elective *Upper Chambers on the Continent.* (1) *France.*

The suggestions and movements for reform of the Upper Chamber in Sweden, Denmark and

Holland aim at democratizing the composition of the Upper Chamber rather than at limiting its legislative powers (18). It appears to be generally felt that, where indirect election or a high property franchise for the Upper Chamber give advantages to education or wealth, there is great danger of collision between the two Houses. The one represents property, the other population, in a sharp form, and individualism and democracy are likely to be at variance. The remedy is felt to be in a change in the composition of the Upper Chamber, so as to bring it more in harmony with the Lower. So long as the title-deeds prove the birth from democracy to be direct, the Upper House is either allowed to manage its own estate without much interference or is even permitted to enlarge its powers. This fact is signally illustrated in Holland, where the "prevailing tendency . . . is to *increase* the powers of the Upper House by granting to it the right of amendment, and to democratize its composition by abolishing the present restrictive qualifications." In Belgium, in the Scandinavian, and even in the minor German States, the same or similar tendencies are to be observed in a greater or less degree (19). In France, the one *Elective* Upper Chamber not yet mentioned, we see the Senate perceptibly increasing its power as years go on, while the democratic nature of its composition prevents any protests against its steadily growing powers (20). Unquestionably one of the factors in the rise of the French Senate to dignity and authority was the great democratization in its composition, effected

by the reform of 1884, which abolished an irremovable *nominated* element, amounting to nearly one-third of the whole, and brought the Senate entirely under the control of the electors of the communes. The moral force of this reform has greatly added to the strength of the Senate and has enabled it to encroach on the powers of the Lower House. The fact that the Popular Chamber in France gives itself longer holidays than the Senate is significant of the relations between the two, and of the solid work and efficiency of the latter. Brilliancy the French Senate does not and never has possessed, but, as compared with the restless and unstable majorities and the kaleidoscopic ministries of the Lower Houses, its stability is marked. In 1896 it actually forced a weak ministry to resign by refusing to discuss the credits for the Madagascar Expedition. The ministry resigned and its supporters were beaten at the polls, and, though they made bold declarations against the action of the Upper House, they utterly failed in their attempt to start a political crusade against the Senate (21). During the ten years from that date there have been no serious disputes between the two Houses, and such absence of contest always means either the real weakness or the increasing strength of the Upper Chamber. In this case we cannot doubt it to be the latter, nor can we hesitate as to the cause. "The reason usually ascribed to the absence of disputes between them" (the two Chambers) "is that the political composition of the Senate has tended during recent years to become more and more similar to that of

the Chamber of Deputies." The Senate of France cannot be regarded as wholly typical of the power developed by an *Elective* Upper Chamber, because the circumstances are somewhat exceptional. In France the people seem extraordinarily lethargic and the Lower Chamber unusually excitable, and both facts have aided the rise of the Senate. In Belgium the Senate has power that is less great and a position that is less important, but it is really a more typical example of a foreign *Elective* Senate. Here again we find the stages of the reform in its composition to have been marked in each case by an increase of its power.

(2) *The Belgian Senate.*

Originally in 1831 the electorate for the Belgian Senate was extremely restricted, and the qualification for a senator so high that less than five hundred persons in all Belgium were actually eligible. The result was not a strong Senate, as might have been expected, but a decidedly weak one, a body cautious and afraid of offending the Lower Chamber or of stirring the masses of the democracy without. In practice, it avoided collision and sought compromise with the Lower Chamber on all occasions, its powers continually ebbed, and a hostile feeling against "the five hundred tyrants" grew among the people as a whole. In 1893 a reform in both electoral franchise and senatorial qualification was made, and in 1899 a further and more complete reform was carried

through, and the addition both to the moral and to the practical strength of the Senate has already been remarkable. The Senate now consists of 110 members, elected for eight years, one-half retiring every four years by rotation. Of these eighty-three are elected by a system "of almost universal suffrage tempered by the plural vote" (22). The remaining twenty-seven are elected by the County Councils (*Conseils Provinciaux*), which are themselves chosen by universal suffrage. The result of these ingenious combinations of indirect and direct election has been an excellent Upper Chamber. To a certain extent the plutocratic and business class is over-represented, because a fairly high property qualification is still required for the senator. But the democracy exerts a good deal of influence in the election of the Upper Chamber—its choice is confined to the charmed circle of those *bourgeois*, who have the happiness "to be at least forty years of age, to own or to occupy real estate valued at 12,000 fr. (£480) a year or to pay 1,200 fr. (£48) a year in direct taxes." To an ardent democrat the arrangements do not seem ideal, but the present composition of the Senate is so liberal, as compared with the older one, that the old agitation for the abolition of the Upper Chamber has almost entirely disappeared since the reform of 1899.

(3) *Elective versus Nominee Senates.*

What Belgium illustrates from one point of view, figures will illustrate from another. There are

eleven States, where the Nomination system prevails or predominates, and in five of these serious disputes between the two Chambers arose during the years 1897–1907.* In only one case was the agitation against the Upper Chamber checked without a liberal reform in its composition being promised or actually achieved. On the other hand among the six States with *Elective* Upper Chambers, a conflict with the Lower Chamber has arisen in but a single state during the same period, and that the one in which the property franchise for the Upper Chamber is highest. These statistics merely give a quantitative and obvious expression to the deep political truth that a people tolerates the powers and recognizes the existence of an Upper Chamber, only in so far as it has a direct share in moulding its character.

D.—*Methods of Adjustment on the Continent.*

While the statesmen of the Continent have shown far greater ingenuity in varying the composition and the powers of their Senates than those of the English-speaking races, they have not been

* This estimate includes Prussia, Austria and the five German states—as well as the other ten states. The figures will appear still more remarkable when it is remembered that the threat of "creating peers" is suspended over the heads of the three nominee Upper Chambers of Hungary, Italy and Prussia, and has been used or threatened in all in recent times. This fact makes them particularly anxious to avoid collision with the Lower Chamber.

so fertile in devising methods of adjustment. The reason is not because fierce contests between the two Chambers have been infrequent, but because more direct and less ingenious methods have served to avert the deadlocks. It must always be remembered that the Upper Chamber on the Continent often owes its existence to the same charter that created the Lower Chamber, and that in hardly any case does it feel itself more securely founded on the rock of history and of precedent.

1. *The power of "Swamping" or "Creation of Peers."*

This method necessarily applies only to the *Nominated* Chambers, viz. Austria, Hungary, Prussia and Italy. In the first case the power of the Emperor in this matter was certainly regarded as active until 1907, since when special circumstances have made it inapplicable.* In Hungary the King claims to exercise this power, and in 1895 he actually threatened to use it. The threat alone was sufficient, and the Magnates gave way and passed the disputed measures. The subsequent effect of this blow to the prestige of the Upper Chamber has been very marked. In Prussia, when a dispute arose between the two Chambers in 1872,

* *Vide* Appendix II. for further discussion of the powers of the Upper House in Austria, Prussia, and also the five minor German states. In Portugal and Spain it would appear that the number of nominated Life-Peers is fixed by law, hence "swamping" is impossible.

the King supported the Lower House and "swamped" the Upper House with twenty-four new members. The step was an effective one, and since that date the Prussian *Herren-Haus* would appear to have been an obedient servant of the King. Italy exhibits the most singular instance of a Senate which has been subjected to the humiliating process of "swamping." Feeble as its resistance to the popular Chamber has invariably been, this fact has not saved it from this degradation. In 1886 forty-one additional members, in 1890 seventy-five, and in 1892 forty-two were appointed. If the object of these creations was to prevent deadlocks between the two Chambers in future, this object has been singularly achieved, but only at the cost of reducing the Senate and its members to complete subservience. "The law declares it the first body in the State, but it includes only constitutional invalids. It is powerless in the face of the King and the ministers who have named it, and who can always dictate its decisions by reducing its majority" (23).

Summarizing these results for the four *Nominated* Senates in question, we may say that, with the exception of Austria, the power of "swamping" or "creating" has either been used or threatened in recent times, and is still an active and living instrument for preserving the superiority of the Lower House in three of these States.

2. *The method of Dissolution.*

The premature dissolution of the Lower Chamber can take place in any State, whether its Senate be *Nominated* or *Elective*. It is an easy and obvious method of ascertaining popular feeling, and is far the most usual solution on the Continent in the case of disputes or deadlock. The only objection to it is that it does not necessarily produce a decisive impression on the Upper Chamber, an objection of which Denmark and Sweden have felt the full force. The power of *Simultaneous* or *Penal Dissolution* of both Chambers cannot, of course, be applied to *Nominated* Senates, and has, in fact, been very little used on the Continent for *Elective* ones. It is possible in all of the latter except France, but has hardly ever been employed. Neither in Belgium nor in Denmark nor in Sweden has the power been used, despite some difficulties in the first case and the fiercest constitutional disputes in the last two.* In all such cases there has been a general tendency on the Continent not to dissolve both Houses at once, but to wait until the normal expiry of the term of the Upper Chamber, and so to give the people an opportunity of deciding the issue. This tendency greatly favours the

* By the Constitution simultaneous dissolution is invariable in Norway, and impossible in France ; it is constitutionally possible, but has never been attempted yet in Belgium, Holland, Denmark or Sweden. On the other hand, in Spain, where half the Senate is elective, the dissolution of the Elective part of the Senate and of the whole Lower House is always simultaneous.

Upper House, because it practically releases it from the fear of a penal dissolution. The Lower House is never exempt from this danger, and thus is likely to avoid collisions and to grant concessions wherever possible. The most extreme control over dissolution is possessed by the French Senate, for it is not only, as an Upper Chamber, itself indissoluble till the expiry of its term, but its consent is necessary to the dissolution of the Lower Chamber. The law is that the consent of both President and Senate are necessary to dissolve the Lower Chamber; in practice, this means the consent of the Senate and of the premier leading the Lower House, and it gives a wholly unfair power to the former. In case of any dispute between the two Chambers on the Continent, the premier of the Lower House can ordinarily appeal to the country by a dissolution chosen at his own discretion. But in France he can only effect that dissolution at the discretion of the Senate—his political opponent. Nor does the Senate's control end here. It has not only the legal power to refuse a dissolution to the premier; it can force one upon him by rejecting or by strangling his Bills. Hence it may be said that the French Senate really has absolute control over the prerogative of dissolution. But here again the French Senate is abnormal in its powers and position. Wherever Cabinet and Parliamentary responsibility exist on the Continent, the premier can usually obtain a dissolution of the Lower House without much difficulty, if he wishes to appeal to the people against the Upper House. On the other

hand, the simultaneous "penal" dissolution of both Chambers is as rare on the Continent as the dissolution of the one Chamber is frequent.

3. *The method of Conference and of Joint-Committee.*

In their disputes with the popular House the normal Senate of the Continent is honourably distinguished by its moderate and conciliatory attitude, an attitude entirely different from that of the Upper Chamber in England or in her Colonies. One reason unquestionably is that there is not that difference in character between the two Houses, which history established in England, and which tradition has transmitted to her Colonies. But every effort has been made on the Continent to break down similar differences and to bring the two Houses, as it were, into personal relations with one another. On the Continent ministers can, and usually do, address either House; deputies sometimes become senators, senators sometimes become deputies; the intercourse between the two Chambers is close, continuous, and fluid. In every case of dispute the leaders of the two Chambers meet together and try to arrive at agreement. If these first efforts fail, the almost invariable practice on the Continent is that joint-committees of the two Houses shall meet together, shall discuss the points at issue, and shall report back to their respective chambers.* These reports are always regarded with

* *Vide* Table IV. for details.

great attention, because they are framed in privacy and with a genuine desire to arrive at agreement, and are not programmes, drawn up in public or on the platform, which have an obvious tendency to embitter the struggle. In some cases still further weight is added by making it a principle of the Constitution that all disputes between the two Houses *must* be settled by the joint-committee and conference system. For instance, in Spain the "Law of Relations between the two Chambers" (July 12, 1837) prescribes that, "if one of the Chambers modify or disapprove in any of its parts a Bill already passed in the other Chamber, a committee shall be formed, composed in equal numbers of senators and deputies, for the purpose of conferring on the mode of conciliating the different opinions. The report of this committee shall be discussed, *without any alteration,* by the Senate and the Chamber, and, if accepted by both, the Bill shall be held as passed." The importance of this last provision is that it makes it impossible for the committees to modify the findings of the conference subsequently, in deference to clamour within or without the legislature. The only objection to it is that either Chamber may refuse to accept the report of the joint-committee. In Portugal, however, this difficulty is, to a certain extent, met by an Act of 1896, which lays it down that, "when one of the Legislative Chambers does not approve in whole or in part any Bill issuing from the other Chamber, or does not approve the amendments or additions made by the other

Chamber to any Bill, a committee of an equal number of peers and deputies shall be appointed, and, in accordance with the decision of the majority of the committee the Bill shall either become law or shall be rejected. If there be an equality of votes on the Bill or on any of its articles, or on any amendments or additions, or if the committee can come to no agreement on the question submitted to them, either of the Chambers may petition the Crown for the reassembly of the Cortes (Legislature) with a special mandate to deal finally with the matter" (24). Here the procedure is much improved, because the members of the joint-committee are really ambassadors with full powers to declare peace or war, and, if there is any disposition for agreement on either side in the committee, a settlement is assured. Moreover, as a dissolution is probable, if the joint-committees disagree, there is an additional reason for settling the dispute. Generally speaking, the conference and joint-committee system, whether optional or obligatory, has proved of great use and efficacy. Its only real defect is that there is no means of guaranteeing that such a method is really a final one.

4. *The method of Joint-Session.*

The weakness of the joint-committee and conference system has been shown to lie in the fact that, though the leaders of the two Chambers may arrive at an agreement in private, they cannot absolutely pledge their respective followers to ratify it

in public. For this there is only one remedy—to summon a joint-session of the two Chambers, and to allow the majority of the two Houses combined to decide the fate of the measure in dispute. As has already been shown in the Colonies this method may be used with or without dissolution. At present the system has only been much used on the Continent for matters of finance, in order to make provision that the Budget shall be passed in a single session and before the end of the year. In Hesse-Darmstadt it is provided that, "if the Upper Chamber rejects the" (financial) "proposals" (of the popular Chamber), "the Budget Bill is discussed in a sitting of both Chambers together . . . and a decision is taken by the absolute majority" (*i. e.* by a majority of more than half of both Houses combined). In Sweden the same procedure applies, not only to the Budget, but to all financial proposals whatsoever. In Norway all finance measures are not only decided on, but actually discussed throughout by the two Chambers—sitting as one body. It is obvious that a broad distinction exists between the procedure for settling money Bills, and that for settling disputes over ordinary legislation. In the former case, speedy decision is absolutely essential, in the latter case delay may be even desirable. As a matter of fact, in case of disputes over matters of ordinary (*i. e.* non-financial) legislation, the procedure of joint-session is very little used on the Continent. It is used in Norway, where, in cases of difference, the two not very distinct Chambers become one, and a two-thirds majority of the whole

decides the dispute. Joint-session is used in France, but only for cases of constitutional amendment.* The great advantage of the joint-session method is that the members of the two Chambers can meet together, can actually discuss or amend the measures in dispute, and can preserve opportunities for concession until the very last moment.† One objection which has been sometimes urged against it is that, since the popular House is always superior in numbers, the joint-session method must usually result in a defeat of the Senate and a limitation of its powers. This result is likely to occur in our Colonies and wherever the two-party system prevails, but is by no means the case on the Continent. The Senate of the Continent is very often an homogeneous body, but the popular House is almost always a miscellaneous mosaic of different groups, a confused kaleidoscope of parti-coloured fragments. At a joint-session the majority in the Senate with its clear-cut policy may often win over some of the scattered groups in the popular House to support

* Joint-sessions are sometimes held in both Hungary and Holland, but only for occasions of state and formality. For joint-conferences between the Austrian and Hungarian Parliaments, *vide* note ([25]).

† A variant from the joint-session method for settling financial disputes is seen in Würtemberg, where, in case of dispute over the Budget, the votes cast in both Chambers for or against it are added together, and the resulting majority decides the issue. The same procedure applies to all finance Bills in Baden, *vide* note ([26]). The objection to this method is that it does not really offer opportunities for genuine concession and discussion as the "joint-session" does.

its view of the measure. In Sweden the Upper Chamber has actually increased its powers since the two Chambers have sat and voted together to settle financial disputes ([27]). It would seem, therefore, that, on the Continent, the existence of the group system removes the only valid objection to the joint-session method. So far as I know, it is the only advantage which the group system has ever brought to politics, and it is equally singular, therefore, that the joint-session method is not in more regular use on the Continent ([28]).

E.—*The Lessons of Continental Experience.*

(1) *Strength of* Elective *Senates.*

The most general reflection that strikes us is that the Continent confirms the old Colonial lesson as to the superior strength of the *Elective* to the *Nominee Senate*. The extremely drastic method of creating peers for "swamping" opposition in the *Nominee* Senates has been found to be more necessary and more frequent than in England or her Colonies. But, on the other hand, in the Upper Chambers of the Continent there is a marked refusal to resort to extreme measures or "penal" dissolutions. Cause and effect are bound up with one another in each case. The logical outcome of the Cabinet and Parliamentary system is that a *Nominee* Senate eventually gets into a position in which it must either conquer or die, and the *coup de*

grâce is usually administered by the monarch, who is unwilling to endanger his own position by supporting an unpopular Upper House, whose crystallized opinions cannot be altered within a reasonable time. On the other hand, in *Elective* Upper Chambers there is an equally striking absence of resort to extreme measures, such as the "penal dissolution" of the Upper Chamber. In this case, the interests of the head of the State, whether President or King, are best served by delay and avoidance of extreme steps. If the Upper Chamber is elective, the lapse of two or three years at most brings its members on their trial before the hustings, and the delay will have served to cool the heat of the popular House and its supporters, or so to increase it that the new election will fill the Upper Chamber with candidates pledged to carry the disputed measure. If the head of the State refuses a "penal" dissolution of the Upper Chamber in the first instance, he incurs but a momentary unpopularity, while he retains the assurance that time must eventually settle the question in dispute, and that his firmness may actually preserve and strengthen the Upper House. In fact, so strong appears to be this conviction in *Elective* Senates that the head of the State seems actually more willing to countenance a projected reform of the Upper Chamber than to resort to a "penal" dissolution. A fundamental reform of the first kind can only be carried slowly owing to the checks on hasty constitutional amendment; on the other hand, by granting a dissolution the head of the State may

encourage haste and recklessness. It is the climax of constitutional caution for him to encourage slow legislative reform, in order to avert rapid executive action.

The argument has been that the head of the State—that impartial arbitrator between the two Chambers—usually finds it to his interest to employ extreme executive measures against the *Nominee* Senate and to avoid them with the *Elective* Upper Chamber. This argument has, however, most application when a high property franchise or qualification is required for the election of Senators. Wherever the Upper Chamber appears identified in any way with the wealthier classes, it is dangerous to send its members back to the electors, at the moment when Senate and popular House are at grips with one another. Suppose that the Upper House is insisting upon financial measures favourable to the wealthier classes, then, if the qualification for candidates is high and that for electors considerable, the same body of Senators as before is likely to be returned. The property franchise, plural voting, proportional representation, all have their share in electing the Upper Chambers of States like Belgium, Sweden, and Denmark, and in such cases a new election often serves only to harden the hearts of the senators. Hence the situation will not be improved, and may even be endangered by an election, for the deadlock may continue, and agitation will certainly increase. All the influence of the ruler is therefore directed towards arranging a compromise for the immediate difficulty between the two

Houses by hinting at or by encouraging a future reform of the Upper one.

(2) *The Power of Plutocracy in Continental Senates.*

It is difficult to resist the conclusion that the Upper Chambers of the Continent have generally served in the past as the haunt of the capitalist and as the refuge of the plutocracy, that they have, in the main, sought not the interests of the country but those of its wealthier inhabitants. One instance will, perhaps, suffice to prove our point. Until comparatively recent times no country in Europe had a system of taxation which in any way compared for social justice with that of England, or which succeeded in relieving the poorer classes from unjust and undue burdens.* The reason must undoubtedly be sought, not so much in the large powers of financial rejection or amendment possessed by the Upper House, as in its use of those powers in its own interests. Until recently the members of Continental Senates have too often judged national affairs from the standpoint of its own class rather than from that of the people as a whole. The fact has been gradually realized by the democracy in most States of the Continent, and the result has been a counter-attack. The eighties and nineties were, in reality, a period of extreme peril

* These remarks do not apply to controversial politics, but to the state of England's finance previous to 1906.

for the Continent, because there was a serious danger that a class-war would arise in many European States between the rich, entrenched in their Senates, and the poor, who attacked from the vantage-ground of the popular House. If the Upper House had insisted too rigidly on its rights, had rejected concession and sought only its own interests, the result might have been social disaster of no common kind. All honour should be paid to the Upper Chambers of the Continent for the moderation and dignity with which they have fought a losing fight; for the manner in which they have consented to reform themselves, and for the grace with which they have adopted wider views of national interest than those which they had previously held.

(3) *The influence of the Democracy on Continental Senates.*

If we exclude some of the German States, where conditions are hardly normal, we shall find that the democracy has imperceptibly but decisively made its way, and has either liberalized the composition, reduced the power, or enlarged the conceptions of the Upper Chamber. The four *Nominee* Senates were the first to yield, and in the nineties all of them, either under direct threat of "swamping," or more quiet pressure, abdicated their high pretensions. With the six *Elective* Chambers the struggle has been longer and fiercer, but the result, though still undecided, is no more a

matter of reasonable doubt. The last decade has witnessed a universal movement among them for liberalizing their composition. Four *Elective* Senates have already agreed to reform their own composition in a manner agreeable to democracy, and their Upper Chambers, so long the fortress of the capitalist and the refuge of the *bourgeois,* will soon know more popular representatives. Before 1890 the two other *Elective* Senates were already acquainted with it. Norway's Upper Chamber is but a section of the Lower or popularly elected House, while the French Senate is based on a distillation of the strong wine of universal suffrage. Against one danger France may serve as a warning. There the Senate boldly challenges the supremacy of the Lower House, and one of the reasons of its attitude is that it considers itself a democratically chosen body. If the franchise for both Chambers is to be the same, the political complexion of both will be assimilated, and the rights of both may become equal. To avert the danger of a strife between substantially equal powers no sacrifice can be too great. To democratize the franchise of the Upper House is, in some ways, highly desirable, but the democratization must be effected in such a way as not to impair the supremacy of the Lower House. It is better to sin against the theory than against the practice of democracy, and it is wiser to assign a small property qualification for senators or for the electors of senators, than to risk deadlocks between two Houses equally democratic in choice and popular in spirit.

(4) *Need of differentiation between the two Chambers.*

A slight differentiation of character between the members of the two Houses is, of course, always produced by the universal requirement of an age limit for senatorial candidates. It is much increased by the practice of making the Senate sit for a longer term, and prescribing that its members should not all be elected at the same time, but that a certain section of them should proceed to the polls by rotation at stated intervals. This longer term of membership makes the Senate differ somewhat in complexion and character from the popularly elected House, and renders it less likely to yield to the first gust of popular feeling. At the same time periodic renewals of the Upper Chamber take place, and, by constantly bringing portions of the Senate into touch with the electorate, tend to secure harmony in all vital measures of policy. The general result of all these practices—the age limit prescribed for senators, their election from enlarged constituencies, the longer term and the periodic renewal of the Upper House—is to promote continuity and fixity of policy in that body without either encouraging it in obstinacy, or separating it unduly from the Lower Chamber and from the people as a whole. These methods in general are good, and have so far worked well on the Continent. Such devices, however, are not in themselves enough. They are instruments, not forces.

It is on the character of the electorate of the Senate, not upon the procedure of that body itself, that we must rely to choose an Upper House different from the Lower one. Such a differentiation can always be obtained by giving a slight property-qualification to the electors of the Upper House, and can usually be secured by fixing a high property-qualification for the Senatorial candidate himself. The objection to either of these expedients is that they are dangerous as favouring class prejudice, and it must be admitted that this view is supported by experience on the Continent and in the Colonies.

If the property-qualification for the franchise of the Senate is rejected, we can rely upon proportional representation and plural voting to give the Upper House a character somewhat different from that of the Lower one. Such a system is, however, exceedingly difficult to apply in practice; it is complex and cumbrous, and it offers endless opportunities to wire-pullers, to "bosses" and to all the lower influences of politics ([29]). The example of Belgium, where both plural voting and proportional representation exist for the Upper House, clearly shows that these devices only too often become instruments which the wealthier classes can turn against the more numerous people. If carefully adjusted, these expedients might constitute an almost ideal way of representing all classes in the Upper House. But practical politics, like practical economics, is not the science of the ideal, and the best political devices are not those which allow most to the good.

ness of man, but merely those which give freest play to good motives and least play to bad ones. A broad and intelligible principle, applied with the greatest possible simplicity, is the safest model for a democratic state to adopt, and it is only by adopting some such principle that the problem can really be solved.

(5) *Methods for composing the Senate on a democratic basis.* (a) *Indirect Election from Universal Suffrage.*

The aim must be to get as near as possible to a democratic Upper House, without making it absolutely as democratic as the Lower one. Where conditions are identical, there is a danger that powers will be identical too, and no peril is greater than a conflict of authority between two equally democratic bodies in a wholly democratic State. Two solutions have been suggested by the Continent: first, the method of indirect election; second, the method of direct election from enlarged constituencies. The first makes the Senate a distillation of democracy, and forms its electorate out of urban, provincial or district councillors, who are themselves all elected by universal suffrage in the first instance. This method of indirect election has certain advantages, and has unquestionably worked well in France. The character of the Senate is similar to, but not the same as, that of the Lower Chamber, and the Upper House is genuinely regarded as a check on democratic

ardour in the name of democratic sense. But the system has certain serious drawbacks; it may lead to the introduction of national politics into local affairs, and this may bring corruption and degradation on both. National politics are often corrupt when local politics are not, and *vice versa*. This system makes them identical and ensures corruption for both, if it exists in either. When he votes for the *maire* of the *commune*, Jacques Bonhomme knows that he is voting for an elector to the Senate of France, and if he sells his vote in the one case, he will sell it in the other. In England the corruption of Bumble and of local politics has not yet penetrated to national ones; it might do so if we adopted the French system of electing the Upper House. In any case this system would destroy the independence of local politics even if it left its virtue intact. The expedient of filtering universal suffrage through local bodies is, therefore, a dangerous one, and the latest experience seems to favour other methods for composing a Senate.

(b) *Direct Election from Universal Suffrage.*

The second method, that of direct election of Senators from enlarged constituencies, now remains to be considered. No Unitary State on the Continent has yet gone the length of Federal Australia, which has divided up the country into some half-dozen gigantic electoral districts. In each district the whole list of the senators is voted *en bloc*, and each single elector has as many votes

as there are Senators in his electoral district. In practice the result is that all the candidates of the numerical majority in a given electoral district get elected, and that the minorities secure no representation at all. This system is somewhat similar to that known as *scrutin de liste* on the Continent, and the result has been the same. Party enthusiasm is fanned by the system of the straight or single ticket, and each elector votes blindly for six names, belonging to his own party, without taking any notice of the individual merits of the candidates. The system is unfriendly to the neutral or independent voters, gives the party manager more advantage and increases the majority of the superior party at the polls. If this system obtains for the Senate, and if single-member constituencies prevail for the Lower House, the result must be that the former will become more democratic than the latter. This has actually been the case in Australia, where the Senators outdo the popular representatives in their zeal for the cause of the people, and not only do not retard but actually hasten the course of reform or revolution. Thus we find an Australian Senate passing academic resolutions for land nationalization at a time when the popular House has only reached the point of legislating against too rigorous employers. The spectacle is more extraordinary than edifying, and reveals the serious danger that the Upper House may, in this way, eventually become more powerful and popular than the Lower one. Now the fundamental necessity for all legislatures of Unitary States is that

the Lower (we cannot here say the popular) House should possess a definite (if slight) superiority. Even this is not perhaps the most serious evil, a worse one is that the system provides only for the representation of the majority, so that the Upper Chamber becomes even more hostile to the rights of minorities than the popular House. The Australian method of *scrutin de liste* cannot, therefore, be safely used in a Unitary State as a method for choosing the Upper Chamber. Recent Continental experience favours a much more sober device, which secures an identical, or almost identical, electorate to each Chamber without any of the dangers above indicated. The provision is that the same electorate should choose Senate and popular House but, since the number of Senators is much less than that of deputies, the former is selected from enlarged constituencies. Where the total Senate is half that of the popular House, the Senatorial constituency will be double the size of an ordinary one, and so on in proportion. The enlarged Senatorial constituency should also be a single-member division. This practice avoids the danger of *scrutin de liste* and is found, by experience, to give a slightly more conservative tinge to the Upper House than that which prevails in the popular one at each election. The reasons for this appear to be two, in some cases the enlargement of the constituency enables the country districts to record their opinions and to use their votes with effect. But, in any case, a second and more important reason is that, in proportion as the con-

stituency is enlarged, the chances of a candidate, who is eminent by reason of his intellect, reputation or wealth, are increased. The larger the constituency, the less likely is it that the relatively unknown or parochial candidate will influence the electors. It will be seen that such a system has its drawbacks, and that it gives a slight advantage to wealth, rank or position; but it has the very important merit of differentiating the character of the two Houses, without endangering the supremacy of the Lower one. It may, also, be associated with certain devices, which secure the State against purely evanescent waves of popular passion or feeling, such devices as the prescription of an age-limit for Senators, the enforcement of the retirement of sections of the Senate at stated intervals, and the fixing of a longer term for the Upper House than for the Lower one. In conjunction with these devices, the election of senators from enlarged single-member constituencies may be said to represent the last word of Continental experience for constituting an Upper Chamber.

CHAPTER IV

GENERAL CONSIDERATIONS AND REFLECTIONS

"*The federal system limits and restrains the sovereign power by dividing it, and by assigning to Government only certain defined rights. It is the only method of curbing not only the majority but the power of the whole people, and it affords the strongest basis for a second chamber, which has been found the essential security for freedom in every genuine democracy.*"

ACTON, *History of Freedom*, p. 98.

THE words which stand at the top of this chapter indicate the general conclusions derived from the experience of all countries as to the merits of the two-Chamber system. But they also show the extreme difficulty of maintaining that system in a Unitary State. In a Federal State the establishment of an Upper Chamber is easy, and its sustained vitality is almost a certainty. On the other hand, even to establish an Upper Chamber in a Unitary State is hard enough, to maintain it in full vigour over a long period of time seems almost impossible. In that great period a century ago, which witnessed the birth or the remoulding of nearly all the political institutions in the world, the advocates of the bicameral system carried the day almost everywhere. But their arguments and objects were everywhere different; sometimes the

establishment of the Upper Chamber was due to a precise theory, sometimes to a direct imitation, sometimes to a vague sense of tradition. America nurtured it in deference to the theory of checks and balances; Europe adopted it in obedience to the example of England (1); the Colonies acquired their Upper Chambers, as their motherland got her empire, "in a fit of absence of mind." Therefore, even if the two-Chamber system were universal (which it has never yet been), the circumstances of its origin in different cases are so varied and so peculiar as to prevent much stress from being laid on this unanimity. A coalition of different motives has combined to establish a certain institution; just as a coalition of different parties sometimes combines to establish a Parliamentary majority. It will usually be admitted that an institution, like a majority, is most strong, when it is based on a unity, and not upon a variety, of motives.

In the past it has been too hastily assumed that the nearly universal acceptance of the bicameral system by civilized States is a proof of its necessity. As has already been pointed out, not only is the Federal analogy misleading, but there are a number of exceptions to the bicameral system. But what is of far more significance than the numerous exceptions to a fairly well-established rule is the fact that many bicameral States seem now to be gradually evolving a system, which tends in practice to become single-Chamber government. Whatever the theory, which gave birth to the bicameral system, the working out of that theory has been almost directly contrary to the ideals of its founders. The

old idea certainly was that the Upper Chamber should be a "Checking" Chamber, and should in certain cases possess an absolute veto on the will of the people. The progress of democracy has transformed all that, and this idea now prevails only in the State-legislatures of America. There it must indeed be admitted that the Upper Chamber may still be a real Checking Chamber, but it is only powerful because democracy has rivetted fetters in itself. The election of State-Senators and popular representatives on the same tenure, the presence of corruption in the Upper Chamber and of lethargy among the electors has tended in practice to a maintenance of old conditions of which nobody in America really approves. But wherever democracy is progressive, wherever the people becomes more united and better educated, there the idea of a Checking Chamber disappears. A generation ago the Upper Chambers of the Continent stood firm to every breeze—and regarded not—

"the gathering cloud
And the little wind arising which should one day pipe so loud."

During the last decade or so a new spirit has arisen, and the wind has penetrated not only into the *bourgeois* palaces where the Upper Chambers of Scandinavia or Belgium take counsel, but into the recesses of those feudal castles where the solemn Senates of Germany sit enthroned. The Nominee Chambers are fortresses, which have been taken by direct assault, and though they have been restored to the conquered, the terms imposed are humiliating. As for the *Elective* Upper Chambers,

they are in future to be garrisoned by the guardians or by the leaders of democracy. Our Colonies tell the same tale. The rising tide of democracy may be checked for a time or its course may be diverted, but in neither case can it be absolutely dammed back by dykes or barriers. Except in the State-legislatures of America, it may be said that the old political conceptions have been everywhere modified or transformed by democracy, and that the Checking Chamber with an absolute veto is an extinct curiosity. It has no longer become a question whether the Upper Chamber should have an absolute veto; it is now a question whether it should have a veto at all. Shall the Upper Chamber really have a suspensive veto, or shall it merely be an Assembly to draft and to revise the decrees of the Lower House? The choice now offered is between a *Suspensory* and a *Revisory* Chamber. The Upper Chamber can no longer be compared to a stern father authoritatively forbidding his rash son to adopt a certain course. It is either an elder brother strongly advising hot-headed youth to reconsider his decision, or a mere clerk correcting his errors in spelling and drafting. In the first case, the Upper Chamber has lost much though not all of its authority, in the second it has virtually lost all effective power.

Half-a-century ago the reasons for this political transformation were given by Baron Joseph Eötvös, who analyzed the conception and duties of an Upper Chamber in the one important work of political philosophy that Hungary has produced (2).

After an exhaustive examination, he concluded that the most real strength of an Upper Chamber lay in the fact that it represented historic rights and the past of a nation. England and Hungary possessed Upper Chambers of this historic type; and he showed that Federal Unions like America could evolve similar Upper Chambers, which might be representative of the historic rights of the component States. In the ordinary Unitary State such an expedient is not possible, and Eötvös probably realized this fact though he does not say so. He goes on, however, to give a prophetic warning. On the grounds both of theory and fact, he said, it is certain that, in so far as an Upper Chamber uses its powers to defend the interests of the wealthier inhabitants against the will and interest of the whole nation, in that proportion will it forfeit confidence and lose power. Experience has shown that this generalization was, in the main, a correct one. The old influences in an Upper Chamber, historic, aristocratic or plutocratic, have often retarded change, but they have not ultimately checked that gradual evolution which has everywhere shifted the political balance of the State. As a nation becomes democratic and realizes its own capacity, so the Upper House becomes democratic in form or in spirit, or else is reduced to impotency. Opinion is everything in a democratic State, and opinion is likely to assume that, if an Upper Chamber consists simply of the wealthy, it will care only for the rich. Now wealth is only the passport to the Upper Chamber, where heredity and nomination compose

it, or where the elective franchise is extremely high. Hence it is that the *Nominated* Upper Chamber—whether on the Continent or in the Colonies—gradually grows weaker (3), and that those *Elective* Upper Chambers, in which the property qualification is high, either abate their powers or reform their composition. On the other hand, those Elective Upper Chambers, in which the franchise is democratic in appearance or reality, often encroach even upon the authority of the Lower House. We see signs of these developments everywhere, but proofs only where the logical evolution of democracy is most uninterrupted, as in the Scandinavian States or in the South African Colonies.

It has been shown that democratic feeling resents a high property franchise for the Upper Chamber almost as much as it resents the hereditary or nominated principle, and that, unless these principles are modified, the power of the Upper Chamber is likely to decline. But it may be argued that these considerations do not apply to a Senate, elected on slight or moderate property franchise, which includes a relatively large number of electors. In this case the Senatorial franchise includes not only the wealthy but the small property-holders—in short, the *bourgeoisie;* and the question arises how far such *Elective* Upper Chambers, based on a moderate property franchise, are likely to retain a real *Suspensory* veto. The Upper Chambers of Belgium and Tasmania may be quoted as examples of this Senatorial franchise, but it cannot be said

that they are either of them strong bodies. Yet in these cases the *bourgeois* element has a real chance of making its influence felt, because it is numerous, because its interests may be broad, and its aims, in a sense, be national. Wherever the numbers of senatorial electors are small, it seems to be assumed that their views and their representatives must be narrow and selfish. At any rate a *bourgeois* Senate, based on a relatively large electorate, will defend the genuine rights of minorities much better than a plutocratic Senate based on an absolutely small electorate. Moreover, there is a further defence for the representation of the middle class in the Upper House; great wealth always has great indirect power, great numbers always have great direct influence, and each will always have some representatives of their views in the Lower House. On the other hand, the middle class, the *bourgeoisie,* often has no adequate representation; in the great cities the working-men out-vote them, in the country districts the landlords and the peasants combine against them. In every new scheme of taxation the middle class is likely to suffer or at least to be less fully consulted than the many or the rich. If, therefore, the rights of minorities are to be defended by a class, the middle class is of all classes the most competent to undertake that duty. Again, if property is to be the element represented in the Upper House, the *bourgeois* is the best and most national representative of property. On the other hand, to establish a class, even a numerous class, in the Upper Chamber is an almost certain way of

producing a declaration of war from the popular House. In all probability, such a conflict would eventually end in the annihilation of the powers of the Upper Chamber. The only way to avert this would be to devise some simple method of proportional representation, which would include a large and purely democratic element, but would at the same time give a preferential advantage to the *bourgeois* element. But the difficulties in the way of executing this plan seems almost insuperable (4).

We are now at last able to see to the heart of the problem. The real argument for a two-Chamber system is not based on history, or on theory, but on fact. It is not the existence of an Upper Chamber that is in itself of importance; it is the existence of an Upper Chamber that is strong enough to protect the right of minorities, which is the true and vital necessity in all Unitary States at the present time. An Upper Chamber cannot, of course, have an absolute veto, because then it would be stronger than the popular House; but it must have a suspensory veto, for otherwise there is no real justification for its existence. Nothing is more dangerous than a Senate of dummies or of shadows, and no price is too great to pay for retaining a Senate which is an Upper Chamber in reality. If, therefore, experience proves that the hereditary or the nominated principle is not the best way of securing a strong Upper Chamber, then these principles must either be modified or must be applied with great discretion. If the chances are that an Upper Chamber, elected on a *bourgeois* franchise, will be

weak, then we must strengthen it by infusing into it more democratic elements.

The most important deduction to be made from recent experience is that an Upper Chamber (which is, on the whole, democratically constituted) is the Upper Chamber most likely to exercise a real suspensive veto over legislation. The French Senate is the best instance of this truth, though its position and powers appear to be exceptional. None the less recent experience elsewhere does not point to the probable abolition of the *Suspensory* type of Upper Chamber. In countries so different and distant from one another as Holland and Victoria, the Upper Chambers retain a real right of vetoing measures of the popular House, and can cause a real suspension of judgment until the will of the people is fully interpreted by both Chambers, or is decisively made known at the polls. Devices, like enlarged constituencies and indirect election by universal suffrage, serve to impart individuality to the Upper House, to make it conservative without making it representative of class interest, and progressive without being revolutionary. Here we have a true check on the impulse of a blind majority, or "rather of that party not always the majority, that succeeds, by force or fraud, in carrying the elections" (5). An Upper House, constituted on the true liberal principles here indicated, is the most accurate interpreter of democratic feeling. It is therefore the most likely of all Upper Houses, however they be constituted, to resist the chance or blind majority in the name of the people

itself, for it alone of all Upper Houses can claim without hypocrisy to know the views of the people better than their other representatives. It would seem, therefore, that in an Upper Chamber so constituted, we have the real security for freedom to the individual and for justice to minorities. An Upper Chamber, which has an absolute veto and a limited franchise is useless, because it defends a minority against the majority; one that is merely revisory but democratically elected is useless, because it simply registers the decrees of the majority. Between these two extremes the *Suspensory* Senate may claim to hold the balance. Its franchise is such as to give some representation to minorities, its suspensory powers not such as to enable these minorities to tyrannize over the whole community, but sufficient to distinguish the chance will of the majority from the designed purpose of the people. It is, therefore, in the Upper Chamber, chosen either from enlarged constituencies on the same terms as the Lower House, or by indirect election from universal suffrage, that the ideal Senate of the future is to be sought. For by these methods alone can we make sure of establishing Democracy in the popular Chamber at the same time that we establish Liberty in the Senate.

Postscript to Chapter IV.

The argument previously advanced has been in favour of an Upper Chamber, endowed with

suspensory powers, and elected on an almost absolutely democratic franchise. Little has been said as to the Single-Chamber argument, which pleads for a Revisory Chamber and a Revisory Chamber only. The argument has perhaps never been better put than by Mr. Ramsay Macdonald, who is able at once to hold extreme views and to express them with extreme moderation. "The Socialist has taken over from the individualist Radical the expression and thought of 'majority rule,' and has been misled, in consequence, regarding his idea of Democracy and of State authority. . . . The majority settles the principles and the aims of legislation, but the minority must always be an important factor in determining how far the principles are to be carried and how near the goal is to be approached. The majority as a legislating power works not for itself but for society. We are made familiar with the point involved in this argument by the criticisms of those who are agitating for Proportional Representation, and by individualists generally. They say that it is not all the people but only an active section of the people who rule. The answer is that the majority vote indicates the General Will, but that the representatives returned by the majority have to observe the wish of the minority in their actions.*

"Moreover, there is another important limitation

* They do not always do this consciously, but the pressure of public opinion soon tells on governments. One of the most flagrant errors in political phraseology to-day is the application of the term "compromise" to this condition of things.—J.R.M.L

imposed on the power of majorities. They cannot violate the reason of the community. This involves various kinds of conditions. They must show that they can carry out their opinions in a practical way. They must not accompany their changes with too great shocks. Above all, they cannot go contrary to the moral sense either of their own followers or of a considerable minority. A majority acts not by force but by persuasion. . . . The essential part is, that under democratic government 'majority rule' is not an accurate description of the reigning force. Representative government, in spite of occasional experiences to the contrary, is not the government of the majority, but the government of the whole people" (J. R. Macdonald, *Socialism and Government,* Vol. I. pp. 79–81).

The practical application of these views is seen later on (Vol. II. pp. 72–3), where Mr. Macdonald argues for "turning the Second Chamber into a Revisory Committee. . . . The safest, the most efficient, and the most responsible legislature is therefore a single Chamber supplemented by a Revision Committee, constituted of law Lords, qualified not only by practice in Courts but as parliamentary draughtsmen, and competent to revise, not the policy of bills, but their technical expression."

So much for the argument for an Upper Chamber of a purely Revisory type, which is really a single Chamber plus a revisory Committee. No further comment is needed except to show that between those who argue for it, and those who argue for a Suspensory Upper Chamber, there exists a funda-

mental difference which cannot be in any way bridged. The dispute turns, as most disputes do, were the protagonists aware of it, on a rather remote point of philosophy. Do you believe that a people expresses its will through a majority in defiance of certain minorities, or do you believe that the "general will" is an expression of the wishes of the whole people, inclusive of all interests and classes? In short, do you believe that "the will of the majority" or that the "general will" is the driving force of modern governments and the source and shaper of the laws? * If the majority is separable from the minorities, it is obvious that an Upper Chamber, with at least suspensory powers, ought to exist, for it is only by these means that the minorities can really be represented. Advocates of the "general will," on the other hand, contend that the majority for the time being comprehends and includes enough of the desires of the minorities in the laws which it passes to make the latter representative of the "general will." These thinkers, of course, regard a suspensory Upper Chamber as merely a useless obstruction, and it even shows considerable liberality on their part that they should realize that the Lower Chamber has any imperfections in it whatever, and that expert draughtsmen may be required to interpret the "general will" in its full entirety.

* "*La loi est une expression de la volonte générale*" is a declaration hung up in every state-building in France. It is not without its irony that this declaration is directly contradicted by the Senate, which imposes the strongest checks on majority known in a Unitary State on the Continent.

CHAPTER V

APPLICATIONS TO THE PRESENT PROBLEM IN ENGLAND

"*It were good that men in their Innovations would follow the example of Time itself, which indeed innovateth greatly, but quietly, and by degrees scarce to be perceived. . . . It is good also not to try experiments in States except the Necessity be urgent, or the utility evident.*"—BACON, *On Innovations.*

"*I am accused, I am told . . . of being a man of aristocratick principles. If by aristocracy they mean the peers, I have no vulgar admiration, nor any vulgar antipathy, towards them; I hold their order in cold and decent respect. I hold them to be of an absolute necessity in the constitution; but I think they are only good when kept within their proper bounds.*"—BURKE, 1781.

"*Except under very perceptible pressure it (the House of Lords) always resists measures aimed at doing good to the poor . . . generally it does only a temporary injury, and that is its plea for existence. But the injury may be irreparable. And if we have manifest suffering, degradation and death on one side, and the risk of a remodelled senate on the other, the certain evil outweighs the contingent danger. For the evil that we apprehend cannot be greater than the evil we know.*"—ACTON, 1881.

IN the last chapter an attempt was made to outline an ideal Upper Chamber, but it would be the greatest of all errors to suppose that an institution of such a kind could be created in England at the present time. Our Constitution is unique, very little adapted to sudden and drastic change, very difficult to reform with effect. To no country does

the saying of Solon—that the laws of a country should not be the best that can be imagined, but the best that its inhabitants can receive—apply so nearly as to England. In all other countries the work of creating a good Upper Chamber was easier, because in no case was a country so fettered to obstinate preconceptions, prejudices and traditions; with us no suggestion of reform can be effective, which does not take account of the present situation and the special conditions of England. Of the latter enough has already been said; the unwritten constitution, the hereditary principle, the use of the King's prerogative to overcome certain kinds of opposition in the Upper House, the love of the Englishman for the concrete and the obvious, all these are the commonplaces of English constitutional history. But of the present situation too much cannot be said, for it is unique in the history of this country. All sides now admit the necessity of change; the House of Lords itself has condemned the principle, which has been the mainspring of its powers, by the solemn Resolution "that the possession of a peerage should no longer of itself give the right to sit and vote in the House of Lords." Besides this decision, the recent breaches which both parties have made in the unwritten constitution, are merely trivial. Here is an announcement that stretches wide and far; in this decision we have definitely reached a new era in England's constitutional history, and, if it is any satisfaction to us, we can all remember that we have been witnesses of its birth.

A.—*The Influence of Democracy on the House of Lords.*

Such being the case, our attitude must be wholly different from what has been that of constitutional reformers in the past. They lived in an age when there were men who condemned the constitution of the House of Lords; we live in an age when the House of Lords has condemned itself. The reason of this astonishing admission must be sought in the new tendency of our age, in the profound and all-pervading influence of democracy. The sneers at the equality of man are endless, but there can be no question that, in a mainly democratic State, the hereditary principle ceases to have that claim on political privilege which it may otherwise possess. The Resolution of the Peers is in itself an acknowledgment of this fact. It is possible for democratic feeling to admit the hereditary principle as an exception in one case—as of the monarch; impossible for it to excuse it in six hundred cases—as with the House of Lords. The growth of democratic ideas, the sense of the growing equality of man, is indeed probably the deepest cause of the dissensions between Lords and Commons. Political cleavages usually rest on social ones, and the alienation between our two Chambers has become most marked, since the extension of the franchise has placed power in the hands of the many, and has enabled the poor to return members of their own class to Parliament.

After 1832, an immense number of representatives of the wealthier middle-class forced their way into the Commons. This fact would probably have soon produced sharp conflicts with the Upper House, had it not been for the extreme subservience of the Peers after their defeat over the Reform Bill. Even so, far-reaching reform or practical abolition of the Peers was proposed by men like Macaulay, the third Earl Grey, Cobden and Bright. But time softened these differences. The rich merchants sent their sons to public schools, where they met and learned to know Peers' sons, and Whig noblemen became political allies of Manchester cotton princes. Thus, even when the disputes between the two Houses became fierce, there remained a certain bond of union, a certain amount of social sympathy, between the classes represented in the two Houses. Palmerston and Russell were aristocrats with a genuine sympathy with the middle-class, Gladstone and Peel sons of business men with a real liking and reverence for the hereditary Peers. But with the Reform Bill of 1867, and still more with that of 1884, a new spirit entered into the House of Commons.* It became increasingly filled with men who had never been to public schools and who had never wanted to go

* In 1869 Mill could write of the Lords as a "very irritating kind of *minor* nuisance," and even in 1881 Acton could say of the Upper House "generally it does only a *temporary* injury, and that is its plea for existence." I think that even non-partisan writers might hold that this "plea for existence" has now no very firm basis.

there, men who had never known Peers and who did not want to know them, men who hated hereditary power on principle, men who had, and desired to have, no knowledge of its working in practice. The immediate result has been the renewal of sharp and bitter contests between the two Chambers.* The leaders of the Liberals and Conservatives may still represent old types, but their followers have changed in character, and in each of the two historic parties there are many who urge on the attack upon political privilege from motives which are quite different from those of yore. A social chasm separates the members of the two Houses, and it continues to widen; personal intercourse becomes less and less, political hostility increases more and more. Exactly the same tendency appeared between masters and men in the early days of factory life. After the old system of personal relationships and apprenticeships had broken down, the manufacturers got entirely out of touch with their workmen; and the strife between Capital and Labour increased in bitterness. That difficulty has been met by inventing a fictitious personal relationship, and by bringing masters and men together in conferences, at which employers and Trade Union representatives learn to know one another personally and to respect one another in

* The Home Rule controversy tended to exalt the power of the House of Lords, and to convert most of them to one party. But this specific measure only hastened the revelation of a division between the two Chambers that was really fundamental, because based on a difference of social culture and outlook.

proportion to their knowledge. These methods of bridging the social chasm are absolutely essential to reconcile men of varying types, different educations and opposed interests, and the Lords will only be able to preserve their power by renewing their direct and personal contact with the democracy or with its representatives.

The establishment of a system of conferences and committees between the two Chambers will not of itself solve the difficulty; only the introduction of some kind of democratic element into the Upper House can effect that. This fact seems to have been recognized even by Mr. Balfour, but the real efficacy of any such reform will depend upon whether the new element introduced into the Lords is influential enough to bring that body into real sympathy with democracy. On account of the profound social changes above-named the political situation has become unprecedented to-day, and it is this fact which makes specific suggestions or general criticisms by those great statesmen or political thinkers, who only knew the English Constitution before 1867, almost entirely inapplicable to present conditions. For instance, Canning said that he hoped never to see the day when England was a "democracy, inlaid (for ornament's sake) with a nobility, and topped (by sufferance) with a crown." We may not have reached that day yet, but it is quite certain that neither Peers nor King enjoy anything like the power they had in the twenties. Prior to 1867, England was governed either by an aristocracy or by a *bourgeoisie;*

between 1832 and 1867 it was really governed by the latter. A government of business-men and an electorate of small tradesmen and shopkeepers, which is steadied and influenced by a hereditary nobility, may not be an inspiring government, but it is a profoundly peaceful and law-abiding one. The rights of property are safe, and there is little danger of hasty or rash measures; the resources of the country and the suggested reforms in its institutions are weighed and considered as carefully, as correctly and as minutely as the grocer measures out his sugar and as the merchant balances his accounts. Every Chancellor of the Exchequer as he draws out his Budget, every minister who prepares his Bill of constitutional reform, imagines that these worthies are looking over his shoulder, and frames his measures with that economy, scruple and exactness which only a *bourgeois* electorate can require (1).

Under such a government, and with such an electorate, much could be done that would be impossible under any other conditions. For example, an Upper Chamber, in so far as it exists as a check on hasty or rash legislation, has hardly any claim to exist in such a state. There was not all satire in Disraeli's remark in *Coningsby*, that no one in the thirties wanted a Second Chamber except a few disreputable individuals. It is, therefore, not very surprising that Whigs or Radicals of the '32–'67 period—like Macaulay, the third Earl Grey, Cobden, or Bright—should practically advocate a single Chamber, while our official Liberal of to-

day theoretically advocates a second one.* In a country where the democracy reigns, we have none of the characteristic quiet and order of the *bourgeois* state. Passion runs higher and quicker (for the impulses of a democracy are both nobler and baser than those of the *bourgeoisie*); there is something of a contempt for economy and even for law and order, if these happen to oppose an immediate popular passion. When he is considering a measure for constitutional reform, the democratic lawgiver sees not a well-dressed deputation from a Chamber of Commerce, but an angry crowd passionately demanding its rights; when he frames his money Bills, the democratic financier sees not an accountant with his books, but a child holding out its hand for bread. Such influences lead to impulsiveness in measures, to extravagance and to violence. It is easy to exaggerate these tendencies, but it is folly not to recognize them at all, and not to see that, if an Upper Chamber is to be remodelled in a democratic State, the principles must be different from those in a *bourgeois* one, and that, in consequence, the suggestions of reformers or of constitution-makers half-a-century back have ceased to be valuable. The profound surprises awaiting

* In the subsequent discussion I refer almost exclusively to the views of the Conservative and Liberal parties, not in any way because I value their general views above those of the Irish or Labour party, but because in this matter the two latter parties advocate a Single Chamber—either openly or in a slightly disguised form. As my argument has been for a Suspensory Upper Chamber throughout, these views are not here discussed, though they are criticized elsewhere.

those constitution-makers who framed their Upper Chambers on the *bourgeois* model, and the profound changes which have often been needed, in order to adapt these bodies to the new democratic conditions, will be in themselves enough proof of this contention. The reforming of an Upper Chamber in a democratic State, therefore, involves a danger that is real; on the other hand, it presents an opportunity that is greater and a success that may be more splendid than under any other species of government.

B.—*Lessons from Foreign and Colonial Experience.*

Before attempting to consider any specific proposals for the reform of the House of Lords, it may be well to outline certain principles, derived from the foregoing practical study of Upper Chambers and Senates in other countries, in order to show the true lines on which such reforms should proceed. The first and most obvious of these deductions is that an Upper House must represent a principle rather than a party, for, so long as it is linked indissolubly with one political party in the Lower House, an Upper Chamber must sink in prestige and esteem. The danger is most real, for a political party, other than the one that has filled the Upper Chamber, will sooner or later be in the ascendant. Eventually it will have the Upper House at its

Danger of partisanship in the Upper House

mercy, and when such is the case a remodelling will be drastic. There seems to be no reasonable doubt, despite the disclaimers of Conservative politicians, that the House of Lords is such a partisan assembly. English judgments are suspect, but we can hardly dispute the conclusion of a profound investigator of English institutions, whose knowledge is unequalled, and whose bias, if apparent, is in favour of historic evolution. President Lowell, of Harvard, says: "The House of Lords, without ceasing to have an opinion of its own on other matters, has become for party purposes an instrument in the hands of the Tory leaders, who use it as a bishop or knight of their own colour on the chess-board of party politics." *

The danger of having a partisan assembly for an Upper Chamber has not been adequately brought home to the English public, because the politicians of each party always deny that there is any difference between their own partisan aims and those of the nation as a whole. It is necessary

* Lowell, *Government of England*, vol. i. 409, quoted by Marriott, *Second Chambers*, p. 85; *vide* note (3) for further detailed evidence. To my mind one proof alone of the partiality of the Lords is sufficient. No attempt, so far as I can discover, has ever been made to provide for representation of minorities in the election of either the Irish or the Scotch peers by their brother peers. A recent case (that of a peer rejected by his brother peers for the new Parliament, for voting for the Budget in 1909, which an enormous majority in Scotland approved). seems flagrant, but special circumstances may have intervened. One cannot, however, disregard the evidence of the past, when Liberal peers were in a very strong minority both in Ireland and Scotland. It is enough to quote from Lord Langford's *Letter*

to speak boldly and strongly in this matter, because party government is so frequently contemned in theory and so frequently applied in practice. Party government, however despised, is the only workable system for conducting the affairs of a democratic State, and it is based on the principle that fundamental divisions exist between different sets of persons in the State. No one should really be deceived by the cant that, when a party gets into office, it pursues wholly national ends. It is the melancholy truth, which no partisan dares to admit even to himself, that no party can afford to be so disinterested. However devoted it may be to the nation at large, a party in office must secure itself in power by granting certain special advantages to the chief classes of its political supporters. The mischief thus caused is remedied by the fact that the other party also eventually comes into power, and in turn makes concessions to its own classes of supporters. The Conservative party give doles to the Established clergy and to the landed class; the Liberal party would like to give doles to the lower middle-class and to Nonconformist ministers.* In this way the party-system secures that the

on the Peerage (London, 1837), which gives an interesting series of tables to show that the elections, whether for Scotland or Ireland, had been, both then and in the past, systematically conducted with a flagrant disregard for the claims of minorities.

* Not, I mean, as individuals, but as a class. It may be asserted with almost axiomatic certainty that any Conservative educational or land legislation will favour one of the first two classes, any Liberal legislation of the same kind one of the latter.

special class-benefits given by the one party are balanced by the special class-benefits given by the other. This is the logic of party government, and, though the system seems cynical, it secures a rough balance of justice to each party in certain special class legislation. It is

> "the right and wrong
> Between whose eternal jar justice resides."

Necessity of the party-system in the Lower House

It is necessary not to have any misunderstanding in this matter, and to show that, though the party-system necessarily implies the securing of advantages to certain individuals and classes with which the party in power is identified, it not only does not retard certain measures that are genuinely national, but actually ensures that they will pass into law. After enough of party-advantage has been secured by specific legislation, each party in the State can and does take up a national policy. In fact, certain measures, in the highest degree beneficial and genuinely national in character, can be passed with much more efficacy by one party than by another. To take examples from relatively recent politics, the Irish Church Disestablishment Bill could only have been passed in its existing form by the Liberal party; the Irish Land Bill of 1903 could only have been passed in its existing form by the Conservatives. The broad and national shape impressed on each Bill was due to the fact that in either case the party in power was the party which could frame, and which could make sure of carrying, the Bill most universally acceptable. Had the

other party framed the Bill, it would either not have been as broad in its scope or would have been mutilated or injured during its passage into law. In each case, the party, which opposed the measure at the time, probably now recognizes that that measure was, in a sense, the best immediate settlement that could have been made. If these reasonings be correct, either party may claim that it represents the nation in some of its measures at certain moments, and that it sometimes carries out a national policy without specific popular pressure. To a popular agitation—if sufficiently manifest and prolonged—either party will, of course, always yield, and that consideration does not, therefore, practically affect the argument. What is really of more importance is to realize the two other factors in the situation, the first being that a party in power is likely to represent the nation in some of its aspects, and to carry some national measures; the second being that such a party is certain to carry some party measures, and that such partisan measures are essential to the existence of party government as now understood. If, therefore, the second condition is not observed, the result must eventually be political chaos and disruption.

In so far as the party-system is evil, it is because it necessitates certain special kinds of class- and party-legislation, but the balance and alternation of parties in office largely outweighs that evil. When, however, the Upper House merely votes and sides with one party, the working of the party-system is evil without any balancing advantage. One party

can pension and dole its supporters at will, the other cannot, so that the longer the first party remains in office, the more it does for its special supporters; and the longer the second party holds office, the less it does for them.* Thus the whole balance of the party-system is upset, and a single party and a single Chamber pass measures of special class-legislation, purely for their own advantage. No check whatever is imposed on them from above; from below they are subject only to that moral force of public opinion which advocates national measures. So long as the Liberals are in power we have a two-Chamber government, in which the Upper Chamber has not a suspensive but an absolute veto on party legislation; directly the Conservatives assume office we have a government in which the Upper Chamber is not even a revising committee, but one in which there is no check whatever upon certain kinds of party legislation. It is this excess of partisanship which is probably the most crying of all the abuses that have necessitated the reform of the House of Lords. It is not so much because it consists of a hereditary class, but because a hereditary class should have lent itself to such manœuvres, that the House of Lords has proved the need for reconstruction. It is not its abilities but its tactics, not its independence but its partiality, which condemns the existing House of Lords.

* There is, in addition to this objection, the extremely serious danger that this party might be induced to secure posts for its partisans at the expense of the Civil Services.

An Upper Chamber that is serene and above party is admittedly a rarity, but an Upper Chamber that discriminates unfairly against one party in the State is also an exotic. It cannot be asserted that the House of Lords is the former, it can hardly be denied that it is the latter. This is the true cause of the dangerous situation in England at the present time. The Lords have forgotten their old habit of allowing something to the other side; they have cleverly recognized that they must not oppose the obviously national measures; they have recognized, with equal acuteness, that they can destroy the special partisan legislation of the other side. This is the real reason of the present agitation against them, because no party other than the Conservative can continue to exist, unless the House of Lords is limited in power. The older agitations against the Upper Chamber died down because the Lords, on the whole, recognized facts and adapted themselves to new conditions. In fact, between 1832 and 1867 their general conduct was marked by true and statesmanlike moderation. Yet, even in 1860, Lord Acton, observing the rise of democratic influences, could have doubts as to the continuance of this wise policy: "*The aristocracy*," wrote he, "*does not represent* [*any constituents*] *and has no real right to change, as its elements are constant. Whether or no aristocracy is an element of progress or of stability, properly, seems to me highly to be questioned*" (2). Time has signally justified him, has confirmed his fears, and exhibited the House of Lords in an attitude and with a policy singularly

different from that of their predecessors of the forties.

It was the glory of the old House of Lords that it knew how to distribute its vetoes or acceptances between both parties with a relatively impartial hand; it is the shame of the present one that it has forgotten the wise indifference of its predecessors. President Lowell's judgment, quite apart from other evidence such as that of Lecky or Acton, is, I think, sufficient to establish the fact of partiality, however the Peers themselves may wish to disclaim it (3). In any case, even if we do not admit this, we must admit that no reform can be satisfactory which does not avert this evil in the future. Human nature cannot be reformed out of existence, and party feeling is as impossible to eradicate as original sin. But it ought to be possible at least to secure that the worst evils of partisan influence are removed from a reformed Upper House, and to see that other parties in the State than one should obtain a tolerable representation and authority in the Upper House.

If we are to reform the partisan character of the Upper House, no change in its powers will of itself be effective; only a change in its composition can alter the balance of parties within that assembly itself. We must therefore consider, in the first place, the general nature of the changes of composition that are desirable, before proceeding to criticize any suggestions in detail. If the conclusion be correct that the party character of the Upper House has pro-

A change in the composition of the House of Lords necessary

duced the present crisis, then that result must be due to the almost exclusively hereditary character of the Peers, and every reform must start by reducing or confining that element in the Upper House. It is quite unnecessary to attack the present hereditary Peers purely on the ground that their ability is actually inferior to that of an elected Chamber. Even if this be the case, it would not prove that the existing Upper Chamber ought to be destroyed. Its function is to act as a political safeguard, as a revisory or suspensory Chamber, and it is not necessary, nor even altogether desirable, that its legislators should possess the brilliant originating ability needed for initiating Bills. The reason for the reform of the Lords is not so much their lack of ability as their lack of discrimination and impartiality. In any case, the charge of inferior ability is not proven, and so much popular misconception exists over this point that a few words on the subject will not be superfluous.

C.—*Heredity as a Basis for Political Power.*

(a) *The Scientific View.*

Much jubilation was recently expressed because science appeared to support the popular conception as to the incapacity of hereditary legislators. It is true, indeed, that eminent scientists assure us that eldest sons do not usually inherit the full measure of their family's ability, that the first son is usually inclined to be more

weak-minded or weak-bodied than his brothers. (4) But this is only really an argument for choosing the best out of the sons of each peer, not for excluding that family altogether from its legislative privileges. The scientist never meant to say that the eldest son was not likely, in each case, to inherit a good deal of the ability or courage or strength of his race; he would, in fact, have been the first to affirm it. Most families of peers have been founded in the past by real ability, often by the highly distinguished ability of a great soldier or statesman, sometimes of a brutal swordsman, of a pliant, corrupt courtier, or, as is more often the case to-day, by the ability of a man who knows how to amass wealth and to spend it with judgment. It would be as wrong to suggest that the original qualities of the old peers were those of extravagant virtue, as it is right to admit that considerable ability of one kind or another has almost always gone to the founding of the old aristocratic families. Now there is nothing on which the modern scientist insists more than on the predominance of hereditary characteristics in descendants, and therefore even the eldest sons of many peers are likely to possess ability far above the average. In any case, the majority of the existing hereditary peers are likely to possess enough ability to choose the best hundred out of the existing peers. If the hereditary element in the present Upper House were reduced by five-sixths, and the remaining sixth were elected by the hereditary peers from among the general body, there is every reason to believe

that these men would be among the ablest in the whole country.* If some such system as this were adopted, the maximum of genuine hereditary ability would be preserved and secured for a reformed Upper House, while the older or less able peers would forego their political privileges.

Heredity.

(b) *The views of the dependants of class.*

The residue of hereditary ability, secured by applying the winnowing fan of selection to the existing House of Lords, would be an asset of a value that it would be quixotic to cast aside. It would be the height of folly not to draw from this reservoir of proved ability. But there is another argument which also makes it clear that it would be impolitic to banish the hereditary element altogether from a reformed Upper House. It is essential that any reform of the House of Lords should be such as to carry as universal an acceptance as possible, and it must be remembered that total abolition of the hereditary element would seriously injure the feelings and desires of what is at least a powerful minority of

* Science also affirms that a stock, however endowed with ability, is likely eventually to degenerate. Hence at the present time there are probably a number of peers who inherit famous names and nothing else from their great ancestors. But by a system of election the functions of these degenerates would be limited to voting for their brother peers, whose superior ability they would probably be intelligent enough to recognize.

the nation. Generations of dependants on the upper class, of servants, of small tradesmen, and of the *bourgeoisie* generally, have learnt to worship the political privileges of the nobles, and have loved to trace their pedigrees in Burke with a zeal and interest which others find it hard to understand. The feudal tradition is strong, many still love to be kept in "their proper stations," and submit willingly to the influence of a "lord." Nor is the feudal relation without its merits, for it evokes chivalry in the lord and affection in the retainer, and forms ties which are not purely those of profit and loss, or of economic tyranny and slavery. The dependants and worshippers of hereditary ascendancy will, therefore, be injured in their dearest desires by a proposal to abolish totally the political power of the hereditary nobles, in whom these men probably place more confidence than in any elected representatives. Such a proposal will disturb the repose of cathedral cities, injure the feelings of peasants, and harrow the souls of the numerous dependants of class. True political justice is shown by evincing toleration and respect even towards the views and wishes of parasites and flunkeys, and it would be most unjust to assume that all of these class dependants are the one or the other.

The rights and wishes of minorities should receive every consideration, and it is not just to injure the feelings of a strong section of the community, if such injury can in any way be avoided. It is true that the Lords have shown themselves indifferent to the wishes of very large sections of

the people in certain matters which are not political. Take for example the Cruel Sports Bill, which in no way injured the interests of legitimate sport, but merely forbade certain methods by which animals are brutally tormented. This Bill was thrown out by the Peers, who insisted on maintaining their privilege of torturing harmless animals in certain specifically cruel ways (5). But because the present hereditary peers have chosen to insult the humanitarian feeling of what is certainly a strong minority, and perhaps an actual majority, in the country, it would be wrong for the nation to retaliate in kind. Nothing is to be gained by unduly hurting the feelings of that strong minority, which wishes to preserve certain members of the community in a certain specifically privileged position. Justice to the wishes of a strong minority compels us to retain a considerable proportion of the hereditary element, since this retention is unlikely to harm any one except *doctrinaire* fanatics, and is likely to be politically beneficial.

(c) *The historical defence of Heredity.*

But there are stronger grounds for retaining some part of the hereditary element than those already urged; to secure proved ability to part of that Upper House is not everything (for conscience and sympathy are more important than ability); to refuse to injure the feelings of a powerful minority is not everything, for we must prevent that minority from being powerful

enough to injure the interests of the people as a whole. The hereditary lords as a body may not represent ability nor the feelings of a majority in any excessive degree, but they do represent something more important than either—they represent history. No Constitution can work well unless it grows, and a successful Upper Chamber in any country must always owe its success to the fact that it has adapted itself to some of the existing conditions. The present House of Lords has not done this, and this fact necessitates a drastic reform of its constitution; but, at the same time, it enforces the preservation of some of its traditional features.* In England the Upper Chamber is an ill-tended and straggling growth, and a gardener is needed to improve its condition. But while he finds it needful to lop some branches and to prune others, even to graft alien saplings upon it, there can be no more fatal mistake than to pluck it up altogether at the roots. It may be desirable to reduce the hereditary element in the Lords to one-half or to a minority of the newly constituted Chamber, it cannot be wise to abolish it altogether. It may be well to hew it down even to a mere

* J. S. Mill is not usually reckoned a defender of hereditary privilege, but even he says (*Representative Government*, chap. xiii.), "The historical antecedents of England render it all but certain, that unless in the improbable case of a violent subversion of the existing Constitution, any Second Chamber which could possibly exist would have to be built on the foundation of the House of Lords, it is out of the question to think, practically of abolishing that assembly to replace it by such a Senate as I have sketched or by any other."

stump of the trunk; it cannot be wise to destroy it wholly. The old trunk must retain an organic spark of life, in order to vitalize and to fertilize the new elements grafted upon it. Without some such centre, the sap cannot course through the new limbs or break into foliage and blossom in the future. In a land where history has moulded every institution in the past, it would be a crime not to allow it to have some share in moulding this institution in the future.

On the three grounds, therefore, of securing the certain hereditary asset of proved ability, of protecting the rights of minorities, and of respecting the influence of history, the total abolition of the hereditary part of the Upper Chamber is rejected. On the grounds of practical convenience it must be limited to a much smaller number than at present, and, for various reasons already given, that number must be merely a part, not the whole, of the newly constituted House.

D.—*Methods of limiting Hereditary Power in the Lords.* 1. *Nominative Principle.*

If we are going to admit any other elements at all, we must admit (*a*) those that are nominated; (*b*) those that are elected. The nominated principle is one that we have already carefully examined in the light of the practical experience of other countries. It was the favourite device for reforming our House of Lords in the fifties, and was favoured at a much later date by such different personalities as John

Stuart Mill and the late Lord Salisbury. As has been shown, it is a device of *bourgeois* statesmen for a *bourgeois* State, and whenever genuinely democratic conditions have supervened, either in the Colonies or on the Continent, the nominee Senate of this type has either abdicated its powers or transformed its composition. In fact, there has been this advantage of England's delay in reforming her House of Lords, that she has had time to profit by the blunders of other countries.

The practical experience, either of our Colonies or of other lands, has hardly been appreciated by some of our leaders, as may be shown by the following quotation. On March 15, 1910, the present Marquis of Salisbury said in the House of Lords that the proposal "with regard to Life-Peerages was a very good one, but why should they not have a system under which members of the hereditary peerage would be nominated for life to serve as Lords of Parliament?" This proposal—professedly derived from "history"—is to fill the Upper Chamber with hereditary peers, nominated for life from among the existing number. The hereditary system, as such, is condemned, but it is to be rendered respectable by being associated with the nominee system. The view seems to be widely held, and the Marquis's speech appears to have commanded assent. It would be interesting to know from what "history" the noble Marquis derives either these ideas or he view that a purely nominated Upper Chamber is a "very good," an independent, or a powerful body. Is it from that

of Portugal or Italy, of Newfoundland or of New South Wales? Wherever the conditions anywhere approximate to those of England, we find that the result of composing an Upper House exclusively of nominees has been seriously to diminish its independence or to reduce it completely to a shadow. There is no reason why a certain number of hereditary peers, nominated for life, should not form part of the new Upper Chamber and even add to its strength, but to constitute the whole of that Chamber in this way is simply to aim a deadly blow both at its strength and independence. If the Radical reformers were real Machiavellians, they would gladly accept this method as the true way of abolishing the Lords. To condemn heredity altogether, and to offer nomination as the sole principle for constituting the new Chamber, is simply to commit political suicide, and to commit it under every circumstance of humiliation and contempt. In almost every case a purely nominated Upper Chamber is eventually forced to yield by "creation" of Peers or "swamping," and is subjected to political degradations from which it can never fully recover. If this be the case in a Chamber of nominated Life-Peers without hereditary titles, how much more likely is it to be the case with one consisting of hereditary peers nominated for life! This consideration only condemns the nominee system as inapplicable for constituting the whole Chamber, but as we have already laid it down that the hereditary element must constitute one part of our reconstituted Chamber, the nominee

ex officio element must be relatively small, or the new Chamber will possess no elasticity.

2. *The Elective Principle.*

Throughout our survey it has been constantly shown that, in a developed and established democracy, the *elective* system of constituting the Upper Chamber is the best, and probably the only, way of rendering it strong and efficient. In England, democracy is not completely developed, and therefore it is wise to retain some of the hereditary element in the reformed Upper Chamber. At the same time, it is obviously expedient to associate an elective element with it, and thus to bring hereditary peers into fresh and vigorous touch with the people, and to render the Upper House tolerable in the eyes of convinced democrats. Moreover, to have an elective element in the Upper House is the only way of getting all parties adequately represented there. A system of heredity has failed to do that, a system of nomination can only do it in a very indirect way, whereas the advantage of the elective system is that it periodically reproduces in the Upper House the direct feelings of the people as a whole. Up till now the Upper Chamber has been in the most favourable of all positions for securing impartiality, and has signally failed. Hence the only chance of impartiality in the future is to secure an adequate representation of all and several parties in the Upper Chamber, so that measures can receive full discussion, and that

parties may be sure of something like fair treatment in the Upper Chamber. No other method can do that with the same directness or success as the elective one. The purely hereditary system may never do it at all; the nominee system can only do it in an extremely indirect and cumbrous manner. It is just these delays and complexities which irritate a people to madness, and which will give the demagogues their chance and the Lords their death-blow in the future. The only, or at any rate the best, way of protecting the Lords against any agitation in the future is to give the popular voice a chance of being heard directly, and not of being interpreted indirectly, in the Upper Chamber.

It will have become apparent by now that the real way of dealing with the Lords is by a change in composition, and that it is their composition that will really do most to determine their future powers. If the Lords are to be left as they are in composition (except for reduction of size) their powers must be further clipped. There are only two courses before any reformer of the Upper Chamber: he may genuinely improve its composition, or he may seriously limit its powers. We have adopted the first alternative as the most desirable, and, in the light of this judgment, we may consider the various schemes of reform presented.

E.—*Schemes of Reform now before the country:* (a) *that of Lord Newton's Committee.*

The first scheme of reform, which was considered in the calm of the Gilded Chamber before the voice of popular agitation had swelled, is the report of Lord Newton's Committee issued in December 1908 (6). It may be briefly summarized. Under the arrangements it suggested, the new House would number about three hundred and fifty members; it would consist of three peers of the Blood Royal, two hundred representatives elected by the hereditary peers, one hundred and thirty qualified hereditary peers, ten spiritual Lords of Parliament, five law Lords. To these add a possible annual increment of four Life-Peers (*ex officio* or nominated in the ordinary way) up to the total number of forty. The grand total of the House would then be about four hundred. The scheme has been subjected to an able and merciless criticism by Mr. McKechnie, and is only interesting as showing the extremely small amount of concession which a hereditary corporation will make when it is not subjected to real pressure (7). The practical effect of this scheme would be that the hereditary element would still number three hundred and thirty out of four hundred members, or about four-fifths of the whole. Moreover, the power of "creation" or "swamping" is practically withdrawn, so that the Upper House, by an entirely illusory concession to the nominated principle, would secure itself for

all time from the only legal means of exerting pressure upon it. An Upper Chamber so constituted and so protected against change is one which no democracy would long suffer, and abolition would probably in the end result from such a reform. It is an interesting commentary on the whole scheme to see on what very different lines the Upper House of Hungary was reformed in 1885. Their Hereditary Magnates allowed about one-fourth, not about one-fifth, of the total number to be nominated, and they did not withdraw the power of "creation" from the King. As this reform was passed by the most reactionary and aristocratic nobility in Europe, it does not reflect very much credit on our Upper Chamber that their recommendations of but yesterday should be actually so much more illiberal than reforms to which the Hungarian Magnates consented more than a quarter of a century ago.

(b) *The scheme of Mr. Balfour and the Conservative Opposition.*

It is only fair, however, to say that the Conservative party, as a whole, seem inclined to much more liberal views, and in no way to follow their hereditary pundits in the work of reaction. The official leader of the Opposition says (*Times*, April 14, 1910): "The simpler and the more obvious method, and the one which I believe commends itself to the great body of the party to which I belong, is that there should be an element in the

House of Lords which comes from outside, which is elected, which is drawn from the people, which is not merely in relation to the democracy, as I believe the present House of Lords is, but is in direct, formal, and explicit relation with democracy; and undoubtedly the great body of opinion, I think, in the House of Lords itself, and among members of the House of Commons is in that direction!" The leader of the Opposition is certainly in touch with the Upper House, and he may be congratulated on the speed with which he has induced them to stultify their own recommendations. But apart from the Lords altogether, this utterance, and the lead it has given to one party in the State, is in every way noteworthy. To introduce an elective element is unquestionably the right way to regenerate the House of Lords. But all depends on the proportion borne to the rest of the House by the elective element in question. If it is to be a small and powerless minority, it will be useless and even harmful; if it is to be all-absorbing, it will destroy the historic character of the House.

(c) *The Liberal Resolutions.*

(1) *Reform of Composition.*—This brings us to the third scheme of reform before the country. The provisions for reforming the composition of the House are still only to be conjectured from the passage that follows: "And whereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on

a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation."

This announcement is judiciously vague, and the one thing certain about it is that the hereditary element is to be abolished altogether. But it appears to be generally admitted that the Liberal scheme is one which makes the Upper House either purely elective, or predominantly so, *i.e.* in the latter case it will be associated with a small and irremovable element of nominated Life-Peers. For the reasons already given, this reform appears to go too far: moreover, it should certainly precede, and not succeed, the assignment of powers to the reconstituted Chamber. If the Peers are to reform their own composition and at the same moment are to have their powers defined by a hostile majority in the Commons, the inevitable result will be that there will be too many Hereditary Peers left in the new House, and too little work left for them to do. They would merely be a set of hereditary ornaments, whose assent was formally needful to clothe Bills with the form of law. Neither historic party can really help in the matter, until it is ready to forego some of its own interest or advantage for the common cause. At present, neither Conservatives nor Liberals can really propound a solution that will be satisfactory; for the one party wishes that the reformed House should be too strong, and the other that it should be too weak. The matter can only be settled on national and not on party grounds. It would seem that a national plan would

fill the Upper House with at least half, and perhaps with more than half, purely elected members. A national plan would compose the rest of the House partly of elected hereditary peers, partly of nominated Life-Peers. Such a plan would be on the basis of a genuinely national settlement, because it would compromise with the past and anticipate the future; the Liberal plan above outlined would do neither of these things.

(c 2) *Reform of Powers.*—If there is a satisfactory reform in composition, the question of powers will tend to settle itself, but, before sketching the details of our suggested plan, it will be well to consider the Liberal Resolutions, as they are at present the only plan before the country which deal with the new situation created by the rejection of the Budget in 1909.

(*a*) *Abolition of the Financial Veto.*

The proposal with regard to money Bills is as follows: If a money Bill is sent up to the Lords at least one month before the end of the session, and is not passed by them without amendment, in such case, unless the Commons direct to the contrary, the Bill shall be presented to the King, "and become an Act of Parliament on the Royal Assent, notwithstanding that the House of Lords have not consented to the Bill." Provision is made against "tacking" on the part of the Commons, by arranging that, when such Bill is presented to the

King for assent, the Speaker of the Commons shall accompany it, with a certificate to the effect that the Bill is a money Bill. Provision is equally made against "amendment" by the Lords, by the provision that "no amendment shall be allowed to a money Bill which, in the opinion of the Speaker of the House of Commons, is such as to prevent the Bill retaining the character of a money Bill." Lastly, a definition is given of a money Bill as one which contains "only provisions dealing with all or any of the following subjects: namely, the imposition, repeal, remission, alteration, or regulation of taxation; charges on the Consolidated Fund or the provision of money by Parliament; supply; the appropriation, control, or regulation of public money; the raising or guarantee of any loan or the repayment thereof; or matters incidental to those subjects or any of them." It is important to note that this definition includes both the voting of supplies and the ways and means of raising them, two principles normally associated in English money Bills, but usually distinct elsewhere. But far more important even than this is the very interesting main provision that any money Bill can be made law without the consent of the Upper Chamber.

The most important reason for assigning a large share to the hereditary element in a reformed House was one of history, and was necessitated by the importance of maintaining historic survivals so far as they are compatible with progress and with new conditions. Exactly the same argument applies to the abolition of the financial veto of the

Lords, for the historic rights of the Commons are at least as important as the historic rights of the Lords, and according to history the Commons is the superior House in everything, and more superior in finance than in anything else. The Lords have not amended a finance Bill for two hundred and fifty years; until last year they had never forced a dissolution on a Budget and, in effect, refused supplies. In finance there cannot be two masters. Just as it would have been the better plan if there had been more elected and more nominated members in the Lords in the past, so it unquestionably would have been better if it had been the custom to present finance Bills individually and *seriatim* to the Lords, for then their real right of rejection would have been preserved intact. This is the practice in many lands—including our Colonies; unfortunately it is not, and never has been, our own practice. Until 1910, the right of rejecting money Bills had been used in England only at rare intervals, and for a number of insignificant money Bills (8). Hardly any one can have dreamed until last year that, for all practical intents and purposes, the Lords had a financial veto. If they are in future to assert a real one, they can only do it by absolutely destroying such of the unwritten Constitution as still stands. It cannot be right to destroy more of that than has already been destroyed, and the best way out of this financial *impasse* is to abolish the financial veto of the Upper House altogether. It is by no means an ideal solution, but it is the only practicable one, for it is

the one that destroys least of the historic Constitution, and yet secures the avoidance of friction in future.

This is a loss of the form rather than of the substance of financial power, since the Lords may reap some benefit from this resolution, because for the first time in English history they will have an authoritative definition of what a money Bill is (9). In this way it will be impossible for a social or political revolution to be effected in future through the medium of a money Bill. Objection has been taken to the fact that the Speaker's decision is to be final in this matter, because the tendency will be, in future, to degrade the Speaker and to make him a mere echo of the party in power. The danger is probably overrated, but it is well to guard against even the suspicion of partisanship in this matter. A good solution would be to associate three of the judges of the Judicial Committee of the Privy Council with him in his decisions. The separation of the judicial power from the legislative and executive powers is essential to liberty, and the judicial power can here be used, in a very salutary way, to check the excesses of the other two powers in the State. Encroachment on the judicial sphere by the legislature or executive has been far too common of late. For this reason alone it would be worth while to associate some judges with the Speaker, in order to exalt still higher the judicial office. It may be said, of course, that the effect of this measure will be to turn the judges as well as the Speaker into politicians, but, in the case of the

Judicial Committee of the Privy Council, this danger is less than with other judges. At any rate, the danger is relatively so slight that a small risk is worth the running on account of the enormous advantage that may ensue (10).

(*b*) *The Summary Procedure of the three Sessions.*

"II. (1) If any Bill other than a money Bill is passed by the House of Commons in three successive sessions (whether of the same Parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, that Bill shall, on its rejection for the third time by the House of Lords, unless the House of Commons direct to the contrary, be presented to his Majesty and become an Act of Parliament on the Royal Assent being signified thereto, notwithstanding that the House of Lords has not consented to the Bill: Provided that this provision shall not take effect unless two years have elapsed between the date of the first introduction of the Bill in the House of Commons and the date on which it passes the House of Commons for the third time.

"2. A Bill shall be deemed to be rejected by the House of Lords if it is not passed by the House of Lords either without amendment or with such amendments only as may be agreed to by both Houses.

"3. A Bill shall be deemed to be the same Bill as a former Bill sent up to the House of Lords in the preceding session if, when it is sent up to the House of Lords, it is identical with the former Bill or contains only such alterations as are certified by the Speaker of the House of Commons to be necessary owing to the time which has elapsed since the date of the former Bill, or to represent amendments which have been made by the House of Lords in the former Bill in the preceding session. Provided that the House of Commons may, if they think fit, on the passage of such a Bill through the House in the second or third session, suggest any further amendments without inserting the amendments in the Bill, and any such suggested amendments shall be considered by the House of Lords, and if agreed to by that House, shall be treated as amendments made by the House of Lords and agreed to by the House of Commons; but the exercise of this power by the House of Commons shall not affect the operation of this section in the event of the Bill being rejected by the House of Lords.

"4. Any certificate of the Speaker of the House of Commons given under this Act shall be conclusive for all purposes, and shall not be questioned in any court of law.

"5. Nothing in this Act shall diminish or qualify the existing rights and privileges of the House of Commons."

In practice, apparently, this resolution means

that in three sessions (not necessarily of one Parliament) any Bill can be made law by the Commons and the King, without the consent of the Lords. It is not quite clear how the amending system will work, and it looks as if, in practice, the amendments of the Lords might be final. If this were so, the Lords would obtain very considerable control over important Bills. Indeed the paradox has been suggested, not altogether without plausibility, that this provision gives the Lords more powers than they at present possess. So it does or may as regards amendments, but it removes their absolute veto altogether, and seriously limits their suspensory one.

Much, however, will depend upon the way in which the closure or the guillotine will be used in the Commons in the future. It is the frequent use of the guillotine which has rendered legislation so hasty and rash in England, and it is this exercise of power, far more than anything else, which is the real justification for an Upper Chamber in England. If the guillotine is to be used with moderation in the future in the English Parliament, the procedure suggested is probably sound enough for all ordinary legislative matters. The period of three sessions gives time for reflection and is longer by one session than the period prescribed in our Colonies as essential to effect a similar result. Given a moderate use of the guillotine, there is no undue haste or danger about this procedure; it merely enables the party in power to insist that a certain part of the measures (to carry which they

assumed office) shall become law within the duration of one Parliament. It would seem that, in practice, the Commons could only get one, two, or at most three controversial Bills through one Parliament, and that even these might be subjected to the amending rights of the Peers. This is not an undue amount of concession to the partisan needs of the party installed in power. This summary procedure of the three sessions resembles that adopted in certain of our Colonies. Moreover, a method of limiting the veto of the Lords in certain directions, and in one form or another, has long been advocated by men of very varying shades of opinion, from an impartial Colonial governor on the one hand, to the not very revolutionary Mr. Lecky on the other, and, so long as this procedure is carefully defined and not applied to fundamental constitutional measures, it appears to be quite defensible ([11]).

(*c*) *The Summary Three-Sessions Procedure should be inapplicable to Constitutional Amendments.*

It has been said that the procedure here suggested is sound enough for all matters of ordinary legislation. But it appears to be both unsound and dangerous in all matters affecting constitutional amendment. For example, this resolution, if it became law, would enable the party majority in the Lower House to abolish the Upper one altogether in three sessions, without any appeal to the country. In the case of fundamental amendments

to the Constitution, it cannot reasonably be contended that this proceeding is safe. We need not go as far as Mr. Balfour and wish to make constitutional amendment as difficult as in the United States, where amendments can practically only be carried by civil war or by an agreement that is miraculous. But, while the drastic procedure of the Liberal Resolutions may possibly be applied to ordinary legislation, constitutional amendments demand a method involving far more caution and giving far more time for reflection. It is exceedingly difficult to make a suggestion in the matter, because, though a difference between constitutional and ordinary legislation is recognized in almost every other country, such difference is not and never has been recognized in England. At the same time, it would probably be possible to define certain constitutional matters by statute, as exempt from the special summary procedure, and to entrust the task of interpreting what these constitutional matters were to the committee of the judges and the Speaker, who would define a money Bill. Subject to this exceedingly vital amendment, the rest of this resolution is probably sound enough.

"Five years shall be substituted for seven years as the time fixed for the maximum duration of Parliament under the Septennial Act 1715."

This resolution limiting the duration of Parliaments to five years appears, in every way, desirable, and it is much to be regretted that the leader of the present Opposition has declared against it. Before dismissing these resolutions, we must notice

one last point. Methods of adjustment were mentioned in Campbell-Bannerman's resolutions, and ways of securing conferences and committee meetings between the two Houses were suggested, but of these the new Resolutions speak no word. If this omission implies any desire not to revive this salutary practice, it must be reckoned as a grave error. In general, the Liberal Resolutions satisfy many of the conditions of reform, but need the serious modifications indicated to be really practical or acceptable.

F.—*A suggested plan.*

Several schemes or outlines of schemes for improving the composition or powers of the House of Lords have now been discussed and have, for the most part, been subjected to serious criticism. At this crisis, any critic of other schemes can only justify himself by bringing forward his own, and an account of the experience of other countries can hardly be valuable, unless it shows some definite and practical directions in which that experience can be embodied in our own Constitution. The following is a scheme that seems a possible one, and which, in the ordinary sense, is not a partisan one.

*Composition of the Lords** (not including

* The power of the "creating peers" should be retained to keep the hereditary peers up to the level of 600. When hereditary peers are elected by themselves, and when the number of the House is fixed, "swamping" is useless. It would have to be

Princes of the Blood Royal, who sit as of right—at present they number three). Total number . . .	260
Hereditary Lords (to be elected by the total number of existing peers) * . . .	100
Nominated Life-Peers (three to be nominated each year by the King on advice of his ministers, until complete) . .	30
Elected Members (to be chosen on the same franchise as the Commons, either by *scrutin de liste* from six-member constituencies, *or* from enlarged single-member constituencies, to sit for nine years, but one-third to retire by rotation every three years)	130
	260

The dominating principle of this plan is to bring the Upper House into direct touch with democracy, and yet at the same time to preserve to it some of its traditional and historic renown. The aim is, therefore, to associate hereditary Peers with democratic representatives in about an equal proportion, not to produce a new House entirely representative of the *bourgeoisie* or the democracy. Liberty is our

provided that, in case of deadlock between the Chambers, the King could create a number of hereditary Peers, and increase the total of the House, so as to allow the Peers thus created to take their seats at once without election. The procedure is clumsy, but is needed as a safeguard ; it would, however, in all probability never be required.

* If desired, a simple method of Proportional Representation could be devised for the choice of the hereditary Peers ([12]).

ideal for the Upper House, but liberty is only real when it has a close acquaintance with democracy. The hereditary Peers and the nominated element will sufficiently represent the classes and the rights of property and of minorities; the elective members will represent the democracy and the rights of the majority. The first consideration imposes on us the necessity of constituting half the Upper Chamber from *Hereditary* Peers and of strengthening them by a *Nominated* element. The second consideration—which is the absolute necessity of having the majority directly represented in the Upper Chamber—brings us to advocate either the principle of *scrutin de liste* for choosing the *Elective* members, *or* of election from enlarged single-member constituencies.* Any other method, such

* It is useless to disguise the fact that *scrutin de liste* tends to the representation of the majority and of that only. In ordinary cases, as in the Federal Senate of Australia, this would be a serious evil; in our case it might be a real advantage. As, however, it may be objected that this method is too drastic, the principle of election from enlarged single-member constituencies might be adopted. The disadvantage of this is, as has already been shown, that it gives a slight preference to wealth or eminence as against numbers, and may prevent the latter from having adequate consideration (pp. 135–9). It may be argued against *scrutin de liste*, on the other hand, that it increases the influence of party, and of one party, as against all others. This is to some extent true, but it does not necessarily exclude other parties altogether. For instance, Ireland would under this system, for the first time, have representation in the Lords, and the Labour party would also be represented. The reader may choose between the two systems; personally my own predilection would be slightly, but not decisively, in favour of *scrutin de liste*.

as indirect election, or election from or by town or county or parish councillors, may lead to the choice of elected representatives, eminent for wealth or birth. But, as wealth and birth are already represented in the *Nominative-Hereditary* section of the House, we must secure that poverty and numbers are represented in the *Elective* section.

A scheme on the lines suggested is not such as could be proposed in a new land, or in a country just entering upon Responsible Government. England is a country that is historic, conservative and prejudiced to an unusual degree, and she must have special provisions to meet her particular case. Guarantees of stability must be provided, and care must be taken not to shock the people with a sense of too violent change. The last point is met by allowing nearly one-half of the House to remain hereditary, while the actual working out of the scheme will deal with the other matter. Practical safeguards are fully preserved; the 100 hereditary peers will probably be cautious enough, the 30 nominated Life-Peers will probably be conservative in a non-party sense. Further, of the *Elective* section a proportion—even if a minority—will be conservative in a party sense.* Thus there will probably be at least 130, and probably a larger proportion of, cautious and slow-moving members;

* On a system of proportional representation, of course, some hereditary Peers might be Liberal, but this would be balanced by the fact that some elected ones would be Tory. It is objectionable that no system could secure representation among hereditary Peers either to the Irish or Labour Party.

that is, fully one-half of the Upper Chamber will be ready and able to exercise a suspensive veto on legislation, whenever it thinks it needful or desirable. The scheme in no sense provides a mere Revising Committee, but it establishes a Suspensory Chamber in the full sense of the word.

If the scheme errs on this side, it errs in making obstruction too easy and in providing too many safeguards for the expression of mere traditional and conservative views, and the only corrective to this will lie in the moral force wielded and exercised by the elective element in the Upper Chamber. The elective members themselves will tend to be slightly more cautious in action than those of the Lower House, because they will have a more permanent tenure of power than the latter and will be renewed at periodic, and not at unforeseen, intervals. There is thus somewhat more chance that there will be a certain sympathy between their views and those of the hereditary element, enough, at least, to produce compromise and agreement. It does not seem too much to hope for this result. It certainly is more desirable, where possible, to form the Upper House wholly out of one element or on one principle, but Continental experience shows that Upper Chambers can be formed out of mixed and diverse elements. The House of Commons in England is perhaps the most illustrious example of the possibility of uniting such different elements in one Chamber, for in old times the country gentlemen from the shires and the citizen representatives from the boroughs sat together on

the same benches, and united to win the same victories for English freedom. It is not too much to hope that, in this new and more democratic age, the descendants of barons and the representatives of democracy may find as broad a ground of union and may achieve purposes as noble.

The deadly danger, which besets every Upper Chamber at the present moment, is that it will become a haunt of capitalists, a machine that the rich may use to the disadvantage of the nation as a whole. This danger was foreseen for the House of Lords long ago by the most profound of English political thinkers. "I trust," said Edmund Burke, "whenever there has been a dispute between these (two) Houses, the part I have taken has not been equivocal. If by the aristocracy . . . they mean an adherence of the rich and powerful against the poor and weak, this would indeed be a very extraordinary part. I have incurred the odium of gentlemen in this House for not paying sufficient regard to men of ample property. When, indeed, the smallest rights of the poorest people in the kingdom are in question, I would set my face against any act of pride and power countenanced by the highest that are in it; and if it should come to the last extremity, and to a contest of blood, God forbid! God forbid!—my part is taken: I would take my part with the poor and low and feeble" (13). One, who was not usually numbered among the revolutionaries, was therefore ready to proceed to civil war, in order to prevent the country being ruled by a plutocracy.

That the danger from the tyranny of wealth is greater now than it was in the days of Burke, few will deny. Walter Bagehot could tell us that there were some things which money could not buy from the aristocracy of England. The number and amount of these things has certainly decreased since he wrote (1867). In 1881, exactly a century after Burke's utterance, Acton wrote a denunciation of the evil influences which induced the Lords to retard legislation on behalf of the poor—a denunciation which heads this chapter. But the remedy of the historian against the danger of plutocracy was different from that of the political philosopher; in the last extremity the one contemplates a remodelled Senate, the other a civil war. It needs, indeed no very profound reflection to see that one of these things may avert the other.

Ever since the time when Acton wrote the danger of the plutocracy monopolizing power in the Lords has manifestly increased. In 1899, Mr. Lecky declared that the immense place given to undistinguished wealth in the modern peerage had contributed to lower its character. It appears now to be an established principle with each party, as it gains power, that a certain proportion of peerages should be given to certain heavy contributors to their party-funds. The tendency is the more alarming because it is comparatively new—the practice was favoured by none of the premiers in the early part of Victoria's reign, by Peel and Palmerston least of all.* It is only since about

* Between 1830–1865 about 150 peerages were created; in the

1867 that the House of Lords has been largely and rapidly increased by members distinguished for little but their wealth. Against the influence of such men a remodelling of our Senate is our only remedy, but that remodelling should be made in such a way as to command the assent of some of the older hereditary Peers. For against a plutocracy a natural aristocracy of birth may form a useful and adequate defence. The Peers of the wilderness and the backwoods, the ponderous landowners, who vote only once or twice in a session, may not be ideal legislators, but they do possess the merit of not estimating all men and all institutions in terms of money. If rightly handled, such men can be brought into sympathy with the people as a whole much more readily than can the mere selfish capitalist, whose business has bought him a coronet. The best defence against pure capitalism is an alliance between hereditary nobles and the populace, between birth and numbers. A genuine aristocracy and a genuine democracy have common reasons for uniting against a pure oligarchy of wealth, and it is only by their association in the Upper Chamber that this compact can be sealed and this alliance achieved.

Powers.—Once the composition of the reformed Upper House is settled, the powers will tend to settle themselves. It will, however, be needful to

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same number of years between 1866–1900 about 230 peerages were created. Mr. Lecky (*Democracy and Liberty*, i. 426) ascribes the increase almost exclusively to the influence of wealth.

restrain and define carefully the scope of the authority which can safely be permitted to the Lords, for, if the new House is successful, its powers must not become so great as to endanger the supremacy of the Commons. Accordingly, it would be wise to abolish the financial veto of the Lords, subject to the very important point of reserving the definition of a money Bill to the decision of three judges advised by the Speaker. Similarly, for ordinary legislation, the summary three-sessions procedure may be adopted, but this procedure must not apply to constitutional amendments. The definition of constitutional amendments must rest with the same judicial committee, and constitutional amendments, as such, must be passed in the old traditional way. We may be quite certain that an Upper House, constituted on the lines we have indicated, is not often likely to make a purely factious opposition to measures from the Lower House.* When it does desire to oppose a Bill, its resistance will be considered the more weighty and impressive by the country, because it will be the opposition of a more representative House. Moreover, the Upper Chamber would be immensely strong in talent, energy, and in intelligence; it would have the selected hereditary ability of the country, certain guarantees of great ability in the persons of the

* These restrictions are so great as to prevent any one describing this proposal as a mere endorsement of the Liberal Resolutions. In any case, however, the fact that the Liberal Resolutions only apply to the existing House, while this revised and expurgated edition applies to a reformed House, would make clear the considerable difference between the two.

Life-Peers, some ability in the case of the elected members. Even if the party majority in the Lower House were not always impressed by so able, so intelligent, and so dignified a resistance, it is certain that the nation would be. Hence, it is quite likely that disputed Bills will either be abandoned or passed before the third session, because public opinion could easily be manifested within the Upper Chamber itself. The periodic renewal of one-third of the Upper Chamber, which would take place every third year, would serve as the barometer and index to popular feeling, and its result would be largely decisive of measures in dispute between the two Chambers.

In the case of constitutional amendments the case would not be parallel with ordinary legislation; here the Lords would be unwilling to yield easily, and the summary procedure of the three sessions would not apply. It would retain a full suspensory veto in the strictest sense. In this case several expedients are to hand in the event of an absolute deadlock. A Referendum, in the case of constitutional amendments, may be a sound measure, and is certainly apt to be rather conservative than radical in its effects (14). But several more obvious expedients are to hand; the easiest would be a simultaneous dissolution of the Lower House and of the elective part of the Upper one; the most difficult would unquestionably be a resort to "swamping." In all probability the last extreme measure would never have to be employed, and even the others might not have to be exercised,

because the whole character and relations of the two Chambers would have changed, and have changed infinitely for the better. Instead of being an Upper Chamber which checked a number of minor Bills and a large amount of party legislation, it would be one of the suspensory type, not only in these measures but in major matters. On the other hand, in national legislation the dangers of deadlock would be removed, and the progressive development of the Upper Chamber in harmony with the popular wishes might be assured. So great is likely to be the revival of the Upper House, that it is desirable to insist on a modification of the Liberal Resolutions, in order to secure that the Lower House will remain predominant. As in other respects, the positions of the two Chambers will have changed, the relative supremacy of the Commons must be preserved by some such means as are there indicated. The abolition of the financial veto will serve to remind the Upper House of its inferiority, the summary three-sessions procedure will enable certain measures, essential sometimes to partisan and sometimes to national interests, to become law. But the jealous preservation of the old forms for amendments to the Constitution will teach the House of Cŏmmons that its powers are not unlimited, and thĕ opinions of the judges as to what constitutes such amendments will perhaps, also, develop a very valuable arbitral court for preventing differences from arising between the two Houses, merely over questions of interpretation. In any case, the retention of the old forms

for constitutional amendment and the intervention of the judges will exercise a moderating and steadying influence on legislation.

The reason for these changes in the House of Lords is in reality very simple. Their present composition and powers induce each Chamber to disagree with the other and to misrepresent its motives; the changes which our scheme introduces into both should induce them to meet, to respect and, above all, to know one another. At the present time it is to the interest of the Conservative leaders, who have a secure party-engine in the Lords, to encourage them to throw out Liberal Bills; similarly it is to the interest of the Liberal leaders, who see that the Lords aim at destroying their party-strength, to attribute their action to the vilest motives. When both and all parties have a more equal representation in the Lords, it will be to the interest of all to concentrate their strength on the periodic elections for renewing the elected element, and not to waste their time in bigoted defence or exaggerated abuse of the Upper Chamber. The extreme predominance of one party in the Lords would be a thing of the past, and its feelings would become more sympathetic towards the ideas and aspirations of the people as a whole. The hereditary peers and the elected members would have much to give and much to receive from one another. The most obvious evil of the present House of Lords is its partisan character, and the deep underlying cause of it is the social chasm that separates the two Houses. To introduce an

elective element into the Upper House is the way to bridge that chasm at once, and to make harmonious relations between the two Chambers immediately possible. Everywhere we have seen like results follow from like arrangements, and have found that the Upper House not only does not lose, but actually regains power, in proportion as its composition is assimilated with that of the Lower Chamber, and in so far as the Upper Chamber becomes the meeting-place for the representatives of every class. That such would be the case in England can hardly be doubted. Instead of the members of the two Chambers standing apart from one another, sullen and scowling, they will be able to meet in friendly conference as of old. These meetings between Lords and Commons (which statesmen remember as a unique experience at the Round Table Conference of 1884) would become an every-day commonplace of Parliamentary life. Instead of the rival leaders standing on opposed pinnacles, and now directing childish sneers, now uttering calculated insults against the other House, we should hear the language of respect, of regard, and of conciliation. No conflict can now open between the two Houses without our hearing threats of abolition on the one hand and pleas for divine right on the other. No conflict could then open without there being some prospect of arrangement, some desire to avert conflict till the next periodic renewal of the Upper Chamber, some desire to agree and not to contend with the other Chamber. There is no end to the certainty of enmities under

the old system, no end to the possibilities of friendship under the new.

It can be said justly that the scheme before us is a compromise; it has been said often that a compromise is a confession of failure. So indeed it has been and would be in some countries and with some peoples. The imagination of some nations fixes fondly not on the sage and cautious statesmen, but on glorious failures, broken idealists, tragic dreamers, on a Gambetta, a Mazzini or a Kossuth. That has not been the way with England: her heroes have drawn their strength from the earth; it was her people, her institutions, her peculiar spirit that set the serene wisdom and solid achievements of Pitt and Castlereagh before the dazzling genius of Chatham and of Canning. In all the great settlements of her history England has sacrificed absolute ideas to compromise and to expediency. In the Revolution settlement she compromised about the powers of her king; in the Reformation settlement she compromised about the nature of her God. Whenever the moment for settlement has come, bad logic and good sense have gone hand in hand, concession and exception have been the rule. A people of this kind does not change its nature at once, and though it may now be less cautious than of old, it still shrinks from the blinding glare of absolute theory or of general principles. The scheme outlined is one which suffers from no excess of these things; it is one at which Siéyès would have scoffed. Is it rash to hope that it is one that Halifax might have

approved? The favour of the typical English constitution-maker would compensate for the scorn of his French rival. At any rate, the scheme recognizes some of that regard to special circumstances, of that acknowledgment of particular interests, of those qualifications and of those cautious expedients by which Halifax shaped and moulded the English Constitution in days that are gone.

The end is not yet, and the outlook is hard to discern, but it is probable that the phase of reform on which our Constitution is now entering will have an issue somewhat different from that which extremists of both sides either desire or imagine. Eventually, though doubtless after long struggles and perhaps after a repeal of measures actually placed on the statute-book, both parties will be forced to a compromise, and the final settlement will be made on a ground that is marked out not by a party but by the nation. If that be so, the settlement will bear the impress and the character that has already been given to the nation, for nowhere is opinion so ready to mould legislation, and nowhere is legislation so directly based on national characteristics as in England. Between that time and this the mind of the nation will be formed by an infinite series of imperceptible tremors and changes of opinion, influenced now by party clamour, now by genuine education and knowledge, and everywhere and always by that slow, yet cautious, instinct for grasping what is practical and expedient which the English nation possesses beyond any other. One danger there is

in this process: for almost the first time we cannot shape our course by our past history and tradition; we are voyaging in strange seas, gazing on strange stars, and guided by pilots with still stranger charts. Disaster may easily come by a too blind adherence to the past or by a too sudden plunge into the future. It is only by a knowledge of the present, by experience from other lands and continents, that the nation can steer its course aright. It has been my aim to indicate the sources of that knowledge and that experience, and to attempt to provide an application of both to the English problem on the basis of compromise. At least it is no ignoble hope to believe that there is something in the nation that is greater and better than party-interests, and that it is not folly to dream of a time when our Constitution shall again be a thing of pride to ourselves and of wonder to others. "True it was," said a great statesman of a graver crisis in our history, "that clouds and darkness occasionally gathered on the horizon; but even through those clouds and through that darkness I saw, or fondly fancied I saw, a ray of light which promised to pierce the gloom, and which might hereafter lighten the nations." *

* Canning, April 16, 1816.

APPENDIX I

THE FEDERAL SENATE—HOW FAR IT IS APPLICABLE FOR COMPARISON WITH THE UPPER CHAMBER OF A UNITARY STATE

THE Federal State is the most complex and ingenious of modern political communities, and its Upper Chamber usually exhibits one aspect of that ingenuity. One principle is, however, common to all such formations: the Federation is based on a union of individuals and of States, and that union is expressed in the constitution of the two Chambers. The Lower one represents the rights and powers of the people—the total numerical majority; the Upper Chamber represents the rights and powers of the States in their separate and individual capacity. Population has always full representation in the Lower Chamber; State-rights have always some recognition in the Upper. Often the Federal union is so close that the doctrine of the supremacy of the whole people is virtually accepted *in toto*, but none the less some measure of strength never fails to attach to the Senate in virtue of the underlying idea that it represents State-rights. In the Unitary State the Upper Chamber only represents the rights of property of individuals or of classes. In this respect, then, a Federal Senate always has an advantage which no Upper Chamber in a Unitary State—as, for example, the House of Lords in England—can ever claim to possess, and it is this fact which lessens the possibilities of comparison and renders

many apparent analogies totally misleading. When, in addition to this inevitable difference, the Federal State possesses legislative machinery totally unlike our Parliamentary system, no valuable lesson for England can be drawn from its example.

The German Empire and Swiss Federation inapplicable for comparison.

If we apply these two principles, we shall find that the Federations of Germany and Switzerland are totally unsuitable for comparison. In Germany the doctrine of State-sovereignty is firmly established in the Upper Chamber or *Bundes-Rath*, in which each component State has a number of representatives roughly proportionate to its size and importance.* So strongly is the doctrine of State-rights held, that representatives from each State must vote *en bloc*, one way or the other; they are not allowed to possess individual opinions. This fact alone gives the *Bundes-Rath* a strength and importance which it could not otherwise have possessed. But this is not all, the chief power really resides in the *Bundes-Rath*, not in the popular House (the *Reichstag*). The *Bundes-Rath* initiates the chief legislation, financial or otherwise; it is an executive, legislative, administrative and judicial body. The *Reichstag* is in a definitely inferior position, and in practice possesses only the right to criticize legislation and to refuse financial supplies. But this is not all; the Chancellor owes obedience only to the Emperor, and he is really a Grand Vizier, the other ministers being wholly

* The proportion is only approximate, *e.g.* Prussia, which is about equal both in size and importance to all the other states put together, has only seventeen out of the fifty-eight representatives of the *Bundes-Rath*. (This is the theory, in practice Prussia has twenty votes.)

inferior to him. Neither Cabinet unity nor Cabinet responsibility exist, it must already be clear that responsibility to the Parliamentary majority of the Lower House does not exist either.

The German *Bundes-Rath*, then, is totally inapplicable for comparison with the House of Lords; it may be doubted, however, whether it is more inapplicable than the Swiss Upper Chamber (*Stände-Rath*). In Switzerland, the direct sovereignty of the people has made itself felt, and by the *Initiative* the people can directly initiate certain legislation in the Federal Parliament, while by the *Referendum* they have power to decide the ultimate fate of almost all important laws. The *Referendum* is, in fact, the true Upper Chamber of Switzerland. In England, Parliament has always possessed a certain independence; in Switzerland its moral authority in weakening every day before the direct influence of the people as a whole. In addition to this, Cabinet and Parliamentary responsibility do not exist, and therefore the Upper Chamber of Switzerland need not be further considered.*

The United States of America.

The United States of America are only slightly more suitable for comparison. The system of State-representation in the Senate is maintained with rigid exactness, every State, however large or small, returning two members. This fact alone differentiates the United States from England, but

* Cp. Parl. Paper (1907), *Foreign Upper Chambers*, p. 59. "The Swiss Constitution does not admit of the existence of an Upper or Second Chamber in the sense in which the expression is generally used, namely, one for revising, remodelling, or on occasion rejecting the decisions of the Lower." The two Houses are, in fact, united in their inferiority to the people's will; as in Federal Germany the Upper House is on a complete equality with the Lower in financial matters.

a theory differentiates it still more. The doctrine of the separation of the executive and legislative powers has been carried out in the Federation with the most precise and rigid exactness. The system has already been described in our account of the State-legislatures of America (pp. 26–34), and it is unnecessary to emphasize further how completely it departs from the English model. The result of these two tendencies has been to make the American Senate actually the strongest Upper Chamber in the world, and incidentally to render it practically useless for purposes of comparison.

The Commonwealth of Australia.

Wherever the doctrine of State-rights is present in an acute form, or where that of the Parliamentary responsibility of the executive is absent, the Federal Upper Chamber will either acquire great strength or become actually superior to the popular House. In either case the supremacy of the Lower House is endangered, and the basis for comparison with England is gone. The application of these tests has been sufficient to remove three important Federations from our view. Four, however, remain, of which three are Colonial; these are Australia, Canada, Brazil and South Africa, the last of which is hardly a Federation at all. The first—the Commonwealth of Australia—is remarkable for its close analogy to the United States of America, though it differs from it in adopting Cabinet and Parliamentary responsibility of the ordinary English type. The strict doctrine of State-rights is, however, preserved by the provision that each of the component States shall elect six representatives to the Senate, though one of those States is as petty as Tasmania, another as populous as New South Wales, a third as extensive as

Western Australia. The method of representation in the Federal Senate may indeed be altered in the future, but it can only be changed in such a way that "equal representation for the several original States shall be maintained." This provision serves to strengthen the Senate and to give it a character which no Upper Chamber in a Unitary State can obtain. It is, however, largely counterbalanced by the fact that the mode of election of Senators is extremely democratic. The Senate sits for six years, one-half retiring every three years, while no property qualification is needed for a candidate. "Senators for each State are directly chosen by the people of the State voting as one electorate." The franchise is the same as for the popular House and includes both sexes, but the six Senators for each State must be chosen *en bloc* and on a single ticket by votes of the whole electorate—*i. e.* a *plébiscite* of their State. Each voter has as many votes as there are places to be filled. It is the system of *scrutin de liste*, and it is difficult to conceive a more thoroughly democratic method, if democracy means the triumph of the mere majority over all minorities. In fact, the Senate appears to have become even more advanced in views than the Lower House. The reason is that the Labour Party has always concentrated its chief efforts upon the Senate, and has carried the whole ticket of Senators in each State without any consideration for the minority.

In the matter of powers, the Senate may not originate money Bills, nor amend them, nor "amend any proposed law so as to increase any proposed charge or burden on the people." In this way the full originating power in finance is preserved to the Lower House, without depriving the Senate of great financial influence and authority. Though it cannot amend money Bills, it can reject them,

and it can insist that such Bills should be presented individually and *seriatim*. Nor can it be compelled to pass ordinary legislation by any attempt of the Lower House to "tack" extraneous matter to a money Bill, for "tacking" is definitely forbidden by the Constitution. Moreover, though it cannot authoritatively amend a money Bill, the Senate can request the amendment or omission of any items or provisions in such Bills, provided always such suggestions do not "increase any proposed charge or burden on the people."

We may summarize its financial powers by saying that it can suggest, though not insist on, financial amendments, and that it can and does exercise an important veto on individual money Bills. In ordinary legislation it has equal powers with the Lower House.

The Australian method for adjustment in case of "deadlock" between the Chambers is one of the most original and interesting in the world. In all cases of difference between the two Chambers, whether over money Bills or other legislation, the procedure laid down in Section 57 of the Constitution applies—

> "If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and

the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

"If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments, to which the House of Representatives will not agree, the Governor-General may convene a joint-sitting of the members of the Senate and of the House of Representatives.

"The members present at the joint-sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried; and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the King's assent." *

In other words, as the Senate has thirty-six and

* *British Colonies* (*Legislature*), *Commonwealth of Australia*, pp. 5-6, Parl. Paper, 1910, No. 81. There is also provision for a Referendum in case of disputes as to constitutional amendments.

the Lower House seventy-five members, the former must obviously give way if the disputed Bill is supported by a strong majority in the latter. The most important point to notice is that a dissolution may intervene between the two sessions in which the disputed measure is brought up. It may either be a natural dissolution of the Lower House (which sits for three years) by effluxion of time, or the Governor may order a simultaneous and "penal" dissolution of both Senate and House of Representatives. But the important fact is that in either case provision is made for the electorate, or the people as a whole to pronounce on the measure in dispute, *a provision which is wholly absent in the method of adjustment adopted in Federal South Africa*. The provision is probably a wise one in Australia, because the extremely democratic nature of the Senate renders it necessary to have some such popular decision manifested. So far the provisions for adjusting disagreement between the Chambers have not been exercised, but they may be needed in the future. If the Lower House proposed class legislation and the Upper House resisted it in the name of the people, the matter would eventually be brought before the whole people for decision. On the other hand, the South African provision, by not insisting on a dissolution, makes it possible for the Lower House to override the Upper one in the name of the people, and thus to become the single and supreme Chamber. As it is, in the Australian Commonwealth, both Houses are continually compelled to produce proofs of their dependence upon the people, and this fact prevents the danger of any conflict of authority between them.

In practice, no substantial difference in character has hitherto appeared between the two Australian Chambers, but this is not inconceivable in the

future. For example, if a resolute attempt to corrupt members of the Legislature were to be made by the capitalists and plutocrats, the Senate, as having fewer members, would certainly be selected for their experiments in bribery. If the attempt were successful, we should then have a pseudo-democratic Senate vetoing the Bills of a genuinely democratic assembly, and each body claiming to be the true representative of the people as a whole. The situation is a piquant one, and rather recalls the Roman picture of the pseudo-demagogue Marcus Octavius vetoing the measures of Gracchus, and finally turning the people against him to compass his downfall. The use of classical analogy is dangerous, as it might suggest that the picture is a fantastic one, but such is not really the case. Organized wealth possesses a sinister power in the world to-day, and several American State legislatures have had Senates which were entirely in the pay of capitalists, or which were chiefly engaged in promoting the selfish interests of these men. American examples are not so remote, nor Colonial politics so clean, as to make it impossible that this situation should be repeated in Australia. None of the signs point that way at present but, if they did, the Australian Federal methods of adjustment would probably solve the difficulty. Nor would they serve only to prevent the real danger of a conflict of authority from arising between the two Chambers. By producing a simultaneous "penal" dissolution, they would demonstrate quite clearly that the uncorrupted Lower Chamber and not the venal Senate was favoured by the people, and the holding of the joint-session would eventually permit the popular assembly to prevail. All this is, however, matter of speculation for the future; at present, all that the Australian Commonwealth has to teach is this: a similar composition of the two

Chambers tends to produce a relative harmony between them, wherever Cabinet and Parliamentary responsibility are fully established.

The Federal Republic of Brazil.

The States of Latin America are nearly all of them Federal republics, but, while their political ideas are always instructive, their political stability has given very little opportunity for constitutional practice to arise. To this rule Brazil is an exception, and it has been selected as the most stable of them all, and as the least liable to political convulsion.* Previous to 1889, its development was fairly peaceful, and even the abolition of the Monarchy and the proclamation of the Republic in that year was accomplished with relative tranquillity. An elected President has taken the place of an hereditary monarch, and some extensions of power have been given to the component States of the Federal Union, but otherwise there is very little change.

Under the Monarchy.

The Constitution of Brazil as established under the Empire possessed two Chambers, of which the Senate was certainly the more important body. So remarkable was its status and dignity that it may claim to have been for almost half a century one of the most successful Upper Chambers in the world. It was admirably suited to the *régime* and social

* This very interesting Constitution has not been studied in this country. Morizot-Thibault, *Des Droits des Chambres Hautes ou Sénats en Matière de Lois de Finance*, Paris 1891, pp. 176–80, has some interesting, but out-of-date remarks on the Brazilian Senate. My information has been authenticated and brought up to date by M. Oliveira de Lima, Brazilian Ambassador to Belgium.

conditions existing in Brazil. Up to the time of the abolition of the monarchy in 1889, the Senate was composed of sixty members appointed in the following manner: Each province was entitled to elect a certain number of members, varying from two to six, according to population. At every election for the Senate in a single-member district, the names of the three candidates who obtained the highest number of votes were submitted to the Emperor. From among these three the Emperor selected one to sit in the Senate.

The Senate was thus, in a sense, representative, because members of certain districts were entitled to sit; in a sense also nominated, because the final choice lay in the hands of the Emperor. Notable impartiality was displayed by the Emperor in selection, who on a number of occasions chose candidates not belonging to the party dominant in the Lower House. The most rigid care was exercised in selection, some names being submitted to the Emperor on six or seven different occasions before he finally chose them. It was the supreme object of every public man to reach the Senate, for that body was an extremely imposing and efficient Upper Chamber. It was often described as an oligarchy, but if so it was certainly an enlightened, impartial and dignified one. The real drawback to the system was its complete success; because the body was impartial, it was not always responsive to public feeling; because a candidate was rejected by the Emperor, he became an enemy of the monarchy. The consciousness of its superiority over the Lower House was indeed one of the most powerful causes of discontent with the monarchical *régime*. The strength of the Upper Chamber did much to weaken the monarchy, and the success of the Senate produced the failure and the fall of the Emperor. So true and tragic is the

reflection that even the best and the most impartial of Upper Houses can only flourish at the expense of the other institutions in the State.

Under the Republic.

With the fall of the monarchy in 1889, the situation altered; henceforward the Senate was elected from among the different provinces, without the subsequent selection by the head of the executive. A republican and federal *régime* has ensued, and the Senate now represents—more fully than it did before—the sovereignty of the component States of the Federation and the doctrine of State-rights. Each State, whether large or small, elects three members to the Senate. There is a good deal of discontent with the existing *régime*, but that discontent is not manifested against the Senate, though its prestige is no longer what it was under the Empire. It is a very interesting fact that even the natural strength, which a Federal Upper Chamber derives from the principle of State-rights, has been unable to increase the prestige which the Upper Chamber enjoyed at the time when Brazil was practically a Unitary State, and the Senate practically a nominated body.

The powers of the Brazilian Senate remain considerable, though it acts as a revising and correcting Upper Chamber, rather than as the guardian of State-rights against the Federation. Though actual deadlocks have been practically unknown between the two Chambers, sharp disputes have often arisen. But, as there is neither Cabinet responsibility nor Parliamentary responsibility in the true sense, the popular Chamber is weak as against the Senate. The Lower House does not now represent, and probably never has represented, the Brazilian people with any approach to accuracy.

The character of its members is not as high as that of the Senate, nor is its stability as great. Hence the Senate has still great advantages, and it is interesting to note that the chief members of the ministry are more often Senators than Deputies of the Lower House. Moreover, the Senate has substantial powers, its approval is necessary to confirm high diplomatic and judicial appointments, and its consent—as well as that of the Lower House—is needed to confirm treaties with foreign States. The Lower House has the sole right to initiate money Bills, but the Senate possesses the right both to reject and amend. The latter body has often complained that it does not receive money Bills in time to discuss them seriously, and has only the opportunity of formally approving financial votes. But the Senate can sometimes turn the tables on the Lower House. In 1907, the Senate received the Public Works Budget in the very last days of the session, and, to mark its displeasure, returned it to the Lower House after completely altering its items. The Lower House received it on December 28, two days before the session closed for the year. They had no alternative but to accept the amended Budget, and could only return it with an angry protest to the Senate. As the Public Works Budget was a Bill of fundamental importance, both financially and politically, the general relations of the Chambers can be judged from this incident. The Senate enjoys the same degree of authority as the popular House, and is considered about equal to it in power, and as neither better nor worse in general position.

The conditions in Brazil can hardly be described as normal, because the Lower House has never had the authority belonging to a truly democratic body. None the less, the example of the Senate is interesting because it cannot be said that any feeling

really exists against the Upper Chamber as such in Brazil. However undemocratic the institutions of Latin America may be, opinion in them is often democratic enough in theory, and it is significant that there is not now, nor has there ever been, a real desire for a Single-Chamber system in Brazil. The Constituent Assembly of 1823 showed some desire for this, but it was eventually dissolved by force amid general approval. Since then there has been a general recognition that the Two-Chamber system is a good one, and that no alteration in that respect is necessary. That is all the more interesting because for two generations the Brazilian Senate was practically a nominee Senate in what was virtually a Unitary State. The combination of these two conditions has led almost everywhere to weakness; in Brazil it has led to strength. The singular result must be ascribed, in the main, to the working of abnormal forces, such as the weakness of the popular Chamber, to the apathy of the electors as a whole, and to those mysterious despotic influences which drain the strength of democracy in every Republic of Latin America.

The Dominion of Canada.

The Federation of Canada is, after South Africa, the most interesting of all Federal Unions of a close type, and it bears considerable resemblance to a Unitary State. Indeed, it is no secret that Sir John Macdonald, the leader of the Federation movement, was himself in favour of a legislative and not of a Federal Union.* Owing, however, to the marked differences between the French and English settlers, he regarded such a proposal as premature and inapplicable, and contented himself with drawing the Federal bands as tight as possible. The Federal

* *Vide* Sir Charles Tupper, *Times*, August 13, 1909.

Conferences met at a time when one of the greatest of all Civil Wars was raging just over the American border between a Federation and some of its component States. That war really turned on a question of State-rights. There was, consequently, no desire to make a loose Federation in Canada or to define State-rights in an ambiguous way, and it is this fact which explains the special features of the composition of the Canadian Senate. It consists of eighty-seven members, summoned from the different provinces, in a fixed ratio which is proportioned to the size and importance of each of them. Thus Quebec and Ontario are entitled to twenty-four members each, while British Columbia has only three.* The Senators are nominated for life by the Governor-General, *i. e.* by the Federal ministry dependent on the party majority in the Federal Lower Chamber. The *Elective* and the *Nominee* principle had both been known in the Upper Chambers of the different States, whose delegates met to fashion the Canadian Federation. At the Conference of 1864 only one of all the thirty-two delegates, who represented all kinds of parties and states, had any plea in favour of an *Elective* Upper Chamber, and he did not bring forward any motion on the subject. Yet the provincial legislatures might easily have chosen members at periodic intervals to form an *Elective* Senate. Two reasons appear to have influenced the delegates to decide on the nomination principle, one being that the plan

* Nova Scotia and New Brunswick receive ten each, Manitoba, Prince Edward Isle, Saskatchewan and Alberta four each. It will not escape notice that the principle of assigning Senators to each component State, in strict proportion to numbers and importance, indicates a greater desire to make the federal union close than does the principle practised in Australia or the United States, where the same number of Senators is assigned to each component State, irrespective of any other consideration.

of the nominated Life-Senate was not likely to create interprovincial jealousies, though periodic elections might arouse them. A second reason was probably even more important, and has been thus stated by a famous Canadian publicist: "If the Senate felt the sap of popular election in its veins, its spirit would become too high, it would claim equality as a legislative power with the House of Commons, perhaps even in regard to money Bills, and collision between the Houses would ensue." * If the delegates intended to guard against this danger, their best method was certainly to appoint a *Nominee* Upper Chamber.

In theory, the Senate of Canada possesses equal powers of legislation with those of the Lower House, except that it cannot originate money Bills. It has, however, full power either to amend or to reject them. In practice, its *Nominee* Senate has not proved very important or effective, largely because it has always been the tool of a party. By 1873 it had been filled with the nominees of the Conservative party, and since then it has been refilled according to the views of the party installed in office. A Liberal member was once appointed by the Conservative premier, Sir John Macdonald, but the present Liberal premier, Sir Wilfrid Laurier, has never departed from the strict party-rule. Since it is so obviously the creature of party, such a body cannot evidently have much claim on the reverence of the country. The fact that its members are appointed for life might tend to produce some difficulty when the opposing party gets into office, but the balance is gradually redressed as vacancies appear. None the less, if the present Liberal party had only had a short spell of office, their legislation might have been interfered with.

* Goldwin Smith, *Canada and the Canadian Question*, London and New York, 1891, p. 165.

In 1873, when the Liberal party was in power for two years, the Conservative Senate vetoed several measures, and provoked considerable complaint at the time from the ministry, though McKenzie subsequently acknowledged that the Senate had used its power to suspend rash and hasty legislation, rather than to check genuinely popular or national measures.* Since then their opposition has been more guarded, but a popular agitation against the Senate has been growing, and a desire for its abolition is frequently expressed. No methods for adjustment between the two Chambers, other than those by conference or committee, have yet been used. By the Constitution, however, it is provided that "if at any time, on the recommendation of the Governor-General, the King thinks fit to direct that three or six members be added to the Senate, the Governor-General may, by summons to three or six qualified persons, as the case may be, representing the three divisions of Canada, add to the Senate acordingly." † In other words, a limited creation of Life-Members for the purpose of "swamping" can be made. A "swamping" procedure, when exercised, has everywhere tended to

* McKenzie was premier at the time, and made this admission in the hearing of Sir Charles Tupper (vide *Times*, August 13, 1909.) The latter further observes that after 1896 the Senate only rejected two important measures of Laurier's Ministry. "One was the purchase of the Drummond County Railway, with the result that the Government was enabled to make a better arrangement, which saved the country half-a-million dollars. The second was the Yukon Railway contract, which the Senate refused to ratify."

† Section 26 of the Constitution. The three divisions in question are Ontario, Quebec, and the Maritime Provinces (Nova Scotia, New Brunswick, and Prince Edward Island). Section 27 provides that "in the case of such addition being at any time made, the Governor-General shall not summon any person to the Senate, except on a further like direction by the King on the like recommendation, until each of the three divisions of Canada is represented by twenty-four Senators and no more."

reduce the *Nominee* Senate to impotence, and in Canada this actual result has been attained without this stretch of prerogative. It is difficult to resist Goldwin's Smith's conclusion that the Canadian Senate "is as nearly a cipher as it is possible for an assembly legally invested with large powers to be."* At any rate, the prestige attaching to its Federal character has been unable to save the Canadian Senate from that curse of impotence and sterility which seems to settle over all *Nominee* Upper Chambers in purely Unitary States.

Federal South Africa.

The last of the Federal States, if indeed it is a Federal State at all, is South Africa. A Federation consists of a centralized Federal power, which claims to legislate in certain matters common to all the members of the Federation, and of several component States which claim to legislate on certain matters peculiar to each individual State. In the normal Federation, the Federal Legislature and the State Legislature share power between them; each is supreme in its own sphere, each owes its authority to the same source and to the same instrument. Moreover, Federal laws can be disallowed if they encroach on the sphere of State-rights, and *vice versa*. There is nothing of this sort in the South African Constitution; the Councils of the Provinces (which correspond to the State-legislatures of an ordinary Federation) are concerned with purely local and municipal business; they cannot even control higher education, harbours, or railways within their own bounds. They cannot legislate; they can only issue ordinances for the province, and even these are effective "as long and as far only

* Sir Charles Tupper (letter in *Times*, August 13, 1909) seems to deprecate the acceptance of this common view.

as they are not repugnant to any (Federal) Act of Parliament." The Federation overrides and overmasters the province at every point, and the theory of a genuine division of power between Federal Parliament and Provincial Councils is totally lacking; in fact, the latter have hardly any more powers than the County Councils in England. We should be quite justified in concluding that South Africa was a Unitary State but for one institution, and that the most important for our special purpose—namely the Senate. We have already quoted some evidence in the text (p. 47) of the dislike of South Africans for the bicameral system, and it may be considered as pretty certain that no Upper Chamber would have been instituted for the Federation, but for the necessity of representing the rights and interests of the separate States as against the Federation. There was an obvious danger, for instance, that the interests of a small State like Natal might be sacrificed to the numerical majority of the whole Federation. This danger could only be guarded against by an equal representation of component States in the Senate, and hence it may be said that the Second or Upper Chamber was the pledge and price of union. Even so it is conceivable that it might be abolished in ten years from now, and there are not wanting those who think that this will be its fate.*

The Senate is composed of forty members, each of the four provinces of the Union electing eight members. They are to be elected in the following manner: the two Houses of each existing State-legislature are to choose their eight Senators while

* Such seems to be a prevalent view in South Africa, but after all the Senate will have to consent to its own abolition. Bagehot says somewhere that it is the duty of a Constitutional King to sign his own death-warrant. Possibly, but even if a Constitutional King agreed to do this act, it by no means follows that a South African Senate would.

sitting together as one body. The Senators are to hold their seats for ten years.* This gives thirty-two members, the remaining eight are to be nominated by the Governor-General in Council (*i.e.* by the Federal ministry). All elected Senators must be over thirty years of age, and must possess "immovable property of not less than £500." There is thus practically an *Elective* Upper Chamber, though one-fifth of the whole is nominated.

The powers of the Senate in South Africa are substantially similar to those of the Australian Commonwealth. The Lower House alone has the power to originate money Bills, and the Senate can neither amend them nor any other Bill "so as to increase the proposed charges or burden on the people." It retains, however, the full right of rejection, and, as money Bills will be presented individually and *seriatim*, this power will be real and effective. Subject to these restrictions, the Senate exercises equal powers of legislation with the Lower House. Provisions for adjustment in case of deadlock are borrowed (but altered in the borrowing) from Australia, and are somewhat similar to those obtaining in the Transvaal and Orange Free State (*vide* pp. 71–2). The provisions are exactly the same as those of the latter in matters of ordinary legislation. They provide that, if the Senate fails to pass a Bill in the second session, the fate of the disputed Bill is to be settled by the two Houses sitting and voting together in joint-session on the measure in question. There is, however, the very important and significant addition with reference to money Bills, "provided that, if the Senate shall reject or

* This will be the last act of the existing State-legislatures, which will be abolished and succeeded by Provincial Councils. In case of vacancy during the next ten years among the representatives of any province, a new representative to fill the place will be chosen by the Provincial Council.

fail to pass any Bill dealing with the appropriation of revenue or moneys for the public service, such joint-sitting may be convened during the same session in which the Senate so rejects or fails to pass such Bill." In other words, a Budget or money Bill can be passed through in one session by the Lower House, provided it has a respectable majority. This provision makes a fairly significant difference between Federal South Africa and the Transvaal, but the absence of any provision for dissolution, simultaneous or otherwise, marks a still wider divergence from the Australian type. In South Africa, at least, democracy trusts the popular House to be the image of itself, and does not fear the audacity of the persons it has elected to that Chamber. How these provisions will work in practice it will be difficult to say, but some Conservative instincts may be expected from the Senate, with its property qualifications for Senators, and with one-fifth of its members nominated by the Governor-General in Council. Hence conflict is not unlikely, and the solution by joint-session is one which probably occasions less friction than most others. Meanwhile, it is of importance to note that there is nothing in the actual process of joint-session itself which prevents its adoption in or application to a Unitary State as such.

Summary.

In so far, then, as Federal Upper Chambers are applicable for comparison at all, it does not appear that their example or practice impairs the conclusions drawn from Unitary States. In Switzerland the *Stände-Rath* is rendered practically impotent, in Germany the *Bundes-Rath* is made extremely powerful, by forces and conditions which are exceptional and in no way operative in England. In

the United States the Senate possesses great authority, partly because of the powers of the independent States which it represents, partly because of the absence of Responsible Government in the English sense of the term. Of the four Federations really applicable for comparison, Brazil is found to offer an interesting testimony to the power of the *Nominee* Senate, but its Upper Chamber a strengthened by the Federal principle and by circumstances that are somewhat exceptional. Canada, despite the Federal principle, has been unable to prevent her Senate from sharing in the usual decadence that is the fate of *Nominee* Upper Chambers. South Africa supplies us with a Senate partly nominated but chiefly elected, and with an original but untried method for adjusting deadlocks, which would be applicable to certain Unitary States. In Australia the *Elective* Senate is found to work well enough to prevent any dangerous deadlocks and conflicts with the popular Chamber, such as often occur between two legislative bodies elected on an equally democratic franchise. With the Upper Chamber in Unitary States, however, it may be said that the Australian or any other Federal Senate provides material rather for suggestion than for actual comparison. The establishment of this contention alone would be of no small service, in view of the fact that English politicians usually assume the powers and objects of Federal Senates to be identical with those of the House of Lords, and consequently think that it is only necessary to fill the latter with County Councillors in order to produce a perfect Upper Chamber!

APPENDIX II

THE UPPER CHAMBERS OF PRUSSIA, OF AUSTRIA, OF THE FIVE MINOR GERMAN STATES, AND OF LUXEMBURG

THOUGH a study of the Upper Chambers of the German States is of considerable interest, their applicability for comparison with England is not great. Their composition and financial powers were both, to a certain extent, borrowed from the English model, and have therefore been occasionally mentioned in the text. In ordinary legislation, however, their powers are widely different. The reason is not far to seek, for none of these States possesses Parliamentary or Cabinet responsibility in the sense that England has it. But, though their development has been different, something may be learnt from their variations from the English type. The most singular divergence in this respect, though in theory her analogy to England is very close, is to be found in Prussia.

Prussia. (For details of the composition of all these Upper Chambers, vide pp. 286–7.)

The Upper House has 365 members, chosen in an extremely composite way, from *Hereditary, Nominated* and *Elective* elements. It consists—first of hereditary Hohenzollern princes; secondly of sixteen mediatized hereditary princes; thirdly of about fifty representatives of the landed nobility; fourthly of Life-Peers chosen by the King from rich landowners, manufacturers and men intellectually or otherwise eminent; fifthly of eight titled noblemen

elected in the eight old provinces of Prussia by landowners of all degrees; sixthly of representatives of universities, heads of chapters, and of burgomasters of large towns; seventhly of a number of men nominated by the King for life. The total of this seventh class is unlimited, and, by adding to its numbers, the King can "swamp" all opposition. It is obvious that this Upper Chamber represents wealth, heredity and learning, and represents all of them in a somewhat extreme form; it might seem, therefore, that it would be intensely aristocratic, reactionary, and cautious, and would almost certainly become the refuge of capitalism from the masses. Were Prussia governed under the ordinary system of Responsible Government, this would undoubtedly be the case. In point of fact, however, it is the Parliament which reigns and the King who governs. In Prussia the King and the people are not necessarily at variance, and the former is quite capable of overcoming the opposition of the Upper House in deference to the popular will. The idea of benevolent despotism is not yet dead in Prussia, and the King, supported by his bureaucracy, may appear as a popular champion against the *junkerdom* and the plutocracy which is enthroned in the Upper House. Moreover, the King has, in reality, absolute power over the Upper House, because he appoints most of the members, and can add an indefinite number of nominees in case of any difficulty. Such a case arose in 1872, when the King, in the interests of the whole people, pressed for certain reforms which the Upper House opposed. The King promptly took vengeance by "creating peers," and soon reduced the Upper House to obedience (c. pp. 117–8). In this case the King acted with the approval of the popular House, but that approval is not necessary for him to reduce the Upper House to obedience.

In fact, the Upper House, in case of need, can always and at any time be converted into a mere register of the royal will, and can thus be used as a weapon against the popular House. For instance, in the stormy sixties, when the Lower Chamber refused to vote supplies, money Bills were prepared, and accepted by the Upper Chamber without demur in spite of the illegality of the procedure.

Directly we examine the relations of the King with the Lower House of Prussia, we perceive the futility of any comparisons between it and the English House of Commons. The theory of the Constitution is the same. Ministers are the servants of the King, chosen by him and responsible only in a legal sense. The real difference is that Prussian practice corresponds to Prussian theory, whilst in England the one is exactly the opposite of the other. Properly speaking, there is no Prime Minister and no Cabinet unity in Prussia. Ministers are appointed by the King, dismissed by him, and politically responsible to him alone. It is true that they come together in a Council (*Staats-ministerium*) presided over by a chief minister (*Präsident*), which meets for the discussion of common policy. But they neither form nor support a common policy in the sense that ministers do in England; in practice, they are responsible as individuals to the King, not as a body to the Parliament. The *Präsident* has not, as of right, the chief guiding power over the whole Cabinet; he only has it in so far as the King suffers him to possess it. Directly he or any of the ministers oppose the King, the latter can insist upon and enforce their dismissal. Even the all-powerful Bismarck, though supported by a majority both in Prussian Parliament and German Reichstag, could be dismissed at a word from the King. In the

last resort, if the King chooses to exercise his power, ministers, whether individually or as a body, only hold office at his pleasure.

As there is no Cabinet unity or responsibility in Prussia, so there is no Parliamentary responsibility. Ministers can bring forward ordinary legislation, but they do not resign office after having failed to pass it; in the same way votes of no confidence or hostile motions can be passed against them, without in the smallest degree affecting their prestige or their security in office. Even in finance the ministers and the King are not really responsible to the majority in the Lower House. During the sixties differences over the increase of the army and the money to be expended upon it arose between the majority in the popular House and the King's Ministry, headed by Bismarck. The Lower House refused to vote the money, but Bismarck passed financial Bills through the Upper House and raised the money in an illegal manner.* The Lower House protested, fulminated, screamed, and English observers prophesied that Bismarck and King William in Prussia would have the same fate as Strafford and King Charles in England. But the men of blood and iron prevailed, and their astounding victory over the Austrians abroad was followed by an equally great victory over the Parliament at home. When Bismarck asked for an indemnity in Parliament after the victory of Königgrätz, it was impossible for grateful patriots to refuse it him. Since that date (1866) it may be reckoned as established in practice that the King is, ultimately and in the last resort, superior to the popular majority in the Lower House. Possibly this situation would have altered had the Prussian

* Of course this might be held to indicate that the Upper House has the initiative in finance, but the circumstances must be held as exceptional.

franchise been such as to allow a popular element to be introduced into the Lower House. But, while the franchise is theoretically that of universal suffrage, a division of voters into three classes renders it in practice the most illiberal and complex in Europe, and prevents any genuine expression of popular feeling. So long as the present system prevails, it is practically impossible for the Parliamentary majority to control the executive or, in consequence, to exert any pressure on the Upper House. Everything is as the King wills. Prussia is still the perfect type of a military state; its King is not a George working with his ministers and his House of Commons, but a Frederic issuing orders to his army. His ministers are only his staff of officers, and his Parliament but a council of war; he can consult its opinion if he wishes, but he is in no way compelled to follow or to abide by its decisions.

The Austrian Empire.

Since both Upper and Lower House are absolutely inferior in power to the King in Prussia, it can hardly be said that one Chamber is superior to the other. They are united in a common subjection, and the relations of the two are abnormal. In Austria, however, the situation is not so peculiar, because the Emperor acknowledges certain limitations on his power, and because genuine universal suffrage exists for the Lower Chamber. Directly conditions become normal in the Lower Chamber, something very like Parliamentary and Cabinet responsibility will be evolved. Up till now, however, nationalistic disputes between the different races have so complicated and hindered development that on very many occasions the legislative business has been actually brought to

a standstill and arbitrary procedure necessitated. Under such special circumstances paragraph 14 of the Constitution enables the Emperor to force the Budget through the Upper House, and to carry on the government without reference to the Lower House. This power has been frequently used, and the effect has been to discredit and to weaken the popular House, and to make it impossible for the Emperor to choose his executive from the majority in the popular House. The result has naturally been to increase the powers of the Upper House, which has never submitted to the Sovereign in the way that its prototype in Prussia has done. Since the introduction of Universal Suffrage in Austria in 1906, however, the situation has somewhat changed, and the popular House has increased in dignity and effectiveness, and probably will challenge the superiority of the Upper House in no long time.

The Upper House in Austria is partly *Hereditary*, partly *Nominated*. It includes from 248–268 members, the total varying according to the number of Life-Peers. In consists of—

1. Princes of the Blood.
2. Certain hereditary Peers possessed of a certain amount of landed property.
3. Ten Archbishops and seven Bishops.
4. A number of Life-Peers nominated by the Emperor, who have distinguished themselves in politics, art, or science, or rendered any signal service to Church or State. Since January 1907 a law has been in force that the number of Life-Peers must not be less than 150 or more than 170. In other words the power of "creating Life-Peers" is strictly limited, and, in practice, that of increasing the hereditary Peers is now equally restricted.

The powers of the Austrian *Herren-Haus* (House of Lords) are equal to those of the Lower Chamber, save that it can only initiate money Bills under the extraordinary circumstances provided by paragraph 14 of the Constitution. In their practical working the relations of the two Chambers were obscured by inter-racial disputes until 1906. Generally speaking, however, until that date the principle prevailed that, when the Crown and the Lower House were agreed on a measure, the Upper Chamber had to give way. Certainly the *Herren-Haus* has never been regarded as the real seat of political power, and in 1877 the expression of the will of the Emperor in his support of the ministry in the Lower Chamber was effective. His will was quite sufficient to prevent the Upper House from throwing out measures sent up from the popular Chamber, even though they happened to be objectionable to the majority of the Peers. In 1906, another crisis arose when the Emperor, supported by the Lower Chamber and by public opinion, boldly advocated the Bill for Universal Suffrage. The *Herren-Haus* showed signs of resistance, but interviews between the Emperor and its chief leaders induced them to pass the Bill, after they had secured one very important concession. They passed the Suffrage Bill, but only on condition that a law should be introduced limiting the number of Life-Peers to a total of not less than 150 and of not more than 170. This provision became law in 1907, and its effect is a far-reaching one. Though the Emperor can still create hereditary peers at will, his choice of them is limited by law to certain hereditary families possessed of a very large amount of real property. In other words he can only elevate younger sons of certain families to the *Herren-Haus*, and these are persons likely to support their relatives who were already in the

Upper Chamber. Consequently, the prerogative of "creating peers" or "swamping" the Upper Chamber has now practically passed from the control of the Emperor. In short, the curtailment of the Crown's prerogative was the price paid for Universal Suffrage.

The effect on the Upper Chamber of the security given to it by the law of 1907 has been already marked. The *Herren-Haus* enjoys a considerable prestige not only from this law, but from the fact that the propertied classes now look to it as the bulwark of safety against mob-rule. Formerly the *bourgeoisie* was represented in the Lower House; now the democratic majority reigns there supreme. Hence the *bourgeoisie* has transferred its affections to the Upper House, considering that its interests will be better represented by *Hereditary* nobles and by *Nominated* superior persons. There appears to be some reason in this supposition, for the lack of historic tradition renders an Upper House on the Continent both flexible and responsive to certain currents of opinion. In 1907 the Austrian *Herren-Haus* threw out a Bill for limiting the Sugar-tax, a Bill which was obviously intended as a first instalment of democratic finance on an extensive scale. Despite popular denunciations, the *Herren-Haus* maintained their attitude of veto, pointing out at the same time that their action had saved the Government thirty million kronen yearly, and the Lower House has been unable to force the Bill through. In this case, then, the Upper House posed as the shrewd and cautious steward of finance, and as the champion of the direct taxpayer against the democratic party, which desires to diminish indirect taxes and to increase direct ones. It seems, in the future, that it will defend property not only in the large sense but in the small, and champion both the plutocrat and the

bourgeois at the same time. It will probably become the best example of the representation of property in one House and of population in another. The danger appears to be that a distribution of power on these lines may lead to fierce disputes and to a class-warfare of a most dangerous kind. This peril has already been observed in the Scandinavian and the small German States, and it can only be effectively met by a thorough attempt to democratize the composition of the Upper House. As the Austrian *Herren-Haus* is not only now limited in numbers, but is composed entirely of life-members, of one sort or another, the difficulty of reform and the dangers of deadlock may become serious in the future. At present the Emperor's authority is enough to avert any real peril.

The Five Minor German States.

Saxony, Bavaria, Baden, Wurtemberg and Hesse-Darmstadt, the five minor German States, offer certain opportunities for comparison which are of value. The composition of the Upper House varies in each individual case, but all of them contain a *hereditary* element, and four of them contain also a large *life-nominee* element.* Four of them also contain an element that is purely *elective* or representative (*i. e.* consisting of delegates from trades, towns or universities).† The result is, generally, very much what we see in Austria, property and the *bourgeois* predominant in the Upper House, the socialist and the democrat rampant in the Lower one. On the other hand, the Sovereign has not been unwilling to put pressure

* Baden contains only six members nominated for life in an Upper Chamber of forty. Full details as to the specific composition of all five will be found in Table IV. pp. 286–7

† Bavaria is the exception here.

on the Upper House in case of disputes between the Chambers, and extensive reforms have been initiated in four of these States within recent times, in order to bring the Senates more into sympathy with democracy.

The difficulty of bringing the Upper House into harmony with the Lower is complicated in all these States by the fact that the executive and the ministers are nowhere wholly dependent on the majority in the popular House. Consequently, the prestige and authority, which the Lower House obtains whenever it chooses the ministry, do not always support it when in conflict with the Upper House in these States. The general working of the Parliamentary system under these conditions may perhaps best be shown by a concrete example: "The Parliamentary system in Saxony," writes Mr. Findlay, "is very different from ours. The Chambers are only convoked once every two years, and it is not necessary or even customary for ministers to resign because they have been defeated in Parliament. Ministers are, in fact, responsible to the King, and not to the Chambers, though it would probably be impossible for a minister who had lost the confidence of the Chambers to maintain his position for any length of time unless supported by the public opinion of the country at large."* The Constitution of Saxony, the most reactionary and illiberal State among those mentioned, in fact closely resembles that of Prussia, the franchise being limited in much the same way. It differs in that the Upper Chamber even possesses a financial equality with the Lower House in legislation.† It is, therefore, very significant that popular opinion can be so influential even in

* Parl. Paper, 1907, p. 49.

† There is no provision confining the initiative in finance to the Lower House.

Saxony; in the other four minor States of Germany Universal Suffrage prevails, popular opinion is more effective, with the general result of exalting the power of the popular House as against that of the Senate. Generally speaking, the power of the Sovereign is used to remove the chances of conflict between the two Chambers, and the recent changes, which have democratized the composition of four of the German States in question, show that the Upper House is susceptible to popular pressure. It cannot be said that Cabinet and Parliamentary responsibility are completely established in any of them, but the general tendency is to reduce the powers of the Senate in favour of the Lower House, and to promote harmony between the two by assimilating their composition. The process has gone far enough in all the States except in Saxony, and there is evidence enough to show that something similar to the situation in the English Colonies will eventually be evolved in them all. In other words, each State will eventually possess a Senate which has been rendered democratic in composition or in feeling, and which has been brought to admit that the Lower House has an acknowledged, though not always a defined, superiority, both in finance and in matters of administration.*

Luxemburg.

The Grand Duchy of Luxemburg was united in the Germanic Confederation till 1867, but is now a sovereign, independent, and neutralized State. The position of its Upper Chamber is unique

* Some interesting details as to specific arrangements for adjustment of deadlocks between the Chambers in the various minor German States are given, p. 101, 124-5 and *note* 26, Chap. III.

among German and perhaps among European States. The legislature is formed of a popular Chamber of 51 members, elected on a small property-franchise. In addition there is a Council of State, which is an Upper Chamber. It consists of 15 members nominated by the Grand Duke; of these 7 are chosen by the Grand Duke out of a list presented by the popular Assembly. The Council of State has two distinct functions; one arbitral, to decide disputed questions of administrative law; second *probouleutic,* to prepare and throw into shape all projects for laws to be introduced into the popular Chamber. The Grand Duke possesses the sole right to initiate laws, and the Council of State deliberates on all proposed laws or on proposed amendments to laws, which he submits to it. The Grand Duke also consults it on grave questions of policy and on important administrative matters. It has, therefore, the functions of an executive council, of a deliberative assembly, and of an advisory committee, but it depends for these powers completely on the Grand Duke. By placing his executive cabinet in the Upper Chamber he has really withdrawn active control from the popular Chamber, and made it a house of irresponsible critics. The whole is really a very interesting development. It is not anything like the ordinary German State, where the executive remains independent of both Upper and Lower Chamber. Here the executive has been captured by and located in the Upper Chamber, a result which might have come about in England under very slightly altered circumstances. Luxemburg's Upper Chamber is well worthy of study, because it is quite possible that its position may eventually be reproduced in the Upper Chambers of the States to be described in Appendix III.

APPENDIX III

THE UPPER CHAMBERS OF STATES NOT OTHERWISE MENTIONED; JAPAN, ROUMANIA, SERVIA, RUSSIA, TURKEY

ALL the Upper Chambers here described are sketches rather than realities, but as the first study of an artist sometimes reveals his real ideas better than the complete picture, in the same way a project for an Upper Chamber may reveal underlying conceptions more truly than a finished and working practical model.

Japan.—The real interest of the composition of the Upper House or Senate of Japan is that it represents the deliberate attempt of her greatest statesman to embody in her Constitution what he considered the best points of European Senates.

"When the Japanese Constitution was framed twenty years ago," Prince Tokugawa said, "the House of Peers was formed in accordance with the judgment of Prince Ito, the great statesman who was assassinated recently at Harbin. He had studied and compared the composition and working of every Upper Chamber in civilized countries. The Japanese House of Peers is modelled more like the House of Lords in Prussia than any other Upper House which has hereditary and other members, and consequently approaches it more closely than it does the British House of Lords." *

* *Pall Mall Gazette*, May 19, 1910. Cp. *Fifty Years of New Japan*, by Count Okuma, London, 1910, which gives Prince Ito's own account (pp. 122–32) and a study of the Japanese Constitution, pp. 132–93.

The success of this attempt may be judged from the following arrangements—

"The Japanese Upper House consists of five classes of members, namely, the male members of the Imperial family, all the princes and marquises, a fifth of the counts, viscounts, and barons of the Empire, chosen for seven years by the members of each rank, 125 life-members, *nominated* by the Emperor for meritorious services or eminence in literature, and 52 members to represent the three chief city districts and 49 country prefectures, *elected* respectively for seven years by the fifteen male inhabitants paying the highest amount of taxes in each district, their choice needing the confirmation of the Emperor. The number of members is indeterminate, being about 380, while the House of Representatives consists of 379 members, making one member to every 127,000 of population." If we are to regard the composition of this Senate as an attempt to adopt the best European models, it is open to the criticism that the *Elective* part of the Chamber is not only chosen by indirect election, but is chosen by an extremely limited number of propertied electors. Even candidates elected in this very indirect way have to be confirmed by the Emperor before they can take their seats. In fact, Prince Tokugawa states the position correctly in comparing the Japanese Upper House to that of Prussia. Two underlying conceptions appear to be common to both Constitutions; first, the representation of the rights of birth, intelligence, and property through hereditary magnates, nominated intellectuals, and elected business men; secondly, the provision that these elements shall be completely subjected to the will of the Sovereign.*

* Cp. Prince Ito (*Fifty Years of New Japan*, by Count Okuma, p. 128: "The Crown was, with us, an institution far more deeply rooted in the national sentiment and in our history than in other

In Japan, as in Prussia, a barrier is interposed between the Monarch and the Lower House and the democracy, a barrier which can always be maintained or removed at the Monarch's will. The Japanese Senate appears to be a pliant instrument in the Imperial hands, but has contrived to attract to itself considerable splendour and dignity.

In theory complete equality of power appears to prevail between the two Houses even in financial legislation. But practice and theory very seldom correspond in any Constitution, still less in an Oriental Constitution, whose Sovereign and author is descended from emperors who lived two thousand years ago, and from gods who founded the world.

Roumania.—Of all the States here mentioned, Roumania is the only one in which the Upper Chamber has had a prolonged practical experience. It may be said that it retains some dignity and power, and has never been reckoned as a cipher in the Constitution. The number of Senators is 120, and their term of office is for eight years. Both Houses of the Legislature are elective, and there is a property franchise for electors in each case. The elections to each House are made through Electoral Colleges (the taxpayers being divided into three colleges according to the amount of taxes paid). The franchise is based on the amount of taxes paid, but the franchise qualification is higher in the case of the Senatorial electors than in the case of electors to the popular Chamber.* To be a candidate for the

countries . . . so that, in formulating the restrictions on its prerogative in the new Constitution, we had to take care to safeguard the future realness or vitality of these prerogatives, and not to let the institution degenerate into an ornamental crowning-piece of the edifice." The Emperor and his council of "Elder Statesmen" sometimes appear to take action independently of either House of the legislature.

* The proportion of Senatorial electors to those of the Lower Chamber is that of about one to three.

Senate a man must possess an assured income of at least £376 a year, and be at least forty years of age. Generally speaking, therefore, the Senate is an oligarchy of wealth based on a *bourgeois* franchise. A check on it is exercised by the King, who has a suspensory veto on legislation, and who usually chooses his ministers in deference to the wishes of the majority in the Lower House. Even when he does not do the latter he is not compelled to choose them from among the members of the Senate.

Servia.—The Servian National or Popular Assembly is elected by males who pay fifteen dinars in direct taxes, and have attained the age of twenty-one. Members of the Legislature must be able to read and write, must be thirty years of age, and pay sixty dinars in direct taxes. Government employees, Communal mayors, and priests are ineligible for membership, but lawyers and university graduates who pay thirty dinars in direct taxes may be elected.

The Upper Chamber is called the State-Council, appointed partly by the King and partly by the Popular Assembly, "to decide complaints of injury to private rights resulting from Royal and Ministerial decrees, questions of administrative competence and obligations, matters relative to departmental and communal surtaxes and loans, and the transfer of their real property, the expropriation of private property for public purposes, the final settlement of debts due to the State, and which cannot be collected, the outpayment of extraordinary sums sanctioned by the Budget, and exceptional admissions to the privilege of Servian citizenship. This body is always sitting." * If the Army was not more important than either King or Popular Assembly, this State-Council might be really an interesting Upper Chamber. It is a

* *Statesman's Year-Book*, 1910, p. 1201.

Revisory Chamber, without real legislative functions, but with very important arbitral and mediatory powers. It would exercise functions similar to those of the Judges of the Supreme Court in the United States, or of the *Nomophylakes* at Athens, and might really acquire great power. Unfortunately it is to be feared that the sword is the true law in Servia, and that a semi-judicial body is the last of all assemblies to impress the officers who override the administration.

Russia.—It is suitable to discuss the Upper House in Russia after Servia, for it has some affinities in power, and still more in the fact that the shadow of the sword falls across it. The Russian "Council of the Empire" is one-half *Nominated* by the Czar, one-half *Elected* by various interests. The latter have members assigned as follows: Orthodox Greek Church, 6; Chambers of Commerce, 12; Assemblies of the Nobility, 18; the Universities, 6; the landed proprietors of Poland, 6; the Provincial Zemstvos, 1 each. The elected members are chosen for nine years, one-third of each group retiring every three years.

The Czar promulgated the Constitution in 1906, and apparently its existence depends on his pleasure. He permits either House to initiate ordinary legislation, but reserves to himself and his ministers the sole initiation of constitutional amendments or laws. Ministers may sit and vote in either House if qualified, and can be interpellated by members of either House. No Bill can be submitted to the Czar for the Imperial sanction unless it has been passed by both Upper and Lower Houses. Each House has the right to examine its own electoral returns and to annul the election of a member. The elected members of the Upper House are paid for their attendance at the rate of twenty-five roubles a day during the session. The

members of the Council of the Empire must have reached the age of forty and must have obtained an academical degree. During session all members of the Russian Parliament are immune from arrest except for grave offences or for offences committed in the discharge of their duties, but either House may consent to the arrest of one of its members. The Czar nominates the President and the Vice-President of the Council of the Empire.

The general idea underlying this Upper House seems to have been to compose it of dignified officials and of representatives of various propertied interests, in order to interpose a barrier between the Czar and the Popular Chamber, and to prevent his incurring too much odium by forcing the Upper House to take the responsibility of vetoing Bills and advocating unpopular policies.

Turkey.—The Turkish Upper House has some points of resemblance to the Russian. It is *Nominated* by the Sultan from among those who have rendered notable services to the State.* The number of Senators must not exceed one-third of the number of Deputies in the Lower House, and to be a Senator one must have reached the age of forty. Senators are nominated for life: they have no control over finance, and cannot initiate legislation without the consent of the Sultan. A minister has the right to be present either in the Senate or in the House of Deputies, and he may be represented in either House by one of his superior officials. The President of the Senate is nominated by the Sultan. It may be noted that it is proposed to make one-third of the Senate *Elective* in the future.

The Turkish Government publishes neither financial accounts nor estimates of revenue and expenditure, and the legislative province of the "Parliament" is extremely limited owing to

* Cp. C. R. Buxton, *Turkey in Revolution*, 1909.

customs so deep-rooted as to be practically irremovable. Hardly anything can, therefore, be said with certainty as to the relations of the two Houses.

Summary.—These five Upper Chambers all resemble one another in being composed under Oriental or semi-Oriental influences, one result of which is that appearance and reality are at variance. But they seem all to be based on the idea of erecting a strong Upper Chamber to prevent hasty legislation being carried by the influence of the Popular Chamber or the agitation of the mob. The strength of the Upper Chamber is based on the two pillars of wealth or intelligence, and is sometimes supported by a third—that of birth. All the countries, to a certain extent, aim at erecting a Senate of intellectuals, but Servia and Russia favour an Upper Chamber of experts and officials, in short, a department of the Civil Service, while the rest incline to a Senate representing a general level of high intelligence or social status. None of them have yet undergone a serious attack from democracy, and their strength has yet to be proved in action. Generally they appear to be creations of the Sovereign for his own purposes, rather than independent institutions. If monarchy is the real government for Orientals, then these Senates will form useful administrative and legislative Councils for executing the decrees of the sole ruler, and may even impose on him the checks of age, of experience, and of bureaucratic traditions. If, on the other hand, democracy as a political force becomes a reality in these States, it may be said with some certainty that one of the first signs of it will be seen in the transformation of their existing Senates.

APPENDIX IV

THE BICAMERAL SYSTEM IN THE ENGLISH COLONIES.

[Extracts illustrative of the opinions of Colonial and English statesmen on the necessity of having two Chambers in the Colonies. The opinions of Earl Grey (Secretary for War and the Colonies, 1846–52) on this subject are given in the text pp. 42–5.]

Colonial Opinion.

Earl Grey. The Colonial Policy of Lord John Russell's Administration, 2nd edition, London, 1852, vol. ii., p. 101, note, gives extracts from the debates of the Legislative Assembly of "Canada" (Ontario and Quebec), which denounce the system of two Chambers. But the circumstances had been very exceptional in the Canadian Provinces, and with the establishment of Responsible Government tranquillity was restored. The view of Joseph Howe, the Nova-Scotian statesman, may be quoted on this point; it was given in 1839, and is typical of a large body of Canadian opinion at the time, and of the views that eventually prevailed.

Nova Scotia.

"I think there is no necessity for this (abolition of the Upper Chamber in the Colonies); first because it would

Downing Street.

The Lieut.-Governor of Van Diemen's Land, Sir W. Denison, to the Duke of Newcastle, Her Majesty's Secretary of State for War and the Colonies, February 14, 1854.

"I believe that in all cases a Second Chamber will be considered as essential, but there will be great differences as to the mode in which this Second Chamber is to be constituted.

"In a Dispatch to Lord Grey, No. 144, dated 15th August, 1848, I suggested the formation of an Upper Chamber; and the following extracts from that Dispatch will explain the grounds upon which I made the suggestion:—

"'The members of this, call it Senate or what you may, will be raised in some measure above the general level of society, they will be rendered independent of popular blame

COLONIAL OPINION.

destroy the close resemblance which it is desirable to maintain between our institutions and those of the mother country; and again, because a second legislative chamber, not entirely dependent upon popular favour, is useful to review measures, and check undue haste or corruption in the popular branch. Besides, I see no difficulty in maintaining its independence, and yet removing from it the character of annual conflict with the representative body, by which it has been everywhere distinguished." (Fourth open letter to Lord John Russell (1839) quoted in Egerton and Grant, *Canadian Constitutional History*, London, 1907, p. 237.) The Governors in the different Canadian Provinces at this time exercised the executive power independently of the Lower Chambers, and often relied on the Upper Chamber to throw out Bills. Hence the Lower Chamber had no effective control whatsoever, and their fury was mistakenly directed not against the Governor, but the Upper Chamber. As soon as Responsible Government gave the appointment and control of the executive to the majority in the Lower Chamber, the differences with the Upper Chambers ceased in the Canadian Provinces. But under the circumstances Howe's judgment must be reckoned an extremely moderate and far-sighted one.

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or approbation, but being also free from the suspicion of acting under the control of the Government, they will conciliate popular feeling, and hold a fair position between the Executive and the Legislature.'" (*Accounts and Papers*, Australia to New Zealand, vol. xxxviii., 1854–5; "Further Papers relative to the Alterations in the Constitutions of the Australian Colonies," Van Diemen's Land, pp. 2–3. Dispatch (Confidential) No. 1.)

Sir W. Denison, Lieut.-Governor of Van Diemen's Land, to R. Dry, April 27, 1854.

"In order that the whole process by which I have arrived at the formation of a definite opinion on the subject may be made clear to you, I may as well state that the principal motives which induce me to advocate the formation of an Upper Chamber are the security afforded by it against party, or class legislation, and against collisions between the Legislative and the Executive.

"It is probable also that property would be more fully represented in the Upper than in the Lower Chamber; and I should wish to see the Upper Chamber looked upon as representing the Colony at large, and to enhance the distinction thus conferred upon its members by every means in our power.

"Having premised this, I

COLONIAL OPINION.

AUSTRALIA.

Sir W. Denison, Lieut.-Governor of Van Diemen's Land, to Duke of Newcastle, Secretary of State for War and the Colonies, February 14, 1854.

"In my Dispatch, No. 198, dated 28th December, 1849, in discussing the form of the Constitution to be granted to these Colonies, I said, 'My opinion, I confess, remains unchanged by anything which I have heard or read since I last addressed your Lordship, indeed, every additional day that I remain in the Colony serves to add to the strength of my conviction that it would be most desirable when the change in the form of the Government of this Colony does take place, that a Second Chamber should be constituted at once by authority of Parliament. Such Chamber, however, should differ from those which did exist in the North American Colonies, inasmuch as a large proportion of the members should be *elected or otherwise rendered independent of the Government*, and they should hold their position for a long period, if not for life.'

"Everything that has taken place in these Colonies since the passing of the Act 13 and 14 Vict., c. 59, has served to strengthen my conviction of the correctness of the opinions above quoted.

"With regard to the con-

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presume that the qualification of the constituents of the members of the Upper Chamber will be higher than that now required for the Council, viz. £10 household occupation, which is, in point of fact, household suffrage; but I should not wish to see such a marked difference made as might lead to jealousies on the part of those excluded, or so high a rate of franchise as might unduly narrow the constituency, and make it appear that the Upper Chamber *was the representative of a class, and not that of the property or intellect of the Colony*."

(*Accounts and Papers*, Australia to New Zealand, vol. xxxviii., 1854–5; "Further Papers relative to the Alterations in the Constitutions of the Australian Colonies," Van Diemen's Land, pp. 18–9; New Constitution, Message No. 31; Sir W. Denison, Lieut.-Governor of Van Diemen's Land, to R. Dry, Esq., April 27, 1854.)

COLONIAL OPINION.

stitution of the Second Chamber, it is evident that, if the Government is to be conducted in strict accordance with the views of the majority of the Legislature, any attempt to secure a majority in one Chamber by the appointment of persons whose political opinions are known to coincide with those of the head of the executive would only lead to permanent differences between the Chambers, by which the action of the Government would be impeded, and a check imposed upon the onward progress of the Colony."

(*Accounts and Papers*, vol. xxxviii., 1854–5; Australia to New Zealand, "Further Papers relating to the Alterations in the Constitutions of the Australian Colonies," Van Diemen's Land, pp. 2–3.)

WEST AUSTRALIA.

Sir F. Napier Broome, Governor of West Australia, to Lord Knutsford, H.M. Secretary of State for the Colonies, May 28, 1888.

11. "Referring now to your Lordship's dispatch of the 3rd of January, 1889 (advocating a Single Chamber for West Australia), I cannot help feeling that it would be very inadvisable to establish here Responsible Government with a Single Chamber. I submit that the case of Ontario, cited by your Lordship, is in many ways different from that of Western Australia. In the first place, Ontario does not

DOWNING STREET.

Sir H. T. Holland (afterwards Lord Knutsford), Secretary for the Colonies, to Sir F. Napier Broome, Governor of West Australia, January 3, 1888.

"Having regard to the present population of the Colony, it may deserve consideration whether Responsible Government might not with advantage be initiated in a Legislature consisting of a single elective chamber, provision being made for the establishment hereafter of a second House, which I quite agree must some day be created, but the creation of which might perhaps be deferred

COLONIAL OPINION.

really furnish an instance of Responsible Government with a Single Chamber, seeing that the Ontario House and Ministry do not completely legislate and govern, but have behind them and over them the Dominion Parliament of two Houses and the Dominion Ministry. Ontario has, in fact, three Legislative Chambers. It is difficult to see how the existence in Ontario of a provincial chamber of *eighty-eight* members entrusted only with partial powers, is at all a safe or covering precedent on the authority of which Her Majesty's Government would be warranted in handing over the whole Colony of Western Australia to a Single Chamber of *thirty* members (the number proposed), possessing full powers.

"There is nothing, so far as I know, within the limits of the British Empire that can be called a precedent for the experiment of a Single Chamber for Western Australia, and I think such an experiment would be full of danger. Much irremediable harm might be done before the Constitution could be changed. Further, it is well known that there is nothing more difficult in politics than to persuade a representative assembly that it should surrender power, and whatever right were reserved to Her Majesty in Council, there might be considerable trouble in altering a Constitution once granted.

"Legislation and government

DOWNING STREET.

until the white population of the Colony has increased to (say) 80,000 inhabitants, or to such date as Her Majesty may decide, power being reserved to the Queen in either case to call it into existence by Order in Council. The Colony will require the services of all its best men in the beginning of self-government, and it would seem that their powers would be more readily brought to bear if concentrated in a Single Chamber.

"This form of Constitution is now in force in Ontario, where the Legislature consists of an Assembly numbering eighty-eight members, and in other provinces of the Dominion of Canada."

(*Accounts and Papers*, Colonies and British Possessions, Australia (Western), vol. lv., 1889. Correspondence respecting the Proposed Introduction of Responsible Government into Western Australia, p. 25, Parl. Papers, C. 5743.)

Evidence of Sir F. N. Broome.

Question 677.—The Legislature (of West Australia), I understand, was not in favour of a Single Chamber?

Sir F. N. B.—Certainly not.

Q. 678.—That was your own personal idea, as I gather?

Sir F. N. B.—Yes. It is the fact that the Government is carried on now under a Single Chamber; but then a Single Chamber with partial powers is a very different

COLONIAL OPINION.

by a Responsible Ministry in a Single Chamber of only thirty members would, indeed, be an ultra-development of democratic institutions, even in this democratic continent. If at Court it be thought unnecessary to be more loyal than the King, surely in Australia it would be a mistake to be more radical than Victoria.

14. "It seems also to be inexpedient to propose for this Colony a Constitution which would place its political system out of harmony with those of the neighbouring States of this part of the Empire. It is desired to assimilate and draw together these States as much as possible, and would it be wise now to create a distinctly new type of Constitution by handing over a third part of the continent to a Single Chamber? To initiate such a hitherto unheard of development of democracy would also be to strike a blow at the position, already attacked by some, of the Upper Houses which are the safeguards of the other Australian States. As for Western Australia itself, the danger of carrying democratic precept to its highest pitch at one bound in a young and politically untried community, with the special past circumstances of this Colony, would surely be very great.

"Of course I quite understand that your Lordship, in proposing a Single Chamber, has had regard not so much to political considerations as to an apprehended practical

DOWNING STREET.

thing from a Single Chamber with complete powers. The Governor may be said to be the Upper House under the present Constitution.

(Report from the Select Committee on the Western Australia Constitution Bill together with . . . Appendix, Parliamentary Paper 150; Reports Committee, London 1890, vol. xviii. p. 45; Evidence of Sir F. N. Broome, K.C.M.G., Governor of West Australia.)

COLONIAL OPINION.

difficulty in at first ensuring a sufficient number of desirable members for two Houses. But even as to this, it may be observed that Queensland and other communities began their political career with two Chambers, when they had a much smaller population than Western Australia, and I do not think there would be difficulty here in making up the complement of an Upper House of fifteen members and a Lower House of thirty members. Moreover, on whatever special ground a Single Chamber may be advocated, we must before adopting it have regard to the whole issue—to the whole result of such a deviation from established principle and usage. It is significant that the proposal has been caught at and supported here by a very few persons of ultra-radical opinions, and hardly any one else. The Legislative Council have strongly opposed it, and have given it as their opinion (Resolution No. 4, transmitted by my previous dispatch), 'that the Constitution of the Colony should from the first provide for the establishment of a second Legislative Chamber.' I am not certain that the community would accept Responsible Government with one Chamber, and I think they would do wisely in rejecting it on such terms."

(*Accounts and Papers*, vol. lv., 1889. Correspondence *re* Responsible Government in West Australia. Parl. Papers, C. 5743.)

DOWNING STREET.

COLONIAL OPINION.

Evidence of Sir F. N. Broome, March 25, 1890.

Question 668.—Did not the Secretary of State (for the Colonies, Lord Knutsford) originally suggest a single elective Chamber as the best form of Constitution (for West Australia)?

Sir F. N. B.—He did.

Q. 669.—That was not approved of?

Sir F. N. B.—No; it met with very little support, indeed, in the Colony. I was . . . invited . . . to give my own views, and I gave them against the proposal.

Q. 670.—May we take it that the views which you gave to the Secretary of State . . . represented the dominant opinion in the Colony (West Australia) on the subject of a single elective Chamber?

Sir F. N. B.—Most certainly.

(Evidence before Select Committee on Western Australia Constitution Bill, March 25, 1890, p. 44. Parl. Paper No. 160, in *Reports of Committees*, vol. xviii., 1890, p. 486.)

NATAL.

To the Electors of Natal, February 1891.

As an admission of the "*nominee*" element into the Constitution appeared repugnant to the strongly manifested feeling of the community, a single *elected* Chamber was substituted for the proposed bicameral body.

DOWNING STREET.
WEST AUSTRALIA AND NATAL.

Lord Knutsford, Colonial Secretary, to Governor of Natal, May 28, 1891.

"I do not, however, hold that a Colonial community, which is otherwise fitted for self-government, is incompetent to decide the question between a Single-Chamber and a Double-Chamber legislature. There may be cases in which the number of educated persons able and willing to devote their time to legislative duties is too small to furnish sufficient materials for the composition of two effective Chambers; and recently, in the case of West Australia, I expressed the readiness of Her Majesty's Government to accept a single Legislative body . . . but it is difficult to reconcile the decision arrived at in favour of a Single Chamber with the strong utterances in favour of an Upper House by the supporters of the Bill."

(P. 72 (C. 6487, Blue Book), Correspondence relating to Responsible Government in Natal, 1891. *Accounts and Papers*, 1890–91, vol. lvii.)

NATAL.

As the colonists adhered to their uni-cameral scheme, the Home Government vetoed the project, December 2, 1891.

Lord Knutsford to Governor of Natal.

"The creation of an Upper

COLONIAL OPINION.

(John Robinson, Chairman of Responsible Government Party in Natal, p. 57 (C. 6487, Blue Book). Correspondence Relating to Responsible Government in Natal, 1891. (*Accounts and Papers*, 1890–91 vol. lvii.)

NEW ZEALAND.

Lord Glasgow, Governor of New Zealand, to Lord Knutsford, Colonial Secretary, June 22, 1892.

"Both Mr. Ballance (the Premier) and Sir Patrick Buckley said that many of their supporters are opposed to a bicameral system, although they themselves are not, and that if nothing is done to improve the position of matters in the Upper House, and if a cry is got up for the abolition of the Legislative Council, it would be so strong that it would bear down all opposition."

(*Vide* p. 15, *Accounts ana Papers*, vol. lxi., 1893. Parl. Papers, No. 198, 1893.)

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House would obviously tend to preclude hasty or unfair legislation on such subjects ("native question," and declares (January 12, 1892) that "Her Majesty's Government consider an Upper Chamber indispensable."

(Pp. 19 and 20, Correspondence relating to Responsible Government in Natal contd. C. 6487). Parl. Papers, 216, 1893. *Accounts and Papers*, 1893–94, vol. lx.)

APPENDIX V

NOMINEE *VERSUS* ELECTIVE UPPER CHAMBERS IN THE ENGLISH COLONIES

[Extracts illustrating the opinions of Colonial Statesmen and English Ministers on this subject.]

Colonial Opinion.

Canada.

In Canada John Howe, certainly one of the most far-sighted of early Colonial Statesmen, saw no special dangers in the Nomination System.

Fourth Open Letter to Lord John Russell (1839), (quoted in Egerton and Grant, *Canadian Constitutional History*, p. 238).

"I should have no objection to the Legislative Councillors holding their seats for life, by which their independence of the Executive and of the people would be secured, provided they were chosen fairly by those to whom, from time to time, the constituency, as at home, entrusted the privilege" (*i. e.* by the Executive depending on the majority in the Lower Chamber).

Taking the Australasian model, we find that Colonial opinion in New South Wales at a very early date acknowledged that there might be

Downing Street.

Generally speaking, the Home Government appears to have favoured the Nomination for Life principle, but in several instances it refrained from pressing this system on a Colony. The most conspicuous instance in which it did so was in 1852, when Sir George Grey as Governor of New Zealand suggested an Elective Upper Chamber. The Home Government over-ruled him, and substituted a nominated one. In 1893 the Home Government forced the Nomination System upon Natal, but in this case it introduced it with the special object of defending the natives, which object it certainly has not achieved (vide p. 46 *infra*), p. 267

Tasmania.

Sir W. Denison, Lieut.-Governor of Van Diemen's Land, to Earl Grey, Her Majesty's Secretary of State for the Colonies and for War, August 15, 1848.

COLONIAL OPINION.

some advantages in the Nominee System.

NEW SOUTH WALES.

W. C. Wentworth, on third reading of the Constitution Bill in New South Wales (*Sydney Morning Herald*, December 22, 1853):

"The reasons cited by the opponents of the *Nominee* principle, in behalf of an elective Upper House as superior to a similar structure on the *Nominee* principle, was its unexpansive and inflexible character; and for the very same reason he had been strenuous in his opposition to the *elective* principle prevailing in the Upper House. The erection of such a body would lead to a revolution. (*Hear, Hear!*). It would control the Lower House, and could trample on the rights of the people. Therefore he was in favour of a nominated Upper House, which he felt assured would and must give way, rather than excite a revolution, and also because he felt assured that the responsible minister of the day would compel it to give way in such an exigency."

(Quoted on p. 80. Papers and Extracts relating to the Appointment of Members to the Upper House of Representatives in New Zealand and the Colonies. *Accounts and Papers*, vol. lxi., 1893. Parl. Papers, No. 198, 1893).

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"I also think that in order to render the members perfectly *independent of either the Government or the people, they should be appointed or elected for life.*

"That the Second Chamber should be constituted in such a manner as to free it from any direct or immediate dependence upon the popular will, would be, I think, desirable.

"That it should be elected upon a different principle, and that its members should have higher qualifications than those of the First (Lower) Chamber, would also probably be advantageous; but I do not attach much importance to the mode of election, whether directly by different and more highly qualified constituencies, or indirectly by a species of double election."

(Enclosure in Sir W. Denison to Duke of Newcastle, February 14, 1854. Van Diemen's Land (confidential). Further Papers relative to Alterations in the Constitutions of the Australian Colonies. *Accounts and Papers*, Australia and New Zealand, p. 13, vol. xxxviii., 1854-5.)

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SOUTH AUSTRALIA.

In the same year (1883) Colonial opinion in South Australia expressed a decidedly different opinion from that in New South Wales, and advocated the *Elective* Upper Chamber.

Vide *A Memorial presented by Mr. Hutt on behalf of* 4013 *persons* "*For Alterations in Proposed Constitution for South Australia*," 1853.

"Reference to the proceedings of the late Session of the Legislative Council will (in the opinion of the memorialists) show that the clauses of the Act to establish a Parliament in South Australia, making provision for an Upper Chamber, consisting of Nominees of the Crown, appointed for life, have been carried against the wishes, of the colonists and their representatives, who have been misled by the assertion of the Government, that no other system would be sanctioned by the Home Government. Such representation was always opposed to the opinion of your memorialists, founded upon a careful perusal of the dispatches of the Colonial Office; but their views and opinions were rendered nugatory by the statement of the Colonial Secretary, that the Government would oppose any measure to amend the Constitution, differing in principle from the one they had introduced. The views and opinions

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Sir George Grey, H.M.'s Secretary of State for the Colonies, to Sir W. Denison, Lieut.-Governor of Van Diemen's Land, August 3, 1854.

"I have to acquaint you in reply that Her Majesty's present Government are of opinion, that provided the Legislative Council is so constituted as to possess the respect and confidence of the community, and at the same time to be less directly liable than the Assembly to popular impulse, and to be capable of acting as a salutary check against hasty legislation, *the particular mode of constituting it is not a matter of primary importance, and they do not therefore feel it necessary to insist on its being nominated by the Crown.*"

(*Accounts and Papers*, p. 30, vol. xxxviii., 1854–5. "Further Papers relative to the alterations in the Constitutions of the Australian Colonies," Van Diemen's Land, p. 20.)

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of your memorialists have since met with ample confirmation, in the much more liberal reform of the Constitution introduced by the Victoria Government, which concedes the principle of an *elected* Upper Chamber, so earnestly desired by the colonists of South Australia; and your memorialists entertain the confident conviction that the colonists of South Australia are equally fitted to receive the great boon of an elective Parliament as the colonists of Victoria."

(P. 552, *Accounts and Papers.* Australia and New Zealand, vol. xxxviii., 1854–5. Copies of Petitions on proposed Constitution for New South Wales and South Australia, p. 12.)

DOWNING STREET.

SOUTH AUSTRALIA.

Address of the Legislative Council of South Australia to the Lieutenant-Governor, Sir H. E. F. Young, November 22, 1854.

The member for East Adelaide . . . brought forward a motion—"That, in the proposed Bill for constituting a Parliament in South Australia, this Council are of opinion that the Upper Chamber should be *elective*." During the debates on the first reading of the Parliament Bill and the motion above quoted, the Government officials, as well as the nominee members, spoke and argued strongly in favour of the abstract principle of a *nominated* Upper

NEW SOUTH WALES.

H.M.'s Secretary of State for the Colonies, Lord Kimberley, to Sir H. Robinson, Colonial Governor of New South Wales, November 29, 1872.

"It does not appear to me to have been established that the appointment of its (the Upper Chamber in New South Wales) members by *nomination* has been the cause of the difficulties which have from time to time induced ministers to recommend the addition to it at once, for a particular object, of an unusual number of members. If the tenure of his seat by a Legislative Councillor had been limited in the Constitution Act to a term of years, and it had been arranged

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Chamber, and were unanimous in their interpretation of the Dispatches of Her Majesty's Secretary of State for the Colonies; first, "That in reference to the constitution of the Upper Chamber as consisting of *nominated* members, it was impossible that the Government could arrive at any other conclusion than that the Dispatches left them no choice"; "That a specific measure had been proposed for our adoption, which the Secretary of State left us free to accept or reject"; "That the vital principle of the Bill was a Second Chamber nominated by the Crown"; and, second, "That the Dispatches confined the gift of the Crown lands to our acceptance of a nominated Upper House"; "That the control of the Land Fund depended on our framing a Constitution similar to that of Canada"; and "The Colonial Secretary stated that if the Council affirmed the principle of the motion (in favour of an *Elective* Upper Chamber) it would be fatal to the Bill, and the Government would support no other unless it contained the desired principle" (a *Nominated* Upper Chamber). Under these circumstances some of the elective members—who had declared that their own opinions and those of their constituents were in favour of an *Elective* Upper Chamber—voted for the "previous question," and entered into what is termed

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that a fixed number of seats should become vacant, either annually or at frequently recurring periods, there would have been little danger of the Legislative Council being, or continuing for any long time to be, in opposition to the policy supported by the Elective House. And it does not seem out of place to inquire whether, if any reform of the constitution of the Council should be held to be requisite, it is necessary to abandon the system of nomination. I do not wish to express a decided preference for either form of constitution, but I may observe that a Legislative Council constituted on an *elective* basis has proved itself, as your ministers are aware, not less liable than a *nomination* House to come into collision with the representatives returned to the Assembly.

(Quoted in *Accounts and Papers*, p. 98, vol. lxi., 1893, Parl. Papers, No. 198.)

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"the compromise," in pursuance of which some modifications were introduced into the nominee clauses, and the Parliament Bill was passed in its present form; some of those who signed the compromise, considering the nominee element of the Bill less objectionable than the continuation of the present system, which deprives the colonists of all control over the Land Fund—leaving it to be expended by a party not responsible to them, and on projects often opposed to the wishes of the colonists.

(*Accounts and Papers*, Áustralia to New Zealand, p. 59, vol. xxxviii. 1854–5; Further Papers relative to the Alterations in the Constitutions of the Australian Colonies, New South Wales (South Australia), p. 23.

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WEST AUSTRALIA.

Sir F. Napier Broome, Governor of West Australia, to Lord Knutsford, H.M.'s Secretary for the Colonies, November 6, 1888.

4. The Legislative Council, and I believe the Colony, have decided to accept your Lordship's views respecting the regulation of the Crown Lands, and respecting the protection of the Aboriginal Natives. The principle of a *nominated* Upper Chamber was also carried last night by a majority of 13 votes to 9. But this majority was produced by the

WEST AUSTRALIA.

Her Majesty's Secretary for the Colonies, Lord Knutsford, to Sir F. Napier Broome, Governor of West Australia, July 30, 1888.

7. I still think it desirable that such Chamber should be nominated, at all events in the first instance, and until the population of the Colony has considerably increased. It is, however, worthy of notice that none of the three Colonies which possesses a *nominated* Council have taken measures to change it for an *elective* body; and the working of

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voting of the official and nominee members. Of the 17 elected members of the Council (3 of whom were absent) 11 are in favour of an *elected* Upper Chamber, and they are supported by a considerable preponderance of public opinion throughout the Colony. I apprehend difficulty on this question of the Upper Chamber when the newly-elected Legislative Council meets to finally consider the Constitution Bill, and I would strongly recommend, as not inconsistent with the views stated in your Lordship's dispatch of the 30th July last, paragraph 7 (*vide* opposite), that, while the new Constitution should *begin* with a *nominated* Upper Chamber, the Act should provide for an *elected* Upper Chamber, either in six years' time, or when the population of the Colony shall have increased to 60,000 souls.

5. *Elective* Upper Chambers have "stood the test of thirty years' experience," in these Colonies at least, as well as nominated Upper Chambers. It is often argued that the last thing which a democratic Lower House desires is *to replace a weak, sleepy assembly of nominees by an elected Upper House, vigorous, vigilant, authorized and strengthened in the exercise of power by the suffrages of the most enlightened portion of the community. In the opinion of many persons this feeling partly accounts for the permanency of a nominated Upper*

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these Councils has stood the test of thirty years' experience.

(*Accounts and Papers*, Colonies and British Possessions, Australia (Western), p. 425, vol. lv., 1889. Correspondence respecting the Proposed Introduction of Responsible Government into Western Australia, p. 55. Parl. Papers C., 5743).

Her Majesty's Secretary for the Colonies, Lord Knutsford, to Sir F. Napier Broome, Governor of West Australia, January 15, 1889.

I have not changed my personal opinion that in the circumstances of Western Australia, where, after constituting a Legislative Assembly, there will necessarily be but a very limited number of gentlemen well qualified for seats in the Legislative Council, it would be of very great value to secure the power of nominating to that Chamber men of high character and capacity who might not desire to submit their qualifications to the vote of a very limited electorate. And it appears to me not impossible that when the new Constitution has been brought into operation the force of this consideration may be apparent to some, at all events, of those who now advocate an Elective Upper House; and they may also recognize the fact that an Elective Legislative Council is more liable under certain circumstances to come into

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Chamber. I do not wish myself to depreciate such a Chamber, but certainly the balance of even *conservative* opinion here is strongly in favour of an elected Legislative Council Only five of the elected members voted in favour of a nominated Upper Chamber. It is feared that some of these gentlemen may lose their seats on this question at the general election. Should this be the case, the majority among the elected members, hostile to a nominated Upper Chamber, would be still further increased when the new Chamber meets. Delay and difficulty would then occur.

(*Accounts and Papers* Colonies and British Possessions, Australia (Western), p. 442, vol. lv., 1889. Correspondence respecting the Proposed Introduction of Responsible Government into Western Australia, p. 72. Parl. Papers, C., 5743.)

Is it not the case that the Colonial feeling desired an elective Upper House to start with?

Sir T. C. Campbell, Bart.—Yes, I did myself, but I think it was a mistake. I think a nominated Upper House is the best to begin with (*i. e.* for a short period).

. . . How will you control the action of the Second Chamber?

Mr. Parker.—*A nominated Upper House is not, as a rule,*

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collision with the other Elective Chamber.

(*Accounts and Papers*, Colonies and British Possessions, Australia (Western), pp. 445–6, vol. lv., 1889. Correspondence respecting the proposed Introduction of Responsible Government into Western Australia, pp. 75–6. Parl. Papers C., 5743).

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a very strong House. It is not a House that is likely to stand against the popular Assembly. It might perhaps reject a measure once; but I do not think it is likely that a nominated Upper House would do so a second time.

(Evidence of Sir T. C. Campbell and Mr. S. H. Parker. Questions 1750–1, 2282. Minutes of Evidence Select Committee on Western Australia Constitution Bill, Parl. Paper, 160, May 6, 1890. Reports Committees, 1890, vol. xviii.)

DOWNING STREET.

NATAL.

"Any admission of the 'nominee' element into the (Upper Chamber of the) Constitution appeared repugnant to the strongly manifested feeling of the community."

(Address to electors of Natal by John Robinson, Chairman of Responsible Government Committee, February 1891.)

NEW ZEALAND.

Mr. W. P. Reeves, Late Agent-General for New Zealand (*Times*, March 22, 1910).

"If the Colonies might furnish one lesson more than another to the home country, it was this—to have nothing to do with Senators nominated for life."

NATAL.

Sir C. B. H. Mitchell, Governor of Natal, to Lord Knutsford, H.M.'s Secretary of State for the Colonies, March 8, 1892.

"The creation of a *nominated* Legislative Council, in accordance with your Lordship's suggestion, vastly increases the value of the Bill, and the chances of the efficient working of the proposed Constitution. The proposed property qualification (£500) might well have been doubled. . . . But these, if defects, are only minor ones, and would not prevent the useful constitutional action of the Upper Chamber."

(P. 25. Correspondence (contd.) relating to Responsible Government in Natal. (In continuation of (C. 6487), Parl. Papers, 216, 1893.

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Accounts and Papers, 1893-4, p. 795, vol. lx.)

TRANSVAAL.

Mr. Winston Churchill (*Under-Secretary for the Colonies*), July 31, 1906—*House of Commons.* — *Liberalism and the Social Problem.* London, 1909. pp. 39–40.

"The greater number of these (Colonial) Chambers are nominated; and I think that the quality of nominated Second Chambers, and their use in practice, have not been found inferior to those of the elected bodies."

APPENDIX VI

ON THE "SWAMPING" OF THE UPPER CHAMBER IN THE COLONIES, THE COLONIAL EQUIVALENT FOR "CREATING PEERS"

THE practice of "swamping" the Upper Chamber, the equivalent of the English practice of "creating peers," has varied somewhat in the different Colonies. It has almost always been discountenanced or grudgingly ratified by the Home Government. Up till 1868 "in every instance when questions have arisen as to the appointment of additional members of Council, the Governor has acted on his own responsibility without previous reference to the Secretary of State (for the Colonies)." Only on one occasion since, in 1892 (vide p. 273), has Downing Street overruled the Governor.

As the process and precedents are of considerable interest at the present moment, the chief ones in the different Colonies may be here quoted. It is important to notice that the mere increase or addition of members to a Legislative Council or Upper Chamber does not, in itself, constitute "swamping." That occurs when such increase is made with the definite aim of securing a majority in the Upper Chamber for the party in power in the Lower House. The result of a "swamping" policy of this kind must be to transform the Upper Chamber, to weaken its powers, and to overthrow its independence.

New South Wales, February 4, 1861, the Duke

of Newcastle (Colonial Secretary) instructs Sir J. Young, the Governor, that appointments are not to be made "on mere party lines." On May 21, 1861, Sir J. Young created twenty-one additional members *for one night only*, in order to carry a measure on the last night of the session. This action was farcical, and Newcastle disapproved "a measure so violent and in its nature so unconstitutional," and called it "a proceeding not creditable to the cause of Constitutional Government in Australia." Sir J. Young took the lesson to heart and refused to create two additional members in 1865, a refusal which caused the resignation of one of his ministers. The Home Government approved of Young's action, and declared his arguments to be "sound and convincing." In 1868 Governor Lord Belmore created three additional members, but the Home Government discountenanced "any increase" as "likely to be used as a precedent and therefore to be regretted." Lord Belmore therefore declined an increase in 1869, and Lord Granville, the Colonial Secretary, approved of his decision, and laid down the constitutional doctrine on the subject as follows—

Lord Granville to Governor, the Earl of Belmore, October 2, 1869.

"I am also fully aware that, on certain critical occasions, it may become not only expedient but indispensable to bring the two Houses into harmony, by creating or threatening to create, a number of Legislative Councillors sufficient for that purpose. But it is not the less clear that the whole value and character of the Upper Chamber will be destroyed if every successive ministry is at liberty, without any sufficient occasion, to obtain a majority in the Council by the creation of Councillors. . . . To prevent this a constitutional understanding

should be arrived at that "it" should be resorted to *not to strengthen a party,* but in reality for the convenience of legislation."

Queensland.—An almost exactly similar doctrine was laid down by a later Colonial Secretary in the case of Queensland five years later.

Lord Carnarvon to Lord Normanby, Governor of Queensland, 1874.

"In a Colony . . . such as Queensland the tendency to introduce a large addition to the number of the Legislative Council . . . will from time to time make itself felt. But if the balance of constitutional power is not to be more than a mere theory, it is clear that such a tendency cannot be encouraged to take its full course. . . . It is prudent to avoid such an increase in the number of the Legislative Council as may give a temporary advantage to one party, thereby altering the constitutional character and functions of the Legislative Body, weakening its general influence, and possibly, if not provoking reprisals at some future day, at least encouraging a practice, which, the more it is indulged, the less easy will it be to restrain."

New Zealand.—These two statements of principle had an important effect on New Zealand. In that Colony three members had been added to the Upper Chamber in 1869, and several in 1877, and the Home Government had guardedly approved the Governor's action in both cases. On January 23, 1891, Lord Onslow (then Governor) added six new members to the Upper Chamber, but acted strictly in the spirit of the doctrine laid down by Carnarvon and Granville.

"I thought it my duty to demand from them (my

ministers) an assurance that the advice was tendered, *less with a view to reward party services,* than for the purpose of strengthening the efficiency of the Upper House. That assurance has been given me, and I have, therefore, accepted the advice."

It cannot be said that this action really "swamped" the Upper Chamber; there had been 48 members of the Upper Chamber in 1887, but the number had been reduced to 39 in 1891, and the effective strength to about 30. Moreover, shortly afterwards, the ministers demanded a further increase of 11, but the Governor refused it and reduced their demands to 6. He took the ground that 11 was "so undue a proportion as to make a dangerous precedent, in case a minister should wish for party purposes to 'swamp' an adverse vote in the Upper House." This creation of 6 was made by him, when a ministry was just retiring, with the result that the incoming ministers were confronted by a solid phalanx of opponents in the Upper House. The incoming Governor, Lord Glasgow, refused to grant the wish of the new Premier (Ballance) to create twelve additional members. The case was certainly urgent. There were no more than half-a-dozen governmental supporters in the Upper Chamber, and Ballance declared it "not the wish . . . to swamp (!) the Legislative Council, but only to have a certain amount of debating power of which at present they (the ministers) have none." The Governor would only offer to create eight new members, "as a larger number might have had the effect of destroying the independence of one of the two Chambers, which I am bound by the Constitution to uphold." Ballance refused to accept eight, and an angry correspondence ensued between the ministry and the Governor. Finally the matter was referred to

the Home Government, the first occasion in colonial history in which this course was taken over this particular type of question. The Colonial Secretary (Lord Ripon) decided in favour of creating twelve additional members (September 24–26, 1892). At the same time he declared that he did not consider this addition to partake of the nature of "swamping," and by implication censured the Governor's action in refusing the creation.*

Through all these different precedents the general line of policy runs clearly up to the year 1888. "Creation of peers" or addition of members for "swamping" purposes was always steadily discouraged by the Home Government. On only one occasion, in New South Wales in 1861, did a clear instance of "swamping" occur, and in this case it was sharply censured by the Home Government. In no other Colony can instances of addition of members to the Upper Chamber be claimed to justify the policy or precedent of "swamping." The ideal of Downing Street throughout was to sanction additions sufficient to make the Upper House fairly representative of the several parties in the popular Chamber, but to discourage every attempt to make it purely partisan or merely an echo of the ministry in power. This ideal appears in every case, except in that of New South Wales in 1861, to have been realized by the Governor. The statement generally holds good of the *nominee* Upper Chambers of New Zealand, Queensland, Quebec, Nova Scotia and Newfoundland, up till the present time.

New South Wales.—But to this rule there is one

* Since 1891 the principle of nominating members of the Upper Chamber for seven years, and not as before for life, had been operative in New Zealand. Hence there is now not the same need for increasing the Upper House, because vacancies now occur at the end of seven years, and all of them can be filled up at the will of the party in power.

notable exception, that of New South Wales. We have already related the case of "swamping" in that Colony in 1861. No subsequent additions to its Upper Chamber can be described as of that nature, until we reach the year 1889. In that year, in consequence of a deadlock between the two Chambers, the Governor (Sir Frederic Carrington) consented to "swamp" the Upper Chamber, on the advice of the Premier (Sir Harry Parkes). Twelve new members were added, and the majority of the Legislative Council was changed into a minority. The result was to establish a disastrous precedent and to destroy the independence of the Upper Chamber. The Home Government had often foretold the results of such a policy, and experience has only confirmed their lugubrious warning. Only recently (1908) a similar large increase was found to be necessary, and each successive addition marks a further stage in the decline of the *Nominee* Upper Chamber in New South Wales. It may now be taken as established constitutional doctrine in that Colony that the Governor is bound to act on the advice of his ministry in this respect. In every other Colony, which possesses a nominated Upper Chamber, some way of circumventing the difficulty has been found, and the policy of "swamping" has become obsolete. (*Vide* Authorities, Papers and Extracts relating to the Appointment of Members to the Upper House of Representatives in New Zealand and the Colonies. May 2, 1893, Parliamentary Paper 198, in *Accounts and Papers,* 1893, vol. lxi. This contains practically all the important precedents till 1888. *Vide* also Keith, *Responsible Government in the Colonies,* London, 1909, chap. vii.; Todd, *Parliamentary Government in the British Colonies,* 2nd edition (1894), chap. xvii., part ii.)

APPENDIX VII

ON THE REPRESENTATION OF RELIGIOUS BODIES, OR OF COLONIAL DEPUTIES, IN A REFORMED HOUSE OF LORDS

Religious Representatives.—The retention of the Bishops in a reformed House of Lords, or the admission of fresh representatives of other denominations, is clearly a matter for grave consideration. It is not, I believe, generally known that this plan was seriously discussed at least once for a Colonial Constitution,* but subsequently abandoned as wholly impracticable. The defence for the retention of the Bishops (which Freeman was fond of making), that they represent the sole elective element in the Upper House, becomes meaningless if other elective elements are to be introduced. Lord Newton's Committee proposed to reduce the twenty-six Bishops to the number of ten.

* Sir W. Denison, Lieut.-Governor of Van Diemen's Land, to Duke of Newcastle, H.M.'s Secretary of State for Colonies and War, February 14, 1854: "There must, of course, be some *ex-officio* representatives of the Government in the House; the Bishops of the Church of England and of Rome might sit as representatives of the Ecclesiastical bodies; but as the object with which I advocate the establishment of a Second Chamber is more that of operating morally upon the body of the community than of facilitating generally the operations of the Executive Government, I should be loath to recommend the adoption of a plan which might in any way neutralize the beneficial action of such a body upon the mass of the people." (*Accounts and Papers*, vol. xxxviii., 1854–5. Further Papers *re* Alterations in the Constitutions of Australian Colonies, pp. 2–3.)

It went further, and said it would "gladly" welcome representatives of other great Churches of the three kingdoms, but, as it made no provision for their inclusion, this "gladness" remains an aspiration. Indeed, the difficulties in the way seem almost insuperable, and the practice does not seem to have been adopted in any except somewhat reactionary and clerical countries. There is the further very serious objection that no proposal is made to represent the views or interests of freethinkers in a reformed Upper Chamber, and thus some of the most able, serious and religious-minded men of the country might be deprived of any opportunity of direct representation of their theological views in the Upper Chamber. Generally the difficulties to be overcome seem greater than the advantages to be gained.

Colonial Representatives.—The idea of the representation of the Colonies in Parliament is not new, and was actually proposed by the great William Pitt for the House of Commons.* This idea has been actually carried out in several continental countries, as Portugal and France. But the essential idea in these cases appears to be that the colonial members sit in the Home Legislature because the Colonies are considered part of the Home country, an extension of county or department overseas, and not individual units with real self-government. This method of representation might therefore be regarded with suspicion by our Colonies, as may be seen from the following memorandum—†

"Several expedients have been proposed, such

* *Vide* Basil Williams, *English Historical Review*, vol. xxiii., pp. 756 *sqq.*, London, 1907.

† *Accounts and Papers*, 1884–5, vol. lv., Colonies, General. On Federation of British Empire. Memorandum by Sir Julius Vogel, K.C.M.G., Colonial Treasurer of New Zealand, in despatch of Governor of New Zealand, Blue Book, C. 4521, July 1885, pp. 5–6.

as a Board or Council to the Secretary of State, the giving a more defined and responsible position to the Agents-General, the leaving the Secretary from time to time to invite the co-operation of the Colonies, and other plans of the same character. They are all open to the objections that they are not sufficiently elastic and capable of expansion, and that they are out of harmony with the ingrained feeling in the Colonies that political power should proceed from an *elective* and not a *nominated* source."

He goes on to suggest the plan of "giving to the Colonies the right to elect a certain number of members to the House of Commons. It is not much to the purpose to say that some foreign countries give to their colonial possessions representation in the Supreme Legislature, because no foreign colonies have essential features in common with the Constitutional Colonies of Great Britain. It is quite the case also that the plan is open in part to . . . objections . . . namely, that such representatives would hold an incongruous position, both in respect to their power of interfering with local affairs and with revenues to which those they represent do not contribute. . . . If federation is ever to be, the source from which it will arise must be *the House of Commons,* and it has to be remembered that the Imperial Parliament is really only local by its own decisions. . . . It would be of paramount importance that they (the colonial representatives) should be *elected* by the constituencies not *nominated* by the governments of the Colonies."

This memorandum appears to express a very general feeling, and, whatever its merits, seems decisive against the feasibility of any representation of the Colonies in the Lords. So far as I can ascertain from good authority colonial opinion appears generally against this last expedient. The grounds

of objection are diverse, some fear that such representation might lead to interference of the Imperial Parliament in purely colonial affairs. There are, however, more general grounds for objection. Indeed, if growth is the chief characteristic of the English Constitution, an artificial introduction of colonial delegates into the Upper Chamber, against the wishes of the Colonies themselves, would be a foolish or impracticable measure. Moreover, colonial opinion would not wish to be represented in the Secondary Chamber but in the Popular one, as we see from the above Memorandum. But, so far as colonial opinion can be ascertained at the present time, it does not regard even this idea with any favour. The colonial statesmen seem to believe with singular unanimity that a system of conferences or of representation at an enlarged Privy Council, and not in a legislature, is the true method of drawing closer the links between Motherland and Colonies. This course certainly seems more in harmony with the general growth of British institutions.

TABLES ILLUSTRATING THE COMPOSITION AND THE POWERS OF COLONIAL AND CONTINENTAL UPPER CHAMBERS.

I. Colonial Upper Chambers: Method of Appointment.

II. Colonial Upper Chambers: Restrictions on Financial Powers.

III Colonial Upper Chambers: In Relation to the Lower Chambers.

IV. Continental Upper Chambers: Composition and Relations to the Lower Chambers.

N.B.—In the following tables the figures relate to 1909. They have been chiefly taken from the *Statesman's Year Book* for 1910, supplemented, wherever necessary, by the most approximate information available.

Federal Upper Chambers are distinguished from those of Unitary States by the name of the country being placed between brackets.

COLONIAL UPPER CHAMBERS

I.—METHOD OF APPOINTMENT

Electoral Franchise for Upper Chamber	ELECTED	NOMINATED	
		FOR LIFE	FOR A PERIOD OF YEARS
Freeholder, £50, or Leaseholder, £20 yearly, or Educational test.	Victoria	New S. Wales.	New Zealand (7 since 1891)
		New Zealand (before 1891)	
Freeholder, £100, or Leaseholder, £25 yearly.	W. Australia	Queensland	Natal 10
Freeholder, £50, or Leaseholder, £20 yearly.	S. Australia	Nova Scotia †	
Freeholder, £10 yearly, or Leaseholder, £30 yearly, or Educational test.	Tasmania	Quebec †	
Same as Lower House.	[Australian Commonwealth]	Newfoundland	Transvaal ‡ 5
,, ,, ,,	Cape of Good Hope	[Dominion of Canada]	Orange 5 River Colony ‡
,, ,, ,,	[S. Africa] *		

* Eight members are, however, nominated.

† Nova Scotia and Quebec are the only provinces of Canada which appear in these tables, the remaining seven being unicameral.

‡ Though the first councils were nominated, provision was made to allow alteration to an elective basis.

II. RESTRICTIONS OF THE FINANCIAL POWERS OF COLONIAL UPPER CHAMBERS

The right of initiation is always confined to the Lower House. The following table gives a list of the cases in which further legislative restrictions have been made.

Upper Chamber cannot amend	Newfoundland . . .	No. 249 of the *Rules* of the House of Assembly
	Natal	Sect. 49 of Constitution Act of 1893
	Transvaal	Sect. 56 of the Letters Patent of 1906
	Orange River Colony . .	Sect. 57 of the Letters Patent of 1907
	[S. Africa]	Sect. 60 of S. Africa Act of 1909
Upper Chamber cannot amend but can suggest amendments	Victoria	Sect. 30 of Victorian Act of 1903
	W. Australia . . .	Amending Act of 1899
	[Australian Commonwealth].	Sect. 53 of the Constitution

III.—COLONIAL UPPER CHAMBERS: IN RELATION TO THE LOWER CHAMBERS

(1) ELECTIVE

Colony.	Upper Chamber.		Lower Chamber.	Provisions for avoiding Deadlock.
	Period for which Members sit.	Number of Members.	Number of Members.	
Victoria	6 years	34	65	Dissolution followed by simultaneous dissolution of both Chambers
W. Australia . .	6 years	30	50	
S. Australia . .	6 years	18	42	Dissolution followed by simultaneous dissolution of both Chambers. Or, by election of a limited number of additional members to the Upper Chamber
Tasmania . . .	6 years	18	30	
[Australian Commonwealth]	6 years	36	75	Joint-session after simultaneous dissolution of both Chambers Referendum for Constitutional Amendment
Cape of Good Hope	7 years	26	107	
[S. Africa] (1910).	10 years	40 (8 nominated)	121	Joint-session without dissolution of Lower Chamber

III (*Continued*).—COLONIAL UPPER CHAMBERS: IN RELATION TO THE LOWER CHAMBERS.

(2) NOMINATED

Colony.	Upper Chamber.		Lower Chamber. Number of Members.	Provisions for avoiding Deadlock.
	Period for which Members sit.	Number of Members.		
New S. Wales .	Life	57	90	"Swamping" is constitutionally possible
Queensland . .	Life	44	72	Referendum
New Zealand . .	Life before 1891. 7 years since 1891	45	80	"Swamping" is legally possible
Nova Scotia . .	Life	21	38	
Quebec	Life	24	74	
Newfoundland .	Life	18	36	
[Canada] . . .	Life	87	221	Six members may be added to the Upper Chamber
Natal	10 years	13	43	
Transvaal . . .	5 years	15	69	Joint-session with or without dissolution of either Chamber
Orange River Colony	5 years	11	39	Joint-session with or without dissolution of either Chamber

IV. CONTINENTAL UPPER CHAMBERS.

N.B.—Luxemburg, Russia, Turkey, Roumania, Servia and Japan are omitted from the following table. The constitution and powers of their Upper Chambers are discussed in Appendices II–III. pp. 241–9

The princes of the reigning family are members by right of the Upper Chamber in monarchical countries, and must therefore be reckoned in addition to the constituent elements of those assemblies which are enumerated in the table. Brazil and the United States are added at the end of this table, as they have been constantly mentioned in this work.

IV. CONTINENTAL

(1) UPPER CHAMBERS ELECTED

Country.	Upper Chamber.	
	How Appointed.	Number of Members.
France	Indirect election based upon universal suffrage	300
Sweden	Indirect election (proportional representation)	150
Netherlands (Holland)	Indirect election by provincial legislatures	50
Belgium	Eighty-three members by direct election, 27 members by indirect election based on universal suffrage. (Plural vote and proportional representation)	110
Norway	Appointed from and by the Lower Chamber	30
[Switzerland]	Elected by the cantons	44

(2) UPPER CHAMBERS PARTIALLY

Denmark	Fifty-four members elected by indirect election and 12 nominated	66
Spain	(1) One hundred and eighty elected members (Indirect election) (2) Hereditary, official and ecclesiastical members (3) Nominated life members	360

(3) UPPER CHAMBERS VARIOUSLY

Italy	Life members nominated out of certain categories	328
Portugal	(1) Nominated life peers (94) (2) *Ex officio* ecclesiastical members (12) (3) Hereditary peers in diminishing number (39)	145

UPPER CHAMBERS

ON A POPULAR BASIS

Lower Chamber.		Provisions for Avoiding Deadlocks.
Number of Members.	How Elected.	
584	Universal suffrage	Rules of procedure provide for joint committees to report; joint-sessions for constitutional amendments Senators' consent necessary to dissolution of Lower Chamber
230	Universal suffrage	Joint-sessions decide on disputed finance Bills Simultaneous dissolution of both Chambers is possible
100	Small property franchise	Upper Chamber forbidden by law to amend money or other bills Simultaneous dissolution of both Chambers is possible
166	Universal suffrage (proportional representation)	Simultaneous dissolution of both Chambers is possible
123	Universal suffrage	The Chambers sit as one House in finance, and in all cases of dispute. In the latter case two-thirds majority needed to pass Bill. Simultaneous dissolution of both Chambers is inevitable by the constitutional provisions
167	Universal suffrage	Joint committees report; Joint-sessions for certain matters

ELECTED ON A POPULAR BASIS

114	Universal suffrage	Joint committees can report (Art. 53 of Constitution) Simultaneous dissolution of both Chambers is possible
406	Universal suffrage	Joint committees must report (Law of Relations, 1837) Dissolution of elective part of Senate simultaneously with the Chamber is usual

COMPOSED ON A NON-POPULAR BASIS

508	Property, educational or occupational franchise	"Swamping" is possible
155	Qualified universal suffrage	Joint committees must decide (Act of 1896)

UPPER CHAMBERS VARIOUSLY COMPOSED

Country.	Upper Chamber.	
	How Appointed.	Number of Members.
Austria	(1) Nominated life members (2) Hereditary members (3) Ecclesiastical *ex officio* members	257
Hungary	(1) Hereditary members (249) (2) Official, ecclesiastical and nominated life members (67) (3) Three elected Croatian deputies	319
[Germany]	Nominated by the rulers of the individual States of the Empire	58
Prussia	(1) Hereditary members (115) (2) Official and ecclesiastical representatives (177) (3) Nominated life members (73)	365
Saxony	(1) Hereditary members and representatives (2) Official and ecclesiastical members and representatives (3) Nominated life members	46
Bavaria	(1) Hereditary members and representatives (2) Ecclesiastical and official members (3) Nominated life members	69
Würtemberg	(1) Hereditary and ecclesiastical members (2) Representatives of various interests (3) Nominated life members	50
Hesse-Darmstadt	(1) Hereditary members and representatives (2) Twelve nominated life members (3) Ecclesiastical and official members	34
Baden	(1) Elected representatives of various interests (2) Hereditary, ecclesiastical and official members (3) Nominated life members	40

AMERICAN FEDERAL

[Brazil]	Three elected by direct vote from each State	63
[United States]	Two elected by each State-legislature	92

ON A NON-POPULAR BASIS—*continued*

Lower Chamber.		Provisions for Avoiding Deadlocks.
Number of Members.	How Elected.	
516	Universal suffrage	Joint committees can report. Since 1907 "swamping" is practically impossible
453	Property, educational or occupational franchise	"Swamping" is possible
397	Universal suffrage	
433	Indirect election by three classes of electors	"Swamping" is possible
82	Indirect election by three classes	Joint committees report
163	Qualification by payment of direct taxes	
93	Universal suffrage	Disputes as to Budget decided by a majority of total votes
50	Indirect election based on universal suffrage	
73	Universal suffrage	Disputes as to Budget decided by a majority of total votes. In ordinary legislation joint committees can report (Law of 1904)
UPPER CHAMBERS		
212	Universal suffrage—proportional representation	Joint committees confer
391	Partially universal suffrage	Joint committees report Biennial renewal of one-third of Senate coincides with dissolution of popular House

NOTES AND ILLUSTRATIONS

CHAPTER I

[1] George Canning, speech to English merchants at Lisbon, April 2, 1816. The application in the text is altered from the original.

[2] A division of power, in the sense of a division of sovereignty between two equal authorities in a State, is, strictly speaking, impossible. According to strict theory, the political sovereignty in a State is indivisible, and in a Federal State, as in a Unitary one, the ultimate power must rest with a single authority. In practice, however, it is possible to establish a *de facto* division of power in a Federation, and to assign one sphere of power to the component States and another to the Federal Union. No such practical division of power can be established in a Unitary State; for example, it would be ludicrous to talk of County Councils in England as having power or sovereignty with the Parliament.

A further aspect of the question is raised when we inquire as to whether sovereignty can be divided between the people and the legislature of a country. But with this latter point we are not immediately concerned. *Vide*, on the whole question, C. E. Merriam, *History of the Theory of Sovereignty since Rousseau* (Columbia University Studies, vol. xii., No. 4), New York, 1900; A. V. Dicey, *Law of the Constitution*, seventh edition, London, 1908, pp. 76, 145, 425, *sqq.*; J. W. Burgess, *Political Science and Comparative Constitutional Law*, New York, 1890, vol. i., pp. 53–8, 69, 122–4; Westel W. Willoughby, *The Nature of the State*, New York, 1896, pp. 276–308.

[3] It is significant that England, Hungary and Bavaria have really the oldest and most historic Upper Chambers in Europe, and therefore are more attached to the hereditary principle.

[4] Lowell, *Government of England*, London, 1908, vol. i., pp. 1–15, argues that the restraint of written Constitutions is less than is frequently supposed, and that in all written

Constitutions a vast mass of custom interprets the written word. The argument is ingenious, but there still remains vast difference between a Constitution like that of England, in which a few great statutes are interwoven with a mass of equally obligatory custom, and a Constitution like that of almost any Continental country, where nearly all the great principles are embodied in statutes or in organic laws, and where customs interpret but do not create constitutional usage.

CHAPTER II

[1] There are a few exceptions among the English-speaking peoples; in Scotland, in Cape Colony, in French Canada and in Louisiana Roman Law or a modification of it prevails. But these exceptions can all be traced to direct imitation from foreign countries or to the presence of a large number of foreigners in the locality affected; hence the general truth of the statement in the text is in no way impaired.

[2] The contrast between the American and English systems of government has been admirably brought out by Sir J. G. Bourinot (*Canadian Studies in Comparative Politics*, Montreal, 1890, pp. 58–60). I make no apology for making the following lengthy extracts from this excellent work, because the book is, unfortunately, but rarely seen in England. The reference throughout is to the Federal Governments both of the United States and Canada, but in the matter of the relations of executive and legislature, the Federal and State Governments of America are framed on the same lines.

"Under the American system the executive and legislative authorities may be constantly at variance, and there is little possibility, on all occasions, of that harmonious and united action which is necessary to effective government. The President may strongly recommend certain changes in the tariff, or in other matters of wide public import, but unless there is in the Houses a decided majority of the same political opinions as his own, there is little prospect of his recommendations being carried out. Indeed, if there is such a majority, it is quite possible that his views are not in entire accord with all sections of his party, and the leading men of that party in Congress may be themselves looking to a Presidential succession, and may not be prepared to strengthen the position of the existing incumbent of the

executive chair. Individual members of the Cabinet can and do give information to Congress and its Committees on matters relating to their respective departments, but they are powerless to initiate or promote important legislation directly, and if they succeed in having Bills passed, it is only through the agency of and after many interviews with the chairman of the Committees having control of such matters. If Congress wishes for information from day to day on public matters, it can only obtain it by the inconvenient method of communicating by messages with the departments. No minister is present to explain, in a minute or two, some interesting question on which the public wishes to receive immediate information, or to state the views of the administration on some matter of public policy. There is no leader present to whom the whole party looks for guidance in the conduct of public affairs. The President, it is true, is elected by the Republican or Democratic party, as the case may be, but the moment he becomes the executive he is practically powerless to promote effectively the views of the people who elected him, through the instrumentality of ministers who speak his opinions authoritatively on the floor of Congress. His messages are generally so many words, forgotten too often as soon as they have been read. His influence, constitutionally, is negative—the veto—not the all-important one of initiating and directing legislation, like a Premier of Canada. The Committees of Congress, which are the governing bodies, may stifle the most useful legislation, while the House itself is able, through its too rigid rules, only to give a modicum of time to the consideration of public measures, except they happen to be money or revenue Bills. The Speaker himself is the leader of his party, so far as he has influence over the composition of the Committees, but he cannot directly initiate or control legislation. Under all the circumstances, it is easy to understand that when the executive is not immediately responsible for legislation, and there is no section or Committee of the House bound to initiate and direct it, it must be too often ill-digested, defective in essential respects, and ill-adapted to the public necessities. On this point a judicious writer says, 'This absence of responsibility as to public legislation, and the promotion of such legislation exclusively by individual action, have created a degree of mischief quite beyond computation.' And again, 'There is not a State in the Union in which the complaint is not well grounded that the laws passed by the legislative bodies are slipshod in expression, are inharmonious in their nature, are not subjected to proper revision

before their passage, are hurriedly passed, and impose upon the Governors of States a duty not intended originally to be exercised by them, that of using the veto power in lieu of a Board of Revision for the legislative body; and so badly is the gubernatorial office organized for any such purpose, that the best-intentioned Governor is compelled to permit annually a vast body of legislation to be put upon the Statute Book which is either unnecessary, in conflict with laws not intended to be interfered with, or passed for some sinister and personal ends.'

"Compare this state of things with the machinery of administration in the (Canadian) Dominion, and we must at once see that the results should be greatly to the advantage of Canada. Long before Parliament is called together by proclamation from the Governor-General, there are frequent Cabinet meetings held for the purpose of considering the matters to be submitted to that body. Each minister, in due order, brings before his colleagues the measures that he considers necessary for the efficient administration of his department. Changes in the tariff are carefully discussed, and all other matters of public policy that require legislation in order to meet the public demands. Bills that are to be presented to Parliament are drafted by competent draughtsmen under the direction of the department they affect, and, having been confidentially printed, are submitted to the whole Cabinet, where they are revised and fully discussed, in all cases involving large considerations of public policy. The Governor-General does not sit in Executive Sessions with his Cabinet, but is kept accurately informed by the Premier of all matters which require his consent or signature. When Parliament meets he reads to the two Houses a speech, containing only a few paragraphs, but still outlining with sufficient clearness the principal measures that the Government intend to introduce in the course of the session. The minister in charge of a particular measure presents it with such remarks as are intended to show its purport. Then it is printed in the two languages, and when it comes up for a second reading, a debate takes place on the principle, and the Government are able to ascertain the views of the House generally on the question. Sufficient time is generally given between important stages of measures of large public import to ascertain the feeling of the country. In case of measures affecting the tariff, insolvency, banking and financial or commercial interests of the Dominion, the Bills are printed in large numbers, so as to allow leading men in the important centres to understand their details.

In Committee of the whole the Bill is discussed clause by clause, and days will frequently elapse before a Bill gets through this crucial stage. Then, after it is reported from Committee, it will often be reprinted, if there are material amendments. When the House has the Bill again before it, further amendments may be made. Even on the third reading it may be fully debated, and referred back to Committee of the whole for additional changes. At no stage of its progress is there any limitation of debate in the Canadian House. At the various readings a man may speak only once on the same question, but there is no limit to the length of his speech, except what good taste and the patience of the House impose upon him. In Committee there is no limit to the number of speeches on any part of the Bill, but, as a matter of fact, the remarks are generally short and practical, unless there should be a Bill under consideration to which there is a violent party antagonism, and a disposition is shown to speak against time and weary the Government into making concessions, or even withdrawing the objectionable features of the measure. After the Bill has passed the House, it has to undergo the ordeal of the Senate and pass through similar stages, but this is not, as a rule, a very difficult matter, as the Upper House is generally very reluctant to make any modifications in Government measures. If the Bill is amended, the amendments must be considered by the House, which may be an occasion for further debate. Then, having passed the two Houses, it receives the assent of the Governor-General, and becomes law. Under modern constitutional usage, he does not refuse his assent to a measure which may immediately affect Imperial interests and obligations, but simply 'reserves' it for the consideration of the Imperial authorities, who must within two years allow or disallow it, in conformity with statute. If the Government should be unable to pass a Bill of their own involving great questions of public policy, it would be their duty to resign, and another ministry would be called upon to direct the administration of public affairs; or they might ask for a dissolution, and an appeal to the people on the question at issue. At any rate, the people make their influence felt all the while in the progress at legislation. It is not as in Congress, where the debates are relatively unimportant, and not fully reported in the public Press, and bills find their fate in secret Committees. As the Press of Canada is fully alive to the progress of every public measure, and all important discussions find their way from one end of the country to the other, every opportunity is given for a full expression of public opinion,

by means of petitions, public meetings, and representations to the members of each constituency. The Government feel the full sense of their responsibility all the while, for on the popularity of their measures depends their political existence. An unfavourable vote in the House may at any moment send them back to the people.

"In the case of other public measures which are not initiated by themselves the Government exercise a careful supervision, and no Bill is allowed to become law unless it meets with their approval. The same scrutiny is exercised over private or local legislation, that is, Bills asking for the incorporation of banking, railway, insurance and other companies, and for numerous objects affecting private and public interests in every community. This class of Bills falls under the denomination of local or private, as distinguished from those involving questions of general or public policy. In the United States Congress and State Legislatures the absence of a methodical supervision by responsible or official authorities has led to grave abuses in connection with such legislation. The 'Lobby' has been able to exercise its baneful influence in a way that would not be possible in Canada, where, as in England, there is a responsible ministry in Parliament, and there are rules governing the introduction and passage of such legislation, with the view of protecting the public and at the same time giving full information to all interests that may be affected, and enabling them to be represented before the legislative Committees. We are told, on the same authority from which I have already quoted, that 'the influence of the Lobby has proved so formidable an evil that many States of the Union have, within a decade, by acts of constitutional conventions or by regular amendments to their organic law, prevented their legislative bodies from enacting special laws in a variety of cases.' 'But,' it is truthfully added, 'the limitation of the power to enact private or special legislation has created, in its turn, an evil far greater than that which it was intended to stay.' The result is that the whole body of general legislation 'is thrown into the arena of special interests, to be changed, modified, or destroyed as special interests may dictate.'"

[3] One of the reasons is that the Referendum, or the principle of submitting legislation to the popular vote, has been much used of late in the American State-Governments. It has been widely felt that neither Lower Chamber nor Senate is exempt from corrupt influences, and the remedy has not been to strengthen or to purify the Lower Chamber, but to introduce a new element—the people—as the direct judge

between the two Chambers. *Vide* Bryce, *American Commonwealth*, New York, 1908, vol. i., pp. 465, 467, 469, 474, 609; ii., 71 note, 259, 355; Lecky, *Democracy and Liberty*, London, 1909, vol i., pp. 277–93.

[4] It is perhaps worth pointing out that the system of choosing the Executive from the majority in the popular House in the Colonies, though advocated by Lord Durham, was not at first adopted by Earl Grey and his contemporaries (*vide* especially *Correspondence Relating to Responsible Government in New Zealand*, 1855; *Accounts and Papers*, vol. xxxviii. 1854–5). These references and many others will show that the Home Government had some idea of creating an Executive out of permanent civil servants, and of making it independent of the Legislature in the Colonies. Something equivalent to the American system was, in fact, contemplated. In practice, however, this scheme proved unworkable, and was generally abandoned. Ultimately the universal practice came to be that the ministers should be chosen from the majority in the Lower House, and should depend on that majority for their continuance in office. Responsible Government in this sense appears to have been what Durham originally advocated in his famous Report of 1839, though the Home Government took a long time to get reconciled to the idea (vide *Durham's Report*, London, 1902, pp. 50–9; Temperley, *Cambridge Modern History*, London, 1909, vol. xi., pp. 757–60; Bernard Holland, *Imperium et Libertas*, London, 1901).

[5] The first realization of the need of this policy is expressed in Earl Grey's *Colonial Policy of Lord John Russell's Administration* (1846–52), two vols., second edition, London, 1852, vol. ii., pp. 94–7, 325–6. The Australia Constitution Act of 1850 gave considerable powers to the Colonies in Australia in this matter. Practically complete powers to amend their Constitutions were granted to all self-governing Colonies in 1865 by what is known as "the Legislative Charter of the Colonies." *Vide* Extract from the Act 28 and 29 Vict., c. 63 (*Colonial Laws Validity Act*, 1865): "Every Representative Legislature shall in respect to the Colony under its jurisdiction have, and be deemed at all times to have had, full power to make Laws respecting the Constitution, Powers and Procedure of such Legislature; provided that such Laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the time being in force in the said Colony." Special provisions exist in a number of Colonies with regard to constitutional

amendments. Bills revising the Constitution are distinguished from ordinary Bills in that a specially cumbrous procedure or a specially large majority in the Legislature is necessary before they pass into Law (vide *infra*, note 9, for examples). In this sense, then, the freedom of certain Colonies to transform their Constitutions from within is limited, or rather rendered difficult. In the latest colonial Constitutions, those of the Transvaal,* Orange River Colony * (and also of Federal South Africa), such special arrangements practically do not exist, and after ten years the Constitutions of each can be almost completely remodelled from within. This is the nearest approach to the model in England herself, where there is no difference recognized between the procedure for ordinary legislation and for constitutional amendment.

[6] It is more ingenuous to describe this policy of reforming the Lords by creating Life-Peers as Whig, though it was held by other statesmen of different views and parties. But the plan was actually proposed by a Whig Ministry including such typical representatives of Whig doctrine as Palmerston and Lord John Russell, and it was the favourite device of Walter Bagehot, who may be described as an independent Whig of the Palmerstonian era. *Vide* Bagehot, *The English Constitution* (London, 1905), pp. 122–9. J. S. Mill also appears to have favoured this scheme. Vide *Representative Government*, chap. xiii., and also *Letters of John Stuart Mill*, ed. Hugh Elliot (London, 1910), vol. ii., pp. 198–9, on Earl Russell's Bill for the creation of Life-Peerages.

"Lord Russell's Bill and its favourable reception by the Lords" (it was eventually rejected by 106 to 77) "was no otherwise of importance than as showing the need which the Lords feel of strengthening their position. So small a number of life-members would do little good even if they were always honestly selected, which they will not be. A few good names may be put in at first, but as a rule the life-peerage will be a refuge for the mediocrities of past administrations. . . . I doubt if a Second Chamber can ever again carry weight in English politics unless popularly elected. I feel sure, at all events, that nothing less than what I proposed in my book on *Representative Government* (chap. xiii.) will enable it to do so."—*Letter to E. Chadwick*, May 2, 1869.

[7] *Vide* Earl Grey, *Colonial Policy*, ii. 322–5. An account of

* Since the inauguration of Federal South Africa the constitutions of these two Colonies have been totally altered,

the working of this unicameral system in New South Wales is given by E. Jenks, *History of the Australasian Colonies* (Cambridge Historical Series), Cambridge, 1895, pp. 160–3. The principle was to make the Single Chamber resemble the bicameral system as nearly as possible. Hence one-third of the Chamber was nominated and two-thirds elected on a relatively popular franchise. Earl Grey's own personal opinion appears finally to have been that this unicameral system should be applied to the Colonies all round. He seems to have thought that the nominated section of the Single Chamber would secure full discussion and debate for every proposed measure, even if it could not check its passage into law. Moreover, in the last resort he trusted that the Home Government would retard, disallow, or veto objectionable measures. *Vide* Earl Grey, *Colonial Policy*, ii. 97–101, and note on p. 101. An interesting variation of this Single-Chamber system was attempted recently (1891) in Natal, but the Home Government vetoed the project. Its scope may be seen from the following extract—

"5. This change (adoption of a Single Chamber) made it necessary to provide in some other form for these conservative checks upon hasty legislation which are inseparable from constitutional Government, and without which sound and safe administration would be impossible.

"6. The checks thus provided are twofold, namely—

"(*a*) All measures that shall specially affect any section of the population not of European birth or descent have, prior to debate, to be referred to and reported upon by a Standing Committee of the Legislative Council, consisting of ministers and four other members of the Council, to be chosen by that body.

"(*b*) All Bills that impose any special disability or restriction upon persons not of European birth and descent have to be reserved by the Governor for the signification of her Majesty's pleasure."

(*Address to the Electors of Natal*, February 1891, by John Robinson, Chairman of the Responsible Government Party in Natal, p. 57 (C. 6487 Blue Book); *Correspondence Relating to Responsible Government in Natal*, 1891; *Accounts and Papers*, 1890–1, vol. lvii.). Both the systems proposed were unicameral, but there existed certain general checks upon each from within, very much in the same way as Aldermen act as a check on Town Councils in England.

[8] Earl Grey, *Colonial Policy*, ii. 96–7, 101 and note, 324–5, 343, 349–50.

[9] Earl Grey, *Colonial Policy*, ii. 97–8. It is, however,

only fair to remember that Earl Grey's argument as to the Single Chamber in a Colony was based on considerations which would now be used to justify the existence of a Single Chamber only in the different States of a Federal Union. The Upper Chamber in a Federation is often able to oppose or modify rash or hasty legislation passed by the Single Chamber of the component States. In the same way Earl Grey and his contemporaries relied on the power of the Imperial Government to retard, disallow, or veto colonial statutes with a freedom which no modern English statesman would advocate. (*Vide* Earl Grey, *Colonial Policy*, ii. 100–1; Temperley, *Cambridge Modern History*, vol. xi., p. 761.) Provisions against fundamental changes in the Constitution exist in the following Colonies: in New South Wales such changes can only be carried by a majority of the Upper Chamber and a two-third majority of the Legislative Assembly; in Queensland by a two-third majority of both Chambers; in Victoria, West and South Australia by an absolute majority of both Chambers. In the Transvaal and Orange River Colony—as well as in the South African Federal Union—there is practically no limit for constitutional change, after the expiry of ten years from the granting of the Charter or Act. (Vide *Accounts and Papers*, 1893, vol. lx., pp. 131 *sqq.*: Constitutional Changes.)

[10] Earl Grey, *Colonial Policy*, ii. 313–61. Report quoted *in extenso*.

[11] E. Jenks, *The Australasian Colonies*, pp. 160–5, 198–202, and especially 234–5.

[12] Earl Grey, ii. 98. *Vide* Appendix V., *Nominee* versus *Elective* Upper Chambers in the Colonies.

[13] *e. g.* Sir George Grey, when Governor of New Zealand, suggested that its Upper Chamber should be elected by Provincial Councils; the Home Government, by its Act of 1852, insisted on their being nominated for life. *Vide* Jenks, *Australasian Colonies*, p. 202. Colonial opinion, even on the subject of life-nomination, appears to have been divided (Appendix V.).

[14] For hereditary experiments in Canada, *vide* Egerton and Grant, *Canadian Constitutional Government*, London, 1907, pp. 100–1; and in New South Wales, *vide* Jenks, *Australasian Colonies*, p. 236.

[15] Earl Grey to Sir John Harvey, Lieutenant-Governor of Nova Scotia, November 3, 1846, quoted in Egerton and Grant, *Canadian Constitutional Government*, pp. 298–9. The epithet "intelligent" may be meant to suggest a limitation on the will of the numerical majority.

[16] Egerton and Grant, pp. 299–301.

[17] The case is dealt with shortly in A. B. Keith, *Responsible Government in the Colonies*, London, 1909 (Stevens & Sons). References are there given to the literature on the subject.

[18] By the Act of 1890 the Upper Chamber of West Australia was nominated temporarily for six years, after which period it was provided that it should be replaced by an Elective Upper Chamber. It illustrates the trend of opinion that exactly the reverse process was adopted in New South Wales in 1855, which began with an *Elective* and ended with a *Nominated* Council.

[19] *Vide* Appendix V., *Nominee* versus *Elective* Upper Chambers in the Colonies. The opinions of two learned English students of colonial institutions may perhaps he quoted here—

E. Jenks: "At any rate it is certain that it is only the *Elective* Upper Chambers in Australia which have any real weight."—*Australasian Colonies*, p. 237.

J. H. Morgan: "It is a safe generalization that where they (*i. e.* Upper Chambers) are elective, as in Victoria, Cape Colony, their powers are larger than where they are nominee."—*Contemporary Review*, May 1910, p. 538.

[20] The elements of an aristocratic or plutocratic class existed in the earlier period in various Australian Colonies, and, as their representatives filled the Upper Chamber, the struggle between property and population was really a phase of the struggle between the two Chambers. Either the democracy or the Labour party (the two terms are not synonymous) has now obtained this preponderance throughout Australasia, and therefore the deadlocks and struggles of the two Chambers are less frequent, and the Upper House has either sunk into a decent impotence or obscurity, or been thoroughly democratized.

The following extracts will show the various forces at work in several Australian Colonies in the early seventies—

"As used in Victoria, the term Conservative expresses the feeling less of a political party than of the whole of the people who have anything whatever to lose. . . . Not content with having won a tremendous victory in raising the Upper House upon a £5000 qualification and £100 freehold or £300 leasehold franchise, the plutocracy are meditating attacks on the Legislative Assembly." . . . "The plutocracy are losing, not gaining ground in Victoria; it is far more likely that the present generation will see the Upper House abolished than that it will witness the introduction of restric-

tions upon the manhood suffrage which exists for the Lower; but there is one branch of the plutocracy which actively carries on the fight in all the Colonies, and which claims to control society—the pastoral tenants of Crown Lands or Squatter Aristocracy. . . . The word came to be applied to graziers who drove their flocks into the unsettled interior, and thence to those of them who received leases from the Crown of pastoral lands. The squatter is the nabob of Melbourne and Sydney, the inexhaustible mine of wealth. . . . The chief of all the evils connected with squatting is the tendency to an accumulation in a few hands of all the land and all the pastoral wealth of the country, an extreme danger in the face of democratic institutions, such as those of Victoria and New South Wales. . . . A few years back, a thousand men held between them, on nominal rents, forty million acres out of the forty-three and a half million—mountain and swamp excluded—of which Victoria consists. It is true that the amount so held has now (1868) decreased to thirty million. . . . The colonial democracy in 1860 and the succeeding years rose to a sense of its danger from the land monopoly."—Dilke, *Greater Britain*, London, 1868, vol. ii., pp. 39–42.

"Though both Victoria and New South Wales are democratic, there is a great difference between the two democracies. In New South Wales, I found not a democratic so much as a mixed country, containing a large and wealthy class with aristocratic prejudices, but governed by an intensely democratic majority—a country not unlike the State of Maryland. On the other hand, the interest which attaches to the political condition of Victoria is extreme, since it probably presents an accurate view, 'in little,' of the state of society which will exist in England after many steps towards social democracy have been taken, but before the nation as a whole has become completely democratic." —Dilke, *Greater Britain*, London, 1868, vol. ii., p. 52.

"Democracy cannot always remain an accident in Australia: where once planted, it never fails to fix its roots; but even in America its growth has been extremely slow. There is at present in Victoria and New South Wales a general admission among the men of the existence of equality of conditions, together with a perpetual rebellion on the part of their wives to defeat democracy, and to re-introduce the old 'colonial court' society, and resulting class divisions. The consequence of this distinction is that the women are mostly engaged in elbowing their way; while among their husbands there is no such thing as the pretending to a style,

a culture, or a wealth that the pretender does not possess, for the reason that no male colonist admits the possibility of the existence of a social superior. Like the American 'democrat,' the Australian will admit that there may be any number of grades below him, so long as you allow that he is at the top; but no republican can be stauncher in the matter of his own equality with the best."—Dilke, *Greater Britain*, London, 1868, vol. ii., p. 57.

[21] For dissolution *vide* note 22. It is not, I believe, generally known that a very interesting procedure for averting deadlocks, slightly differing from that of joint-session, was proposed by Sir F. N. Broome. He was Governor of West Australia at the time when that Colony received Responsible Government (1890). His original proposal was as follows—

Sir F. N. B. to Sir H. T. Holland (Lord Knutsford, Secretary of State for Colonies), July 12, 1877: "I would strongly advise that the Legislative Council have power to reject anything of the nature of a 'tack' or item involving some political measure to which the Upper House objects, added to a money Bill by the House of Assembly, which should have power, however, but only by a two-thirds majority, *and after an interval of at least eight months, to send to the Governor, without consent of the Legislative Council, a separate Bill containing the measure objected to.* This method of obviating deadlock has been suggested by * high authority, and I would propose to adopt it in Western Australia." (*Correspondence* re *the proposed introduction of Responsible Government into Western Australia*, p. 15; Blue Book, C. 5743; *Accounts and Papers*, vol. lv., p. 385.)

These proposals are extremely similar to those actually put forward in the three Liberal Resolutions carried by the House of Commons in England in 1910. It particularly resembles them in the provision that the disputed measure should go straight to the Crown without intervention. Further information may be found in his evidence before Select Committee.

671. Did the Colony suggest that a two-thirds majority of *the Legislative Assembly should have the power of passing Bills over the head of the Council* (*i. e.* Legislative Council or Upper Chamber)?—Sir F. N. Broome: That was a personal suggestion of my own.

672. Did it not also come from the Legislature?—No, the Legislature did not approve of it. The Secretary of State

* The only sanction for them I know is the practice in Baden and Würtemburg. *Vide* Chap. III., n. 25, p. 309.

did not approve of it, and the Legislature endorsed the Secretary of State's opinion.

676. Now, as I understand, you are of opinion that the mind of the Legislature would be hostile to the two-thirds majority proposal?—I think so. . . . I think that the majority of the Legislature were against it, and attached weight to the Secretary of State's observations as to the unwisdom of interfering with the equal power of the Upper House.

(Evidence of Sir F. N. Broome, Governor of West Australia, March 25, 1890, p. 44. *Select Committee on W. Australia Constitutional Bill*, Parl. Paper, No. 160, May 6, 1890. *Reports of Committees*, vol. xviii., 1890, p. 486.)

[22] A dissolution has been refused by the Governor when demanded by a colonial ministry in the following cases: New Brunswick (1855), "Canada" (Ontario and Quebec) (1855), Nova Scotia (1860), Victoria (1872), New Zealand (1872 and 1877), Tasmania (1878). (*Vide* Todd, *Parliamentary Government in the British Colonies* (second edition, 1894), pp. 759–803.) There have been other instances more recently; in several at least of these cases the circumstances were such as would have produced a dissolution in England. Members of colonial Upper Chambers are frequently unpaid, those of the Popular Chamber invariably paid. This fact has a bearing on dissolutions, especially on simultaneous dissolutions of both Chambers.

It is also worth while for English readers to note that, if colonial dissolutions are less frequent, the resignations of ministries are more frequent than in England. In 1897 it was calculated that Victoria had had 26 ministries, New South Wales 28, and South Australia no less than 42 ministries during the last forty years!

CHAPTER III

[1] The only Austrian ruler who governed Hungary in a spirit of avowed absolutism was Joseph II (1780–90), but the restraint imposed on the Kings was *not* exercised by the national Parliament, but by the local justices and the assemblies of the counties (*congregationes*). Vide *Hungary in the Eighteenth Century*, by Henry Marczali, Cambridge, 1910, p. 347. "The Parliament was not the chief opponent to be reckoned with by a sovereign bent on overthrowing the independence of Hungarian political life. . . . Any King desirous of affecting the whole structure, of attacking the

very foundations of this separate national and constitutional life, had above all to overthrow two deeply-rooted and far-reaching institutions—the judiciary and the county" (*vide* also pp. 143, 348, 353–7, and ib. *Ungarische Verfassungsgeschichte:* Tübingen, 1910).

[2] The Duke of Mecklenburg-Schwerin is often described as an absolute ruler. If he is a despot, so is King George in the Channel Isles. In each case the ruler is restrained by a mediæval Parliament of Estates. One point is worth making with reference to mediæval Estates. Usually the mediæval Parliaments were divided into three orders or estates, Clergy, Nobles, and Burgesses (*Tiers État*), or sometimes, as in the case of Aragon and Sweden, into four. It is, however, erroneous to suppose that there were three or four separate Chambers in the mediæval Parliament, as Mr. Marriott (*Second Chambers*, pp. 6, 199, etc.) seems to imply. The orders, though sometimes voting and debating separately, were always regarded as a Single Assembly, as may be seen in the constitution of the Channel Isles or of Mecklenburg to-day. Cp. Marczali, *Hungary in the Eighteenth Century*, 127–8. England's Estates eventually divided into two Chambers, but this was an accident, and was an exception to the general rule on the Continent of Single Chambers.

[3] Legislation by administrative decree is pushed to its extremest limit in Italy, where it is now difficult to distinguish between a law proper and an administrative decree supplementing it. *Vide* Brusa, E., *Das Staatsrecht des Königreichs Italien* (Handbook des öffentlichen Rechts, iv. 1–7), Freiburg, 1/B, 1892, pp. 190–250. Cp. Lowell, *Governments and Parties in Continental Europe*, 1896, i., pp. 165–6.

[4] *Reports from H.M.'s Representatives Abroad respecting the Composition and Functions of the Second or Upper Chamber in Foreign States*, Parl. Pap. Misc., No. 5, 1907 (Cd. 3824). It contains much valuable information. The only use I have seen made of it as yet is in an article on "Parliamentary Deadlocks," by Sir Alfred Mond, M.P., *English Review*, May 1910.

[5] Quoted in Acton, *Historical Essays and Studies*, ed. J. N. Figgis and R. V. Laurence, London, 1907, p. 184. I have changed the obvious misprint of "resolution" into "revolution." These sentiments seem to me to express the usual Continental practice pretty well, and I can see no justification for Maine's contention that "there is not in the least any dislike or distrust of the hereditary principle on the Continent." *Popular Government* (1909), p. 182. Vide *infra*, n. 3, Chap. IV.

[6] Lowell, i. 213. He, however, points out (note) that an adverse vote in the Popular Chamber sometimes produces the resignation of individual ministers, though the Cabinet as a whole retains office. But this practice is not, as he implies, confined to Italy. For example, in France, in November 1897, M. Davlan—the "Garde des Sceaux"—resigned in consequence of an adverse vote in the Senate.

[7] Acton, *Historical Essays and Studies* (1907), pp. 183–4; Morizot-Thibault, *Des Droits des Chambres Hautes ou Sénats en matière des Lois de Finance*, Paris, 1891, pp. 156–75, lays special stress on the weakness of the nominated principle, and uses Italy as its best example.

[8] Professor E. S. Beesly in the *Times*, in criticism of Professor Dicey's article of March 14, "The French Senate and the House of Lords"; *vide* also his definition of the term "Municipal Councils"—"they are those, not of urban communes only, but of every one of the 36,000 communes of France, the enormous majority of which are rural in the fullest sense of the word."

[9] To this rule there is only one exception among Unitary States on the Continent—Saxony, where there is complete financial equality between the Chambers. It exists in two Federal States on the Continent—the German Empire and Switzerland. It should be noted that in some countries—*e. g.* Prussia and Italy—finance is initiated and in practice controlled by the ministers, whereas in others—*e. g.* France—the Popular Chamber as a whole has a real power of initiation and control. In neither case, however, does this circumstance directly affect the powers of the Popular House in relation to the Upper Chamber. Morizot-Thibault, *Des Droits des Chambres Hautes ou Sénats en matière des Lois de Finance*, Paris, 1891, gives a good general view of the whole subject, but unfortunately the work is now out of date.

[10] The following passage from Brusa, *Das Staatsrecht des Königreichs Italien*, p. 331, puts the general conception of the Budget on the Continent very well: "Das Finanzjahr ist eine Verpflichtung für die Verwaltung, theils nach dem Inhalt, theils nach dem Zeitraum. Doch schreibt kein Gesetz vor, dasz das Budget gerade jährlich votirt werde: wesshalb denn die Kammern einmal einen Artikel gut hiessen, durch den für die Finanzverwaltung des nächsten Jahres Ueberschreitung einer gewissen Summe bei den Kosten des Kriegsministeriums verboten wurde. Das Präzedenz blieb jedoch ohne weitere Nachahmung." The only real exception to the rule that the Budget must be passed in some form or other within the year is to be found in Denmark, where during the years 1885–94 provisional Budgets of dubious

legality were passed. An arrangement was then come to by both Houses to provide for the voting of the Budget, subject to amendments, within the year. Similar contests have produced similar results elsewhere, and the rule now applies almost universally on the Continent that the Budget must be passed within the year. Special arrangements are made to secure this end in Norway, Sweden, Hesse-Darmstadt, Baden, Würtemberg. *Vide* note 25.

[11] Up till 1848 both the Houses of the Hungarian Legislature consisted almost wholly of nobles who paid no taxes. Financial business was therefore not their chief occupation until 1867. Even now a public and unparliamentary official, known as the Chief Accountant, controls a good deal of the financial policy and has considerable independence of action, but ministers are responsible to the Lower House for expenditure, and can and often do interfere in the Chief Accountant's business. *Vide* Parl. Paper, 1907, pp. 31–2.

[12] Szilágyi had a great struggle with the Upper House from 1893–4 in other legislative matters besides finance, but never denied the right of the Magnates to exercise the veto in non-financial legislation. Szilágyi, Beöthy Akos and Count Andrássy Gyula (*père*) were the men responsible for introducing and adapting English financial practice in 1867 and subsequent years. For this general information I am indebted to my friend Professor Marczali, of the University of Budapest.

[13] Parl. Paper, 1907, p. 56. It must be regarded as rather doubtful whether Sweden is really available for comparison in this direction. The active personal power of the King of Sweden remains considerable, and he both directs policy and chooses ministers in some degree independently of the Popular Chamber. This fact naturally gives the Upper House a considerable advantage, which it has not been slow to use. *Vide* Woodrow Wilson, *The State*, New York, 1899, pp. 357–8; Flandin, *Institutions Politiques*, Paris, 1909, pp. 321–5.

[14] Parl. Paper, 1907, pp. 21–2; Bodley's *France*, London, 1899, pp. 285–6, 292–4; Dupriez, *Les Ministres dans les principaux pays d'Europe et d'Amerique*, Paris, 1892, tome ii., pp. 430–2. Yves Guyot, in a recent article on the French Senate and Chamber of Deputies (*Contemporary Review*, February 1910, pp. 144–6), assigns to the former more financial power than do older critics. Contrast Morizot-Thibault, *Des Droits des Chambres Hautes ou Sénats en matière des Lois de Finance*, Paris, 1891, pp. 95–105. Cp. note 19 *infra*.

[15] Vide *supra*, note 11, and for Prussia, Dupriez, *Les Ministres*, etc., ii. 410–21.

[16] We must not judge too much by appearances, however, *e. g.* in Hungary since 1885 the initiative of almost all laws has been usurped by the Lower House. But there is a good deal of intimidation and corruption at election times, especially in the country districts where the Magnates have influence. Hence the Magnates, while unable to stop laws in a direct and legal manner in the Upper House, can often check them in an indirect and illegal manner by their control over the elections and members of the Lower House. It should be noted that in Hungary the parliamentary franchise is so managed as to favour Magyars enormously at the expense of other races in Hungary.

[17] Sometimes this power of concluding treaties only extends to such agreements as involve the laying of financial burdens on the people. This is the case in Italy (*vide* Brusa, *Italien*, pp. 490–1). Generally speaking, however, both Senate and Chamber have a much more extensive control over treaties and commercial agreements on the Continent than either Commons or Lords in England. *e. g.* Guyot, *Contemporary Review*, February 1910, p. 143: "On March 15, 1890, the Tirard Cabinet (in France) resigned on account of a vote passed by the Senate refusing to accept a treaty with Greece. I was a member of that Cabinet, and *not one of us questioned the Senators' right.*"

[18] *e.g.* in Hesse-Darmstadt, Parl. Paper, 1907, p. 26—

"In the Bill of 1907 is found the compromise offered in return for *the larger powers proposed to be given to the Upper Chamber*, namely, that in place of the present system of indirect election to the Lower Chamber, by means of electing Delegates who again elect the Deputies, the system of direct election is to be substituted. The system of voting by secret ballot already exists."

Compare *Baden*, Parl. Paper, 1907, pp. 28–30—

"The Constitution of the Grand Duchy of Baden promulgated August 22, 1818, was considerably modified by the Baden Law of August 24, 1904, on which date a new Electoral Law was promulgated, which also defines the manner in which the elective members of the Upper Chamber (called the First Chamber) are to be elected, as well as those of the Lower or Second Chamber. These measures marked the termination of a long struggle for the direct as opposed to the indirect system of voting, which still obtains in the Grand Duchy of Hesse. *Similar measures of electoral reform have also been adopted in Bavaria and Würtemberg*

in recent years. No constitutional disputes have, however, arisen between the two Chambers of the Baden Diet during the past ten years."

[19] The increase is well illustrated in the works on the subject. Bodley, the most profound English student of French politics, described the power of the French Senate as "not as effective as it might be" in 1898. Dupriez, ii. 450–4, and Lowell, i. 21–3, are obviously of the same opinion. The Parl. Paper of 1907 (pp. 22–5), and Guyot, *Contemporary Review*, February 1910, give a very different impression. The explanation of the discrepancy is that the power of the Senate has greatly increased in the last decade.

[20] The crisis of 1896 is described in the Parl. Paper, 1907, pp. 22–5, and in Bodley's *France*, pp. 296–7. The latter belittles the importance of the incident, but it definitely established the precedent that an adverse vote of the Senate may dismiss a Cabinet which has a majority in the Popular Chamber.

[21] Parl. Paper, 1907, pp. 7–11. The system of proportional representation there described is more fully dealt with in the *Report of Royal Commission to inquire into Electoral Systems*. Blue Book (Cd. 5163), London, 1910.

[22] Palma, *Corso Diritto Costituzionale*, vol. ii., p. 264, quoted in Dupriez, i. 301; Morizot-Thibault, *Des Droits des Chambres Hautes ou Sénats en Matière des Lois de Finance*, Paris, 1891, pp. 163–75.

[23] It is interesting and worthy of note that Portugal adopted this joint-committee system of reconciling differences between the two Chambers, *at the moment* (1896) *when it abolished the elective part of its Upper Chamber*, and made the whole body *Nominated* or *Hereditary*. It may be here pointed out that this joint-committee system was proposed in the Sicilian Constitution of 1848, but has not found favour in the modern kingdom of Italy. *Vide* Brusa, *Italien*, p. 156, n. 2.

[24] It may occur to some readers that the system of Delegations, by which the joint affairs of Austria-Hungary are managed, is a system of joint-conference or joint-session for the purpose of reconciling two distinct Legislatures. The situation is, indeed, somewhat analogous, because, though the Austrian and Hungarian Legislatures are both bicameral, there is a good deal of superficial resemblance between the process of reconciling two opposed Chambers and of reconciling two opposed Legislatures. In practice, however, the system is very different; the ideal of the joint-conference of representatives of the two Chambers in a Unitary State is

to promote harmony, that of the joint-conference between the representatives of two Legislatures in different States is to maintain the equality and individuality of each State. The procedure illustrates this fact at once. The Hungarian Parliament and the Austrian *Reichsrath* each appoints from its own members for every session a committee of sixty members (the Delegation) to report upon (1) Defence (Naval and Military); (2) Foreign affairs and Diplomacy; (3) Finance, in so far as it is connected with these matters. The three ministers in whose sphere these affairs fall are appointed by the Emperor-King, and may be either Austrian or Hungarian subjects. The two Delegations meet ultimately in Budapest and Vienna, but they do not confer together, and, though they sit at the same time in the same capital, they do not sit in the same building. The three Common Ministers communicate and negotiate their proposals with each Delegation separately. Each Delegation reports on the proposals of the Common Ministers separately; if their reports do not coincide, they communicate by letter with one another and endeavour to arrive at an agreement. If this process is repeated three times without producing agreement, the two Delegations may meet together. They meet, however, not to discuss or to speak about the matter at issue, but simply to vote about it. No member or members may be absent at this voting on one side without a similar number being withdrawn on the other. The conference then is not really a conference at all, but simply a meeting formally to register the fundamental character of the differences between the two Delegations. There have only been four such conferences since 1867, the last being in 1882, since which date the practice seems to have been abandoned. The present system appears to be that, if the Delegations disagree, the disputed proposal is dropped for the current year. It is not necessary to go farther into this matter, because enough has been said to show that the joint-conference is not really a meeting of committees to promote agreements, but a meeting of Delegations to establish differences. The actual abandonment of the practice shows this to be the case, though the provisions regulating the meeting and forbidding discussion on the subjects in dispute would in any case be explicit enough. I believe I am correct in saying that Deák and others had in mind a real scheme for joint-conference, but that a purely formal character was given to the conference under the *Ausgleich* in 1867, owing to the influence of Count Andrássy Gyula (*père*). In any case, it is obvious that there is no real parallel between this system and that

of joint-conference or joint-session as practised elsewhere on the Continent.

[25] Here are the details with respect to Würtemberg and Baden. Parl. Paper, 1907 (Cd. 3824).

P. 7 (*Würtemberg*): "In the event of its becoming impossible for the two Chambers to agree as to the Budget, the votes cast in both Chambers for or against it are added together, and the resulting majority decides the issue. Should the votes be equal, the President of the *Lower* Chamber has the casting vote." The last provision is interesting because it shows that the last word, and therefore the superiority in finance, rests with the Lower Chamber.

P. 30 (*Baden*): "If the Upper Chamber rejects altogether a Bill of the nature described in Article 60, section 3 (*i. e.* a money Bill), which has been adopted by the Lower Chamber, then, at the request of the Government or of the Lower Chamber, a vote will be taken in the matter on account of the total votes given in both Chambers whether the Bill is to be adopted in the form proposed by the Lower Chamber." It will be seen from the above extracts that these methods do not allow the same amount of discussion, compromise and concession as does that of joint-session.

[26] Parl. Paper, 1907 (Cd. 3824), p. 56. *Sweden:* "Financial questions on which the decisions of the two Chambers are in conflict are submitted to a common vote of both Houses voting as one body, when the absolute majority is decisive. As the Upper Chamber consists only of 150 members, whereas there are 230 in the Popular Chamber, it is clear that the latter has numerically the stronger voice, *but in practice, inasmuch as the Upper Chamber has generally been found homogeneous in character, while in the Popular Chamber parties are more evenly balanced, the influence of the former has been somewhat preponderating.*

"The principle of common voting on financial questions has undoubtedly contributed to counteract constitutional conflicts between the two Houses."

[27] Many of the methods for reconciling two Chambers—*e. g.* that of joint-conference—were proposed by the ingenuity of Siéyès and the legion of constitution-makers whom he inspired at the time of the French Revolution. One solution which they suggested has never had a serious trial. In the Napoleonic Constitution after the 18 Brumaire, 1798, two Chambers, a Senate and Popular Chamber, were established, and a third body (the Tribunate) added for the sole purpose of mediating between them and reconciling their differences.

The Constitution lasted a very short time, but Bolivar subsequently revived the idea, and sought to apply it to the Constitution of Bolivia (1826), and also of Peru and Colombia. He proposed two Chambers, a Senate and a Tribunate (Popular Chamber), and a third Chamber (the Ceusas) to mediate between the two.* The proposal is not as absurd as it sounds, and corresponds somewhat to an Arbitration Board which partly consists of representatives of workers and masters, and partly certain impartial arbitrators. In practice the head of the executive has really usurped the functions of a third House whose function is harmony. In several Continental countries the sovereign really plays the part of a final and impartial arbitrator between the two Houses; the English Government sometimes does the same in the case of disputes between the two Chambers in a Colony, and it is not inconceivable that a King might play such a part in England in future disputes between the Commons and the Lords. It is conceivable that the Judges might assume the same functions in England if they were to be called upon to decide what was and what was not a money Bill. In the United States the Federal Judges do practically mediate between the two Houses in all matters of dispute as to authority between the two. Lord Acton has summed up the question with his usual felicity (*History of Freedom*, p. 96): "In 1799 Siéyès suggested to Bonaparte the idea of a great Council whose function it should be to keep the acts of the (two-Chambered) Legislature in harmony with the Constitution—a function which the *Nomophylakes* discharged at Athens and the Supreme Court in the United States."

[28] Acton's opinion of proportional representation and its aims is most striking. "The one pervading evil of democracy is the tyranny of the majority, or rather of that party, not always the majority, that succeeds, by force or fraud, in carrying elections. To break off that point is to avert the danger. The common system of representation perpetuates the danger. Unequal electorates afford no security to majorities. Equal electorates give none to minorities. Thirty-five years ago it was pointed out that the remedy is proportional representation. It is profoundly democratic, for it increases the influence of thousands who would otherwise have no voice in the government; and it brings men more near an equality by so contriving that no vote shall be wasted, and that every voter shall contribute to bring into

* *Simon Bolivar*, by Loraine Petre, London, 1910, pp. 356–7.

Parliament a member of his own opinions. The origin of the idea is variously claimed for Lord Grey and for Considérant. The successful example of Denmark and the earnest advocacy of Mill gave it prominence in the world of politics. It has gained popularity with the growth of democracy, and we are informed by M. Naville that in Switzerland Conservatives and Radicals combined to promote it" (Acton, *History of Freedom and other Essays*, London, 1907, pp. 97–8). It cannot be said that recent experience has justified the hopes here entertained of the use and value of Proportional Representation. To judge from the latest *Report of Royal Commissions to inquire into Electoral Systems* (Cd. 5163), London, 1910, the theory of Proportional Representation is likely to form an interesting branch of the higher mathematics in the future. The conclusions of the Commission have that judicious poise of hesitance to which we are accustomed in Commissions, but it is difficult to resist such of them as appear to be intelligible. According to their evidence, no known scheme of Proportional Representation as yet appears completely to satisfy the objects aimed at. Moreover, any such scheme must, in practical working, increase the dangers of wire-pulling, and must direct attention to the mechanism of election rather than to the objects of public policy. Hence the tendency must be to divert the electorate from the real issues at stake. Even apart from the evidence of the Commissioners, which is unfavourable to almost every existing proportional system, these other evils are almost sufficient to condemn Proportional Representation. The method, however, is of such importance that we can afford to dismiss it altogether. The system can save a minority from extinction, though it cannot provide apparently for the representation of all shades of opinion. If it could really do the latter, an Upper Chamber would be needless. Cp. note 12, Chap. V.

CHAPTER IV

[1] Gumplowicz differs from this view, and ascribes the adoption of the bicameral system on the Continent, not to an imitation of England, but to a desire to represent caution in the Senate, and to place age in the Upper Chamber as a check on youth in the Popular one. "Wenn sich historisch das Zwei-Kammer System aus konkreten Verhältnissen der Scheidung und Ungleichheit zwischen hohem und niederem

Adel herausgebildet hat; *so haben doch Erwägungen anderer Art*, insbesondere der Gegensatz der Anschauungen zwischen älteren und jüngeren Leuten auch in Republiken, die auf dem Grundsatze der Gleichheit aller Bürger beruhen, zur Konstituierung zweier Kammern der Volksvertretung geführt, in deren erster die älteren und gemässigteren Elementen den in der zweiten vertretenen jüngeren und beweglicheren ein Gegengewicht zu bilden bestimmt sind." Gumplowicz (*Allgemeines Staatsrecht*, 3te Auflage, Innsbruck, 1907, p. 309). The idea seems somewhat fantastic, especially in view of the fact that so much of the Parliamentary procedure on the Continent has been directly borrowed from England. It, however, agrees with the statement in the text, in so far as it says that the origin of the bicameral system has not been uniform. Cp. Morizot-Thibault, *Des Droits des Chambres Hautes ou Sénats en matière des Lois de Finance*, Paris, 1891, pp. 60 *sqq*.

[2] Baron Joseph Eötvös, *Der Einfluss der Herrschenden Ideen des XIX Jahrhunderts auf dem Staat*, Leipzig, 1854, Vol. II., Bk. II., c. xiii., pp. 161 *sqq*. It is much to be regretted that a translation of this masterly work has not appeared in English. Lord Acton's annotated copy of the work, which I have seen, shows that he had read it with the closest attention.

[3] Maine, *Popular Government*, London, 1909, p. 229, contends that "though inequalities of fortune are resented by modern democracy, historic inequalities do not appear to be resented in the same degree," . . . and says "it is an apparent inference from modern European experiments in constitution-building" . . . "that nothing but an historical principle can be successfully opposed to the principle of making all public powers and all Parliamentary assemblies the mere reflection of the average opinion of the multitude." The observation is weighty, but it requires some qualification from Continental experience. The purely *Nominated* Senates of Belgium and Italy have fared badly, but reform has also recently taken place among most of the Senates with *Hereditary* representatives, *e. g.* Hungary, Austria, Portugal, Baden, Hesse-Darmstadt and Würtemberg. Cp. Morizot-Thibault, *Des Droits des Chambres Hautes ou Sénats en matière des Lois de Finance*, Paris, 1891, pp. 60–8.

[4] *Vide* note 28, Chap. III.

[5] Acton, *History of Freedom*, p. 97.

CHAPTER V

[1] The contention here is that the *bourgeois* electorate really inspires its leaders. It is not, therefore, inconsistent with Bagehot's views about the ten-pound franchise creating an electorate that was "deferential" to ministers (Vide *English Constitution,* fifth edition, London, 1905, pp. xii. *sqq.*). In the first place, this deference was partly due to the fact that party lines were blurred and confused; secondly, and more important, the electorate seems to have allowed ministers freedom in details only because of its complete confidence in their identity of sympathy with the electors, above all, in their complete business capacity. Peel, Palmerston, Graham and Russell—the real leaders in the 1832–67 period—were in many ways ideal representatives of the *bourgeois* class, and with that class, too, both Disraeli and Gladstone had many affinities. The following quotation seems to me typical of the whole age and of a *bourgeois régime* in general.

"'Why I like this Maynooth project,' said Tancred, . . . 'is that all the shopkeepers are against it.' 'Don't tell that to the minister' (*i. e.* Peel), said Coningsby, 'or he will give up the measure.' 'Well, that is the very reason,' said Vavasour, 'why I hesitate as to my vote. I have the highest opinion of the shopkeepers; I sympathize even with their prejudices; they represent its order, its decency, its industry.'"—*Tancred,* by Earl Beaconsfield, new edition, London, 1905, p. 198.

[2] June (?), 1860, written by Lord Acton when a member of the Commons. *Lord Acton and his Circle,* ed. Abbot Gasquet, N.D., p. 134. Acton's insight is the more remarkable since it was just about this time that foreigners were extolling the Peers for their moderation and adaptability to altered circumstances—*e. g.* Eötvös, *Der Einfluss der Herrschenden Ideen des XIX Jahrhunderts,* Leipzig, 1854, p. 163, quotes the Reform Bill of 1832 and the Repeal of the Corn Laws in 1846 as instances of how the House of Lords voted against its own interests in deference to popular feeling. Cp. also Castelar, the great Spanish orator, who was certainly no friend to hereditary aristocracy. "Political oligarchy in England does not consist solely in art or ability; it consists in a great measure in the position in which it (the aristocracy) is placed. . . . They know how to resist when opposition is feeble, to give way when it is strong;

they lay down some of their privileges that they may not lose all, never carrying resistance to reaction" (1868). Representative foreign opinion of to-day would hardly endorse these opinions.

[3] Lecky, *Democracy and Liberty*, London, 1899, vol. i., pp. 430–2, speaks of the "enormous increase during the last few years in the political difference between the House of Lords and one of the great parties in the State," and advocates strongly the reform of the House of Lords in certain directions, as limitation of the veto. Lord Acton's view, after he was made a peer, is interesting enough in this connection. "The House of Lords represents one great interest—land. A body that is held together by a common character and has common interests is necessarily disposed to defend them. Individuals are accessible to motives that do not reach multitudes, and may be on their guard against themselves. But a corporation, according to a profound saying, has neither body to kick nor soul to save. The principle of self-interest is sure to tell upon it. The House of Lords feels a stronger duty towards its eldest sons than towards the masses of ignorant, vulgar and greedy people. Therefore, except under very perceptible pressure, it always resists measures aimed at doing good to the poor. It has been almost always in the wrong" (Acton, *Letters to Mary Gladstone*, London, 1906, pp. 102–3).

J. S. Mill, *Letters* (1910), vol. ii., pp. 206–7, gets in a very severe criticism of the partiality of the Lords from a purely non-party point of view. "The Lords have done all the mischief they could to the Scotch Education Bill. One would have thought the unanimous recommendations of a Commission partly Tory and fairly representative of all sections in Scotland might have passed their ordeal. . . . They are becoming *a very irritating kind of minor nuisance*." —To A. Bain, June 7, 1869.

In spite of their modest disclaimers at the present time, the charge of partiality really seems to be admitted by the Lords themselves, for why should they otherwise condemn the hereditary principle?

[4] *Vide* the letter of Sir F. Galton in the *Times*, March 21, 1910—

"Sir,—There is not a single sentence, so far as I have noted, in the multitude of speeches about the House of Lords that differentiates between the principles of primogeniture and heredity. The first usually implies the latter, but the converse is by no means the case. The claims of heredity would be best satisfied if all the sons of peers were

equally eligible to the peerage, and a selection made among them, late researches having shown that the eldest-born are, as a rule, inferior in natural gifts to the younger-born in a small but significant degree. Primogeniture, like gavel-kind, has to be defended on other grounds besides that of heredity.

"There seems to be a regrettable amount of ignorance among our legislators of the facts and statistical methods upon which eugenics are based.

"FRANCIS GALTON."

These views were fully endorsed by Dr. David Heron, of the Galton Laboratory for National Eugenics at University College, who was appealed to for an ampler statement of the facts. It was pointed out to him that the teaching of eugenics as to the inferiority, as a rule, of the first-born was directly opposed to the popular idea that the "best come first."

"Popular opinion is not always wrong," said Dr. Heron. "The first-born in a family is more likely to be insane, tuberculous or criminal than the others. It follows, therefore, that the tendency to diminish the size of families increases the average number of such individuals in the community."

Dr. Heron referred his interviewer to the conclusions arrived at on this subject by Professor Karl Pearson and expressed by him in a recent lecture at the Eugenics Laboratory.

"If our observations are correct, and I believe them to be so," said Dr. Pearson, "then the mental and physical condition of the first and second-born members of a family is differentiated from that of later members. They are of a more nervous and less stable constitution. We find that the neurotic, the insane, the tuberculous and the albinotic are more frequent among the elder-born. Dr. Goring's results for criminality show the same law.

"The result of this law is remarkable. It means that if you reduce the size of a family you will tend to decrease the relative proportion of the mentally and physically sound in the community. You will not upset this conclusion in the least if, as I suspect, the extraordinarily able man, the genius, is also among the early-born. For you will not lose him if you have a larger family, although you will lose the sounder members if you curtail it."

Vide also Sir F. Galton, *Hereditary Genius*, London, 1892; with E. Schuster, *Noteworthy Families*, London, 1906; D. G. Ritchie, *Darwinism and Politics*, London, 1895; Brunetière, F., *Pathologie-Historique: Variétés Littéraires*, Paris,

1904; F. A. Woods, *Mental and Moral Heredity in Royalty*, London, 1906.

Apart from the scientific aspect of heredity, the actual hereditary characteristics of the peers themselves must be taken into account. Disraeli has touched on it satirically in one of his novels. "I never heard of a peer with an ancient lineage. The real old families of this country are to be found among the peasantry. . . . We owe the English peerage to three sources—the spoliation of the Church, the open and flagrant sale of honours by the elder Stuarts, and the boroughmongering of our own times. These are the three main sources of the existing peerage of England." This passage has deep truth, even allowing for the satire, and illustrates the point made in the text that ability, not virtue, has been the key to the peerage. Mr. G. W. E. Russell makes this quotation the opportunity for an amusing if somewhat biassed attack on our aristocracy. *Vide* pp. 140–89, *Collections and Recollections*, Series II., London, 1910.

[5] Mr. Lecky admits the evil that the Lords may do by the rejection of small Bills. "There have been occasional and deplorable instances of its rejecting, through long successions of Parliaments, in spite of constant majorities in the Lower House, reforms affecting small classes of people and exciting no widespread interest" (*Democracy and Liberty*, i. 464, 1899). This is a most serious matter, for it is quite possible to conceive it to the interest of the Lords to reject some small measure very beneficial, say, to general health and approved of by expert and general opinion, but injurious to their own special prejudices or interests.

[6] Mill's scheme—in chap. xiii. of his book on *Representative Government*—is still worthy of study. Its object appears, however, to be to provide an ideal Senate or Chamber of Statesmen as against the People's Chamber. If that be so, it is clearly impracticable, because then, being more intelligent, the Upper Chamber will either gain more power, or wish to gain more power, than the Lower one. But Mill, in fact, recognizes the impracticability of his own scheme.

[7] McKechnie, *Reform of the House of Lords*, Glasgow, 1909. Mr. Kechnie also advances an alternative scheme, which, however, suffers from its advocacy of the *Nominee* Life-Peerage system.

[8] The rights of the Lords over money Bills have been argued at inordinate length and with extraordinary partiality by both sides during the present crisis. Perhaps the two best books recently issued are, Adrian Wontner, *The Lords*

—*their History and Powers*, with special reference to money Bills and the Veto (P. S. King & Co.), 1910. This is a relatively impartial sketch. Professor J. H. Morgan's *The House of Lords and the Constitution*, with introduction by Lord Lansdowne (Methuen & Co.), inclines to the Liberal side, but is a most powerful and able sketch. Perhaps the best summary of the whole question, and certainly the most impartial, is by Mr. Lowell, *The Government of England*, vol. i., pp. 394–422. It has the additional advantage of having been written before the present contest began. Another interesting comment is the evidence from the opinion of Hungarian statesmen—quoted Chap. III., n. 12—which has a very significant bearing on the matter.

[9] This point is of considerable importance, and I cannot recollect that I have seen it anywhere emphasized. For instance, when precedents are quoted for the rejection of money Bills, it is not always clear that the Bills in question were regarded as money Bills by contemporaries—*e. g.* in 1827 the Lords amended the Corn Law Relief Bill. Foreign corn was to be taken out of bond when the price of corn in England reached a certain figure. Wellington carried an amendment in the Lords altering this scale to 66*s*. It is difficult to see how this can be viewed as not amending a money Bill, but no one in the Commons at the time seems to have perceived the fact. The instance is probably not an isolated one.

[10] Judges. Compare *infra* n. 14; Chap. III., n. 27.

[11] Cf. Chap. II. *ad fin.* Of course there is the important difference that the Liberal Resolution does not necessarily allow for a dissolution intervening between the sending up to the Lords of the disputed measure a second and a third time. It is a measure on the South African, *not* on the Australian, model. Cp. Chap. II. *passim*, and note 17.

Reference has already been made to the plan of Sir F. N. Broome, the West Australian Governor. *Vide* Chap. II., n. 21.

Lecky writes as follows: "Some other and minor reforms of the House of Lords seem also to be loudly called for. A power of preventing for all time measures which both the House of Commons and the constituencies desire should not be lodged in any non-elected legislative body." He was also of opinion that a Bill ought not to lapse at the end of a session. He advocated limiting the veto, but allowing a Bill to extend beyond the limits of one Parliament. In other words, he insisted on the dissolution method. Further, he desired that Bills which were to be passed by this summary

procedure should be passed by a two-thirds majority in the Commons. Between this last provision and joint-session there is not very much difference, in fact. Vide *Democracy and Liberty*, 1899, vol. i., pp. 464–5. His plan therefore resembles that used to prevent deadlocks in the Federal Commonwealth of Australia, where a dissolution is needed to overcome the resistance of the Senate.

Acton's opinion, though strongly against the existing House of Lords, was equally against abolition. The logic of his opinions would perhaps have led him into advocating a limitation of veto and a reform in composition. "*To 'sweep away' the House of Lords would be a terrible revolution. . . . The worst anybody can imagine is a modification of the House of Lords, such as would make it less independent, less affected by tradition, less united in one interest, but more intelligent and probably more powerful. That seems to me possible, though difficult, and uncertain and hazardous to an infinite degree. I do not plead for this, but I cannot set myself absolutely and irrevocably against it.*"—Acton, *Letters to Mary Gladstone*, May 7, 1881, pp. 101–2.

[12] Mill has rather an ingenious scheme for proportional representation of the peers in chap. xiii., *Representative Government*. But in devising a scheme for electing hereditary peers simplicity is the great desideratum. It might, for instance, be arranged that for 20 or 30 seats out of the 100 the King should be called on to exercise the faculty of selection on non-party grounds, and thus secure the appointment of a proportion of Liberal peers. Or, again, the principle of the transferable vote might be introduced, which would probably secure the election of some Liberal peers. All these schemes, however, are open to the objection that no Labour or Irish members are likely to be represented in the Hereditary Section, and so long as heredity is maintained neither of these parties will be adequately represented. A scheme, however, might be easily devised for securing representation of all sides in the Nominated Section. Lord Courtney's suggestion (*Times*, March 17) is interesting. It was that "at the commencement of every Parliament the House of Commons should be entitled to nominate 50 persons to sit in the Second Chamber, who would be chosen by the method of proportional representation, so that every section of opinion in the House of Commons should have its proper share. These 50 persons so selected should be recommended by the Crown to be summoned as peers to sit for two Parliaments. If that were done they would have 100 members in the second and subsequent Parliaments, for 50 would

be nominated at the commencement of each Parliament. The nomination of these 50 persons would work out at something like one person for every 13 members of the House of Commons. Under such a system, in the case of the present Parliament, the 39 Labour members in the House of Commons would be able to send three persons to the Second Chamber; the Nationalists would be able to send 7; the Ministerialists 20; and the Opposition 20. But if the system were in operation at the commencement of the last Parliament, the disposition of the 50 would be different because the last House of Commons was composed differently from the present. They would, in fact, have had 30 Ministerialists, 10 members of the Opposition, 7 Nationalists, and 3 Labour members; and, putting the two together, they would have had serving in this Parliament and in its successor, 50 Ministerialists, 30 supporters of the Opposition, 13 Nationalists, and 6 or 7 Labour members, making up 100. In that way they would have a representation of every part of the country, and a representation of labour and capital. If they had such a composition as that the authority of that House would be greatly developed, and the weight attached to its co-operation would be immensely increased. The scheme which he had outlined involved no creation of constituencies; and they would not have to call persons to act together who were not accustomed to act together. The County Councils had been chosen for totally different purposes, and, if they were made the elective bodies, their election in future might be affected by the fact that they would be called upon to perform this duty. They would be free from that."

[13] Burke, *Second Reading a Bill for the Repeal of the Marriage Act* (1781). It is perhaps candid to finish the quotation. "But if these people came to turn their liberty into a cloak for maliciousness, and to seek a privilege of exemption, not from power, but from the rules of morality and virtuous discipline, then I would join my hand to make them feel the force which a few, united in a good cause, have over a multitude of the profligate and ferocious."

On the general tendencies of plutocracy it is interesting and important to note that the younger Pitt introduced a great plutocratic element into the Lords. In Disraeli's famous words, "he created a plebeian aristocracy and blended it with the patrician oligarchy. He made peers of second-rate squires and fat graziers. He caught them in the alleys of Lombard Street and clutched them from the counting-houses of Cornhill." The phrases are literally true, but

the important part is that the patrician element eventually overpowered, transformed and digested the plebeian one. The great difference between this and the present House of Lords is that the plebeian plutocracy now dominates or threatens to overpower the true hereditary aristocrats. Cp. *Collections and Recollections*, Series II., G. W. E. Russell, London, 1910, pp. 59–80 and *passim*.

[14] The proposal of the Referendum as a method of preventing deadlocks between the two Chambers is almost as frequent as is that of composing the Upper House entirely from *Nominated* elements. It is open to almost as great objections. The Swiss Referendum cannot be applied in any direct manner to England, because its operation can only be effective when both the party and the Parliamentary system, as we understand them, have disappeared. In Switzerland the Referendum is, in fact, the real Upper Chamber, and the people as a whole—the electors—the real Lower Chamber. Both Stände-Rath and National-Rath (Senate and Popular Chamber) are really drafting bodies and administrative councils rather than legislative assemblies (cp. Chap. II., n. 3; 210–1). The Referendum pure and simple is really compatible only with direct democracy, and not with representative democracy in our sense.

The use of the Referendum on constitutional amendments only is not open to the same objections, because it does not, to the same extent, destroy the responsibility or independence of the legislature. It has been introduced into Federal Australia, and has been used to settle any doubts which may exist in a legislature as to the expediency of joining a Federation (as *e. g.* in Natal in 1909). It also exists for all legislative deadlocks in Queensland. If it were introduced into England for constitutional amendments, the Committee of three judges could issue a proclamation for the Referendum, which would have the advantage of confining the issue to the measure in dispute between the two Chambers. This would, of course, be a great advantage, but it is balanced by an almost equally great drawback. The Referendum only allows the voter to vote Yea or Nay, and no discussion is possible. Now constitutional amendments are, of all others, those in which concession, compromise and discussion are desirable. Hence a dissolution, followed by a joint-conference or a joint-session between the two Chambers, seems preferable to a Referendum, so far, at least, as England is concerned.

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