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SECOND CHAMBERS

AN INDUCTIVE STUDY IN POLITICAL SCIENCE

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PREFACE

There is reason to apprehend that this work may be regarded merely as a *livre de circonstance*. That the moment of its appearance gives to it something of that character it would be affectation to deny; but, as a fact, it is a fragment of a larger work to which much of my leisure has for some years been devoted. This work may, I trust, be completed within a reasonable time, but meanwhile it seems not inopportune to offer to the public an instalment which may, it is hoped, contribute towards the solution of a problem of immediate importance.

It is a pleasant duty to acknowledge the many obligations which I have incurred. I do not know of any single work which covers the same ground, but parts of it have been traversed with great industry, and to the labourers who have preceded me, and of whose labours I have freely availed myself, I wish to tender my grateful thanks. A short list of authorities will be found in an appendix, but I wish to acknowledge a special debt to the works of Mr. James Bryce, Mr. A. V. Dicey, Mr. C. H. Firth, President Lowell of Harvard, Mr. Woodrow Wilson, Sir Henry Maine, Mr. Lecky, Mr. A. K. Keith, and to the collections of Constitutional Texts edited by Mr. W. F. Dodd and M. Demombynes. To original sources I have gone, as will be perceived, whenever I found it possible to do so. Mr. H. E. Egerton, Beit Professor of Colonial History, kindly permitted me to read one of his unpublished lectures, and in regard to Canada Mr. W. L. Grant, Assistant Beit Lecturer, has given me the benefit of his exceptional knowledge. To Mr. Wray Skilbeck, Editor of the *Nineteenth Century and After*, and to Mr. W. L. Courtney, Editor of the *Fortnightly Review*, I am greatly

indebted for permission, generously accorded, to make use of articles which I have contributed to those Reviews. My friend Dr. R. W. Macan, Master of University College, most kindly read the proofs as they passed through the press, and though he is not in any way responsible for the views expressed or the manner of expressing them, I owe him a heavy debt of gratitude for timely and valuable suggestions. Sir William Anson, Warden of All Souls College, was also kind enough to read much of the book in proof and to make several interesting suggestions of which I have gratefully availed myself. I have been at pains to verify my references, and quote my authorities, but much of the book has been written from notes unavoidably made at odd moments, and for any unacknowledged obligations I crave pardon.

J. A. R. MARRIOTT.

OXFORD,
March, 1910.

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I

INTRODUCTORY

> 'A majority in a single assembly, when it has assumed a permanent character—when composed of the same persons habitually acting together, and always assured of victory in their own House—easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. The same reason which induced the Romans to have two consuls, makes it desirable there should be two chambers: that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year.'—JOHN STUART MILL.

> 'To construct a body which, without claiming co-ordinate authority, shall act as a court of legislative revision, and as the sober second-thought of the community, is practically beyond the power of the political architect. He must try to ensure sobriety where he places power. To suppose that power will allow itself on important matters to be controlled by impotence is vain.'—GOLDWIN SMITH.

Securus iudicat orbis terrarum. With rare unanimity the civilized world has decided in favour of a bi-cameral legislature. 'If a Second Chamber dissents from the first, it is mischievous; if it agrees with it, it is superfluous.' Such was the

superficial dilemma propounded by the Abbé Siéyès, arch-constitution-monger of the French Revolution. 'It passes the wit of man to construct an effective Second Chamber.' Such is, in effect, the characteristic conclusion of the doctrinaire pessimism of which Mr. Goldwin Smith is so distinguished an exponent. But the progressive nations of the modern world have without an exception declined to impale themselves upon either horn of the dilemma of Siéyès; they have not been deterred by abstract considerations against the theory of two co-ordinate legislative chambers; they have ignored the warnings of Mr. Goldwin Smith, and have clung, despite wide differences of circumstance and contrasted forms of constitution, to the two-chambered structure long since evolved by the mother of Parliaments. France—royalist, imperialist, and republican—has throughout all her recent constitutional changes resolutely refused to renew the experiment associated with the first and second Republics. The other unitary States of Europe have, with the single exception of Greece,[1] followed the English model. Federal States, imperial Germany and republican Switzerland alike, look to their Second Chambers for the embodiment and satisfaction of the federal idea. The great English-speaking communities beyond the sea, whether republican or monarchical, presidential or parliamentary, federal or unitary, concur in their adhesion to the bi-cameral arrangement.

For such unanimity in regard to one constitutional device, amid endless diversity in others, there must be solid reasons in history, experience, and fact. Many *a priori* considerations may be adduced which would seem to point in the opposite direction. Theory finds it difficult to escape the dilemma propounded by Siéyès. It may be urged that in the case of the mother of Parliaments the evolution of a bi-cameral form was

accidental. In one sense it was. We might, as will be shown hereafter, have had three Houses, corresponding to the three Estates; we might even, like Sweden, have had four; we might have had one. The ultimate form assumed by the parliamentary structure was unquestionably in some sort accidental. But it is not as though the modern world had had no choice—no experience of other forms. The uni-cameral experiment was not untried even in England. The constitutional history of France affords examples of the trilateral as well as the uni-cameral form. The fathers of the American Constitution lacked neither erudition nor sagacity. They were well versed in political philosophy, and were not ignorant of constitutional practice. Why did they, after brief experience of the uni-cameral, adopt the bi-cameral form of legislature? Canada, perhaps, was hardly a free agent; English prepossessions might account for adherence to the English model, alike in 1791, in 1840, and in 1867. But no one can suppose that any pressure in favour of traditional forms would have been brought to bear upon the democratic communities in Australasia and South Africa, had they preferred to strike out a new path for themselves. But with unbroken unanimity they have adhered to the old. Again we must ask: Why?

The following pages are not intended to supply a direct answer to the questions so bluntly propounded. They will be found to be primarily expository; in a less degree historical; least of all argumentative and controversial. My main purpose is to describe, concisely but accurately, the construction of the legislative machine in some typical states of the modern world; to analyse the composition and to explain the constitutional functions of their 'Second' Chambers, and by this inductive process to reach, if possible, some conclusions which may not

only interest the student of political institutions, but may even afford some slight assistance to the ordinary citizen who is confronted with the responsibility of deciding issues, graver and more momentous than any which have been raised during the present generation. In arriving at a decision, the deliberate judgement of the world cannot safely be ignored. Nor can we regard it as superfluous to appreciate the reasons which have led to its formation. But the first essential is a knowledge of the facts. These facts the following pages will disclose.

With the abstract considerations for and against a Second Chamber I am not greatly concerned. They have long since become the commonplace of the debating society. But their appeal leaves both the student and the statesman unmoved. The necessity of a counterpoise to democratic fervour; the safety which lies in 'sober second thoughts'; the advisability of a check on hasty and ill-considered legislation; the value of an appeal from Philip drunk to Philip sober; the liability of a single chamber to gusts of passion and autocratic self-regard—all these familiar arguments, and many like them, may be as sound as on the day when they were first employed; but somehow the salt has lost its savour. And not less have the abstract arguments on the other side. The only satisfactory appeal, I venture to submit, is the appeal to history; the only safe guide, that of experience. Closer investigation may suggest the conclusion that the world has lavished its worship on a constitutional fetish; that the young democratic communities have sheep-like followed a misguided leader; or that institutions have been unintelligently imitated without sufficient regard to conditioning circumstances. On the other hand, investigation may disclose the fact that under conditions singularly diverse a particular constitutional form has shown unexpected vitality and capacity for adaptation; that

the bi-cameral structure is, under alien skies, a natural and not an artificial growth; that it corresponds to proved necessities, and is, therefore, destined to permanence. But the conclusion is not yet. We may indeed be constrained to confess that no conclusion, with any claim to universal validity, is attainable. Be this as it may, the duty alike of the student and of the politician is clear: to investigate and then to judge.

II

THE HOUSE OF LORDS

ANALYTICAL AND HISTORICAL SKETCH

> 'While the privileges of our Peers, as hereditary legislators of a free people, are incomparably more valuable and dignified, they are far less invidious in their exercise than those of any other nobility in Europe.'—Lord John Russell.

At a very early stage in its evolution the English Parliament assumed a bi-cameral form. This form, except for a short time during the revolutionary period of the seventeenth century, has been retained continuously down to the present time. That this peculiar structure has contributed not a little to its stability, perhaps even to its survival, will be denied by no one who realizes the fate which overtook the States-General of France and the Cortes of Castille and Aragon—institutions coeval with itself. Nevertheless, the bi-cameral arrangement was due, like most English institutions, to a series of fortunate accidents. Like the States-General in France and the Cortes in Spain, the English Parliament was, in its origin, based upon the principle of *Estates*. The model Parliament of Edward I, summoned to meet at Westminster in 1295, represented this principle. The Estate of the Baronage were summoned in person; the Estate of the Clergy, partly in person and partly by representatives; the Estate of the Commons, wholly by representatives; and all for the primary purpose of contributing to the financial necessities of the Crown and Kingdom. From this fact it might have been

anticipated that Parliament would eventually organize itself either in a single chamber or, more probably, in three chambers, corresponding to the three Estates. That it did not permanently assume either of these forms was due to two facts: (i) the secession of the representatives of the capitular and parochial Clergy; and (ii) the junction effected in the fourteenth century between the Knights of the Shire and the representatives of the Boroughs and Cities. The 'lower' Clergy, imbued with a strong separatist spirit, preferred to vote their money-grants to the King in their purely clerical assemblies—the Convocations of Canterbury and York—instead of taking that part in the national assembly of the realm which Edward I was wisely anxious to assign to them. The Knights of the Shire might naturally have been expected to associate themselves politically with the Baronage, the class to which socially they belonged. And for some years after 1295—for how many precisely it is impossible to say—they sat with them. By the middle of the fourteenth century, however, the Knights had definitely separated themselves from the Baronage, and had effected with the Burghers a union, which was destined to endure, in a 'Commons' House of Parliament. Meanwhile the Spiritual Peers—the Bishops and the Abbots—had united with the Temporal Barons in a House of Lords; and thus, before Parliament was a century old, it had definitely assumed the form which, save for a brief and exceptional interval, it has ever since retained.

That the adoption of a bi-cameral form was in itself of first-rate significance I have already hinted; but it was even more important that the different elements of which Parliament consists should have disposed themselves as they did. Had the Knights of the Shire continued to adhere, as they might naturally have done, to the Barons, the history of the English Parliament

might not improbably have resembled that of the French States-General or the Spanish Cortes. The latter disappeared finally in the sixteenth century, the former just managed to survive into the seventeenth. The failure of representative institutions in France and Spain was not due to any single cause, least of all to the absence of the bi-cameral structure. But it must be attributed in no small measure to the success with which the Crown was able to fan the embers of discord between the several Estates, and particularly between the Nobles and the Third Estate. In England such discord was averted and the solidarity of Parliament in its dealings with the Crown was secured by the existence of the Knights of the Shire, and still more by their fortunate association with the Burghers. A glance at the history of county representation will suffice to prove that socially the 'Knights'—certainly down to 1832—belonged, in very large measure, to the same class as the Baronage. Not infrequently they were the sons or brothers of members of the Second Chamber. Their political union with the Burghers was not merely useful in contributing to the weight and dignity of the House of Commons, but formed an invaluable link between the two Houses. Thanks to the existence of this link the kings of England would never, even had they wished it, have been able to drive in a wedge between Nobles and Commons, and to destroy each in turn.

It is, however, with the House of Lords alone that this chapter is concerned.

That House at present consists of 627 members, and is, therefore, by far the largest Second Chamber in the world.[2] Of its members the vast majority owe their seats to hereditary qualification; all but a handful are laymen. Now these characteristics of the House of Lords—its large and perhaps

unwieldy size, the predominance of the hereditary and lay elements—are all comparatively modern. Down to the sixteenth century, or, to be more precise, down to the dissolution of the great abbeys (1539), the House of Lords was small in numbers and was neither predominantly lay nor predominantly hereditary in composition. The process by which it has been so profoundly altered in character will be described presently; but, in the first place, it is important to analyse the elements of which the House is at present composed. In this way something may incidentally be done to correct the vulgar impression that all—or nearly all—the members of the Upper House sit by a common hereditary title. There are no less than six distinct classes of persons entitled to sit in that House:

(i) Princes of the blood royal, sitting as hereditary Peers of the United Kingdom (4).

(ii) Temporal Peers of England, of Great Britain, and of the United Kingdom (548).

(iii) Spiritual Peers: 2 Archbishops and 24 Bishops (26).

(iv) Representative Peers of Scotland (16).

(v) Representative Peers of Ireland (28).

(vi) Lords of Appeal in Ordinary—'Law Lords' (4) and a legal life-Peer (1).

Leaving on one side for the moment the first two categories, which may, perhaps, be more strictly regarded as one, there are at present seventy-four members of the Upper House who do not owe their position directly or solely to the accident of birth.

Of these the Bishops represent the most ancient element in

the House. They had a place not only in the *Commune Concilium* of the Norman and Angevin Kings, but in the Anglo-Saxon Witenagemot; to the model Parliament of 1295 they were naturally, therefore, summoned by Edward I. Whether they sat as Bishops—as rulers of the Church,—or as 'barons'—tenants-in-chief of the Crown,—is a technical point which need not detain us. With the Bishops came the Abbots; but the Abbots resented the obligation to attend Parliament, and insisted that attendance was not incumbent upon them unless they held their lands by military tenure. Thus, whereas 72 Abbots were summoned to Parliament by Edward I, the number had fallen to 27 by the middle of the fourteenth century, and at that figure it remained until the abbeys were dissolved by the Act of 1539. But despite the disinclination of the Abbots to take their place in the Great Council of the nation, the spiritual Peers with brief exceptions generally commanded a majority in the Upper House until the Reformation. Thus in the first Parliament of Henry V there were 47 spiritual Peers as against 38 lay Peers; in the first of Henry VI there were 46 as against 23; in the first of Henry VII, 48 as against 29; and in the first of Henry VIII, 48 as against 36. The Reformation permanently altered these proportions. The Bishops, it is true, were increased by Henry VIII's creations[3] temporarily to 27 and permanently to 26; but the Abbots, Priors, and Masters of Orders finally disappeared, and from that day to this the number of lay Peers has steadily, and at times rapidly, increased. The Bishop of Westminster took his place with the other new creations of Henry VIII in the last Parliaments of that reign and the first of the succeeding one, but the new see was abolished in 1550, and from the reign of Edward VI to that of Edward VII the number of spiritual Peers has remained, with two exceptions, constant.

The first exception was due to the action of the Long Parliament. The Bishops were deprived of their seats in Parliament in 1642, and remained excluded for twenty years. Immediately after the Restoration the Bishops Exclusion Act was repealed (1661) as containing 'several alterations prejudicial to the constitution and ancient Rights of Parliament and contrary to the laws of this land', and as having been 'by experience found otherwise inconvenient'. The second exception was due to the Irish Union. From 1801 down to the disestablishment of the Anglican Church in Ireland in 1869, the Bishops' bench was reinforced by the presence of four Irish Bishops. Apart from this temporary augmentation the number has not varied, despite the large increase in the Anglican Episcopate. The Order in Council creating the new see of Ripon in 1836 gave to the new Bishop a seat in Parliament, but the fusion of the sees of Gloucester and Bristol prevented an increase in the number of spiritual Peers. The successive Acts of Parliament under which new bishoprics have been created for Manchester, Truro, St. Albans, Liverpool, Newcastle, Southwell, Wakefield, Bristol, Birmingham, and Southwark, have expressly provided against any increase in the number of episcopal representatives in Parliament. The two Archbishops, the Bishops of London, Durham, and Winchester, and the twenty-one senior Bishops have seats, the ten junior Bishops being excluded. Various proposals have from time to time been made to 'relieve the Bishops of their legislative duties and give them the opportunity of devoting themselves exclusively to the charge of their dioceses'.[4] But the recent and very influential Committee of the House of Lords, 'having in mind the immemorial position of the Bishops in the House of Lords, and the special authority with which they are able to speak on many subjects, would regret to see the connexion dissolved and their

complete withdrawal from the House. In view, however, of the large reductions proposed in the aggregate numbers of the House the Committee recommended that the episcopal representatives should in future number ten: the two Archbishops to sit by right during the tenure of their sees; and the remaining body of Bishops to elect eight of their number to represent them for the duration of each Parliament'.[5]

But this reform is still in the future; meanwhile twenty-six Bishops continue to be summoned to the Parliaments of Edward VII, as they were summoned to those of Edward VI, and as the twenty Bishops of that day were summoned to that of Edward I.

Of the sixteen representative Scottish Peers little need be said. They sit in virtue of the Act of Union (1707), being elected by the general body of Scottish Peers for the duration of a single Parliament. At the time of the Union there were nearly as many Scottish as English Peers.[6] But owing partly to the fact that no new Scottish Peerages can be created, partly to natural causes, and most of all to the fact that many Scottish Peers have been raised to Peerages of the United Kingdom, there are now only thirty-six purely Scottish Peers, although there are fifty-one Scottish Peers sitting in the House of Lords as hereditary Peers of the United Kingdom.[7] The Scottish Peers cannot, therefore, complain of under-representation in the Imperial legislature, and the day may soon come, as Maitland predicted, when 'there will be no more than sixteen Peers of Scotland, and they will be able to elect themselves.'

The Irish Peers are represented by twenty-eight of their number in the House of Lords. They are elected by the whole body of Irish Peers and (unlike the Scottish Peers) for life. An Irish Peer who is not elected to sit in the House of Lords is

eligible for election by any constituency in Great Britain—a privilege not enjoyed by the Scottish Peers. It was further provided by the Act of Union that for every three Irish Peerages which became extinct one new Peer might be created until the number was reduced to one hundred, after which one new peerage might be created for every one extinguished.

The presence of legal life-peers in the House of Lords is of still more recent date. An attempt made in 1856[8] to confer a life peerage upon a distinguished lawyer was foiled by the action of the Peers themselves. But by the Appellate Jurisdiction Act of 1876, statutory power was given to the Crown to appoint immediately two 'Lords of Appeal in Ordinary', with further power in certain events to appoint two more such 'Lords', to assist the hereditary Peers in the discharge of their functions as the final court of appeal. These 'Law Lords', of whom there are now four,[9] receive salaries, hold office during good behaviour, and are entitled to rank as Barons. Their tenure of seats in the Upper House was, under the Act of 1876, made dependent on the tenure of judicial office; they were, therefore, like the Bishops, to be official 'Lords of Parliament'. By a subsequent amendment of the Act (1887) they may retain their seats and privileges for life, notwithstanding resignation of office. They have become, therefore, life-peers. But their number is limited to four. The Act of 1876, though not curtailing the right of any Peer to take part in the judicial proceedings of the House, further provides that no appeal can be heard or determined in the House of Lords unless three of the following persons are present: the Lord Chancellors (or ex-Chancellors) of Great Britain and of Ireland, Judges or ex-Judges of the High Courts of Great Britain and Ireland, or of the Judicial Committee of the Privy Council, and Lords of Appeal in Ordinary, i.e. the four

'Law Lords'. The principle of 'official' Peers, though limited at present in application, is an important one, and is capable of expansion.

There remains to be considered the fifth element of which the Upper Chamber is composed—the hereditary Peers of England and the United Kingdom. These number at present (including the four Princes of the Blood) no less than 552, or more than five-sixths of the whole House. The vast majority of the Peerages which they hold are of comparatively recent creation. It has been said that 'counting English, Scottish, and Irish Peerages, there are not a hundred which can be traced as far as the Middle Ages, and about half of these have been merged in newer and higher titles'.[10] To the first Parliament of Henry VII there were summoned, as we have seen, only twenty-nine lay Peers. The Tudors, and still more the Stuarts, were lavish in creations, and by the Revolution of 1688 the lay Peers numbered 166. Nearly thirty were added during the short reigns of William III and Anne. Queen Anne, indeed, created twelve new Peers in one batch in order to facilitate the task of the Tories in concluding the Peace of Utrecht.

It was with the intention of stopping such wholesale creations and of maintaining the oligarchical character of the Upper House that in 1719 and 1720 the Peerage Bill was introduced by the Earl of Sunderland. Sunderland represented the quintessence of Whiggism—Whiggism of the type which triumphed in 1688, and regarded with equal suspicion the Crown and the people—the principles of monarchy and of democracy. His Peerage Bills proposed that the number of Peers of Great Britain should be fixed for all time. The Crown was to have the right of creating one new peer for every peerage which became extinct, and of adding to the existing Peerage six new

ones, but that was to be the permanent limit. Scotland was to be represented in perpetuity by twenty-five hereditary, in place of the sixteen elected Peers. The general effect, therefore, of the Bill would have been to fix the numbers of the lay Peerage at about two hundred. The main argument for the Bill was that it was undesirable that successive factions should have the power of swamping the House of Lords, and that the House of Commons would never be really independent so long as its leading members were constantly looking to the Crown for promotion to the Upper House.

This mischievous proposal was defeated by the sturdy common sense of Sir Robert Walpole, and it may be doubted whether in his whole career he ever performed a greater service to his country. Had the Bill become law, the Peerage, instead of being constantly recruited from the best brains of the country, would have become an exclusive and oligarchical caste; the Crown would have been deprived of one of its most valuable prerogatives; above all, the safety-valve of the Constitution would have been permanently closed. Between two legislative chambers, nominally co-ordinate in authority, conflicts must from time to time occur. The only means known to the Constitution of terminating a deadlock—a contingency most elaborately provided for in most modern Constitutions—is the Prerogative by which the Crown may create an unlimited number of new peerages. It may be objected that as a matter of fact the Royal Prerogative has never been so used since 1719, and that the Sovereign has never followed the precedent set by Queen Anne in 1711. This is true; but the numbers of the Upper House have been tripled since 1719; the House has become fairly representative of the talent of the nation; success in every great department of life,—in Letters, in Art, in Science, in

business, in the field, in the forum, in the Church,—is recognized by admission to that House, and thus the Peerage has been kept in close touch with all sides of national activity. Finally, it must be remembered that the Royal Prerogative, though never exercised to effect a single dramatic coup, has, at every great crisis in our parliamentary history, been held in reserve, and has been known to be so held. This knowledge has actually averted revolution, and has preserved the Constitution intact. We were never nearer to revolution than in the Reform Bill crisis of 1832. Twice the Lords had rejected or wrecked Reform Bills on which the constituencies and still more the unenfranchised citizens had manifestly set their hearts. Lord Grey's ministry had resigned; the Duke of Wellington had failed to form an alternative ministry; a deadlock was imminent. It was solved, as in the last resort it can only be solved, by an intimation from the King that he was prepared to create a sufficient number of new Peers to carry the measure through the House of Lords. The new Peers never saw the light; the reserve forces of the Constitution were never called out; but it was only the knowledge of their existence which averted war.

The Peerage Bill of 1719 and the averted deadlock of 1832 represent the two gravest crises in the modern history of the House of Lords. But since 1832 there have been several decisions of the House itself which go to the root of the theory of Peerage and of the qualifications of a Lord of Parliament. These demand a passing reference.

In the first place, it is important to emphasize the distinction suggested in the previous sentence. A *Peer* and a *Lord of Parliament* are far from being convertible terms. 'It would seem,' says Sir William Anson, 'to be of the essence of the Peerage that it should carry with it hereditary right.'[11] Under

this definition Bishops and Lords of Appeal in Ordinary could not be included among Peers: but they are undeniably Lords of Parliament. Conversely there are some Scotch Peers, and many Irish Peers who, though possessing all the attributes of Peerage, are not entitled, unless specifically elected, to a seat in the House of Lords. This point was raised in the clearest possible manner by the famous *Wensleydale Peerage case* in 1856.

It was thought desirable, at that time, to reinforce the House of Lords for the discharge of its functions as the Supreme Court of Appellate jurisdiction, by the creation of life Peers possessed of special legal qualifications. Accordingly the Queen was advised to confer a peerage for life upon Sir James Parke, lately a baron of the Court of Exchequer, under the style of Baron Wensleydale. Letters patent were formally issued in this sense, but the House of Lords demurred to the admission of a life Peer to a seat in the 'hereditary' chamber. There could be no reasonable doubt that the Crown had conferred such peerages in times past, but it was admitted that no case had occurred for the last four hundred years, and it was contended that while the Crown retained the right to create Peers for life, such a peerage did not carry with it the privilege of a Lord of Parliament. The House, after prolonged investigation of precedents, eventually resolved 'that neither the letters patent nor the letters patent with the usual writ of summons issued in pursuance thereof can entitle the Grantee to sit and vote in Parliament'. The Crown acquiesced, and solved the immediate difficulty by conferring upon Baron Parke an ordinary descendible peerage. Whether the Lords were legally right, it is not for a layman to say; it is generally held that they were; but the political expediency of the decision is more open to question. It is true, as we have already seen, that the reinforcement of the Supreme Court of Appeal has

been secured by statute. To this very limited extent the Crown has now a right of creating life Peerages. It is true also that had the right been unlimited it might have placed in the hands of the ministry of the day a dangerous weapon, and might have threatened if not destroyed the independence of the Second Chamber. Nevertheless, some of the best friends of an 'hereditary' House of Lords have not ceased to regret the decision in the Wensleydale case as one of many lost opportunities for strengthening its authority. This is a point which may more properly be discussed when we proceed to examine the schemes proposed from time to time for the reform of the House of Lords.[12] Meanwhile, it should be observed that the Wensleydale case raised questions of first-rate importance, both as to the precise nature of a peerage and as to the extent or limitations of the Royal Prerogative in regard to the creation of Peers.

Not less fundamental were the issues raised, a few years later (1861), by the *Berkeley Peerage case*. Sir Maurice Berkeley, being admittedly 'entitled to the castle and lands constituting what had been the territorial barony of Berkeley' petitioned the Queen that he might be declared Baron of Berkeley, and might receive a writ of summons to Parliament. Technicalities apart, the petition raised the question whether 'barony by tenure' still existed, and whether the holder of a territorial barony could claim as of right a seat in the House of Lords. The decision of the House of Lords was adverse to Sir Maurice Berkeley, and it was thereby authoritatively laid down that no one can any longer claim a 'barony by tenure'. A further question, however, remained: had there ever been a time when such a claim would have been held valid? This question goes to the root of the matter, and necessitates a brief sketch of the

history of the English Peerage and of the House of Lords.

The House of Lords is lineally descended from the Norman Council, which in its turn may claim descent from the Anglo-Saxon Witenagemot. Whether the Witan contained theoretically any popular or democratic element must still be regarded as an open question. But it is certain that in practice it was a small, aristocratic, or, more accurately, official body. The Bishops would seem to have contributed its most permanent element; for the rest it generally consisted of Abbots, Ealdormen or Earls, and *Ministri* or King's Thegns. The Council Court or *Curia* of the Norman Kings was a body not less indeterminate. 'Thrice a year,' says the Saxon Chronicle, 'King William wore his Crown every year he was in England; at Easter he wore it at Winchester, at Pentecost at Westminster, and at Christmas at Gloucester; and at these times all the men of England were with him—archbishops, bishops, and abbots, earls, thegns, and knights.' These may be taken to have represented generally the leading men of the realm. Did they attend the Council or Court in view of any more specific qualification—common to all? To this question no certain or final answer can be given; but it seems tolerably clear that whatever the original theory—if 'theory' there was—it was quickly superseded by the idea that upon all tenants-in-chief,—upon all, that is, who held land directly from the King,—there rested an obligation to attend the King's Council. 'The Earldoms,' as Bishop Stubbs puts it, 'have become fiefs instead of magistracies, and even the Bishops had to accept the status of *barons*' (i.e. tenants-in-chief).

As time goes on the functions of the Council become more clearly defined. The administrative and judicial work is for the most part assigned to a Committee (*Curia Regis*). Its composition becomes also more determinate. In particular a

distinction is recognized between the greater and lesser tenants of the Crown. The former (*barones majores*) come to be distinguished by a personal summons to attend the Council, and by the right to pay their feudal dues directly into the King's Exchequer. The latter (*barones minores*) are summoned to attend through the Sheriff of the County, and through the same functionary pay their dues to the Crown. This usage dates back at least as far as Henry II, and receives legal sanction from the famous clause of Magna Carta: 'To have the Common Council of the Kingdom we will cause to be summoned the archbishops, bishops, abbots, earls and greater barons singly (*sigillatim*) by our letters; and besides we will cause to be summoned *in general* by our sheriffs or bailiffs all those who hold of us in chief.'[13] Another clause of the Charter provides that the heir of a 'baron' shall pay a hundred marks for succession duty (*relief*), the heir of a knight shall pay only a hundred shillings. It has been surmised and with much show of probability, that the distinction of *relief* corresponds with the distinction in the manner of summons. Be this as it may, it is clear that as time goes on there is a progressive circumscription in the 'baronial' class. To the Welsh war of 1276 no less than 165 'barons' received a special summons; to the model Parliament of 1295 Edward I summoned only 41. Already we seem to see a distinction manifesting itself between 'Barons' and 'Lords of Parliament'. Tenure begins to have less and less political significance. The qualification of 'barony' gradually changes. A 'baron' is no longer a man with much land held direct from the King. He is the man singled out by the King for the privilege or duty of a special summons to the 'House of Lords'. Thus *barony by writ* supersedes *barony by tenure*. But who was entitled to receive the writ of summons? This question is not perhaps susceptible of a positive answer, but the conclusions now

generally accepted are thus stated by Sir William Anson: 'that at any rate from the time of Edward I the King used his discretion in respect of the special summons by writ; that as a matter of fact those summoned were usually, though not invariably, tenants of the Crown and tenants of baronies; but that persons were summoned who not only were not tenants of baronies, but were not tenants of the Crown at all. The estate of the baronage was constituted and defined by the exercise of the royal prerogative in issuing the writ of summons'.[14]

A further question now arises: did the receipt of such a writ confer any hereditary right to its continuance? Whether this was originally intended is more than doubtful; but it is clear that the usage was gradually established, and in the case of the Clifton barony in 1673 it was definitely decided that the King could not withhold the writ of summons from the heir of a person who had been once summoned and *had taken his seat*. This latter point—the necessity that to establish the right the summons should have been obeyed—was finally decided by the *Freshville case* in 1677. But meanwhile an important change had taken place in the mode of creating baronies. The dignity of an Earl, a Duke (dating from 1337), a Marquis (from 1386), and a Viscount (*temp.* Henry VI), was conferred by charter or Letters Patent. Richard II was the first King to confer a barony in the same manner, and from the time of Henry VI it has become the established method of creation. A peerage is now invariably created by Letters Patent, after the issue of which the new peer receives a writ of summons to take his place in the House of Lords. Thus there came into existence an hereditary peerage and a House of Lords, consisting, as we have seen, in an increasing degree of hereditary peers.[15] The powers of that House, and its functions, legal and political, will form the subject of a later

chapter.[16]

III

THE UNI-CAMERAL EXPERIMENT

> 'The Commons of England assembled in Parliament, finding by too long experience that the House of Lords is useless and dangerous to the people of England to be continued have thought fit to ordain and enact . . . that from henceforth the House of Lords in Parliament shall be and is hereby wholly abolished —'*Act*' of the Long Parliament (March 19, 1649).
>
> 'That the supreme legislative authority of the Commonwealth . . . shall be and reside in one person and the people assembled in Parliament.'—*Instrument of Government*, § 1 (December 16, 1653).
>
> 'That your Highness will for the future be pleased to call Parliaments consisting of two Houses.'—*Humble Petition and Advice*, § 2 (May 25, 1657).
>
> 'That the Government is and ought to be by King, Lords, and Commons.'—*Resolution of Convention Parliament* (May 1, 1660).

It has been shown in the preceding chapter that the English Parliament assumed almost from the first a bi-cameral form, and, except for eight years in the middle of the seventeenth century, it has retained that form ever since. The period of exception occurred, of course, in revolutionary days, but the

results of the experiment of a uni-cameral legislature are not, on that account, the less pregnant with political instruction and suggestiveness. It is the purpose of the following pages to explain the circumstances under which the experiment was attempted, and to inquire whether, and if so how far, they were sufficient to invalidate any conclusions which we may be tempted to draw from its undeniable failure.

Reduced to a mere fraction of its original numbers by the drastic purge of Colonel Pride, the Long Parliament had set up a special Court of Justice to try Charles I. Under the sentence of this irregular tribunal the King had been sent to the scaffold on January 30, 1649. Six weeks later the same 'Rump' proceeded to pass an 'Act' declaring that the office of King was 'unnecessary, burdensome, and dangerous to the liberty, safety, and public interest of the people', and that it should be forthwith abolished (March 17, 1649). This Act was immediately followed (March 19) by another which declared that 'the Commons of England . . . finding by long experience that the House of Lords is useless and dangerous to the people of England to be continued, have thought fit to ordain and enact . . . that from henceforth the House of Lords in Parliament shall be and hereby is wholly abolished and taken away; and that the Lords shall not from henceforth meet or sit in the said House, called the Lords' House, or in any other house or place whatsoever, as a House of Lords; nor shall sit, vote, advise, adjudge, or determine of any matter or thing whatsoever, as a House of Lords in Parliament'. Further: provision was in the same 'Act' made that 'such Lords as have demeaned themselves with honour, courage, and fidelity to the Commonwealth' should be capable of election to the uni-cameral legislature. It is important to note that the 'Act' of March 19, 1649, having

neither the sanction of the Crown nor of the House of Lords, had no more legal force than any other resolution of the House of Commons; as the work of a House of Commons from which the majority was excluded by force of arms, it had even less than the usual moral significance.

The rump of the Long Parliament having thus rid itself of the King and of the Second Chamber, proceeded to render itself independent of the electorate and to perpetuate its own power; to make itself, in a word, politically and legally sovereign. Under the Act of May 11, 1641,—an Act which had of course received the assent of the King and the House of Lords,—the Long Parliament could not be dissolved, prorogued, or adjourned except by Act of Parliament 'passed for that purpose'. It is noticeable that the Act contained a further provision that 'the House of Peers shall not at any time . . . during this present Parliament be adjourned unless it be by themselves or by their own order'. But, this notwithstanding, the Act was deemed to be still in force, and it did provide a certain measure of sanction for the impudent claim now put forward by the remnant of the House of Commons. On January 4, 1649, that House had resolved that 'the Commons of England in Parliament assembled, being chosen by and representing the people, have the supreme power in this nation'. Never, as Professor Firth says, was the House 'less representative than at the moment when it passed this vote. By the expulsion of royalists and members during the war, and of Presbyterians in 1645, it had been, as Cromwell said, "winnowed and sifted and brought to a handfull." When the Long Parliament met in November, 1640, it consisted of about 490 members; in January, 1649, those sitting or at liberty to sit were not more than ninety. Whole districts were unrepresented. . . . At no time between 1649 and 1653 was

the Long Parliament entitled to say that it represented the people'.[17] Nevertheless the position it assumed had in it this element of strength: in the absence of a King, a House of Lords, and a written Constitution, there was absolutely no legal check upon its unlimited and irresponsible authority. 'This,' said Cromwell, addressing his second Parliament, 'was the case of the people of England at that time, the Parliament assuming to itself the authority of the three Estates that were before. It had so assumed that authority that if any man had come and said, "What rules do you judge by?" it would have answered, "Why, we have none. We are supreme in legislature and judicature."' Supreme the Rump claimed to be; but it ignored the dominant factor in the situation—the new model army and its general, and it chose to forget that its usurped authority rested in fact upon the power of the sword. It was soon uncomfortably reminded of this fact. By 1652 there was a clamorous demand for a settlement of the kingdom. The enemies of the Commonwealth were now scattered: Cromwell had subjugated Ireland and Scotland; the fleet, organized by Vane and commanded by Blake, had swept Prince Rupert and the Royalists from the seas; while Cromwell himself had finally crushed their hopes at home by the 'crowning mercy' of Worcester (September 3, 1652). The victorious party had now leisure and opportunity to quarrel among themselves. Petitions poured in from the army praying for reforms—long delayed—in law and justice; for the establishment of a 'gospel ministry'; above all, for a speedy dissolution of the existing Parliament. The officers were ready to employ force to effect the last object: but Cromwell was opposed to it and restrained his colleagues. During the autumn of 1651 a series of conferences as to the 'settlement of the nation' were held at Speaker Lenthall's. The lawyers like St. John, Whitelocke, and Lenthall himself, already favoured a

restoration of one of the late king's sons; the officers wanted a republic; Cromwell cautiously expressed his opinion that 'a settlement with somewhat of monarchical power in it would be very effectual'. Meanwhile the Rump pushed on their 'Bill for a New Representation'. This Bill suggested that the New House should consist of 400 members, but it contained, in addition, the amazingly impudent proposals that the existing members were to retain their seats without re-election, and that they should have a veto upon all new members who should be elected not merely to the next but to all future parliaments. Against this the officers strongly protested; even Cromwell's patience was exhausted: 'You must go, the nation loathes your sitting.' Later on, he gave his opinion of the 'Perpetuation Bill': 'we should have had fine work then . . . a Parliament of four hundred men executing arbitrary government without intermission except some change of a part of them; one Parliament stepping into the seat of another, just left warm for them; the same day that the one left, the other was to leap in. . . . I thought and I think still, that this was a pitiful remedy.' On April 20, 1653, the Rump was expelled. 'So far as I could discern when they were dissolved, there was not so much as the barking of a dog or any general and visible repining at it.'

In his estimate of the position and policy of the uni-cameral Rump Cromwell was undeniably right. It was in plain truth the 'horridest arbitrariness that ever existed on earth'. It was held that the Rump had become a sort of residuary legatee of all the powers previously possessed by either House. 'Whatsoever authority was in the Houses of Lords and Commons the same is united in this Parliament.' Such was the theory held by Lord Chief Justice Glyn. In particular the judicial power of the House of Lords was held to be vested in the Rump, while Major-

General Goffe went so far as to assure his fellow members 'that the ecclesiastical jurisdiction by which the Bishops once punished blasphemy had since the abolition of the bishops devolved also upon the House.'[18] The union of executive, legislative, and judicial authority more than justified Cromwell's famous description. No man's person or property was safe. It was a repetition of all the arbitrary tribunals of the régime of *Thorough* rolled into one. Hence 'the liberties and interests and lives of people not judged by any certain known Laws and Power, but by an arbitrary Power . . . by an arbitrary Power I say: to make men's estates liable to confiscation, and their persons to imprisonment—sometimes by laws made after the fact committed; often by the Parliament's assuming to itself to give judgment both in capital and criminal things, which in former times was not known to exercise such a judicature'.[19]

That Cromwell did not overstate the case against the arbitrary behaviour of a House of Commons, acting without a sense of immediate responsibility to the nation, and unchecked by any external authority, has lately been proved in detail by the researches of Professor Firth. But the story is not yet complete.

To the 'Rump' there succeeded the Puritan Convention, popularly known as the 'Barebones' Parliament'. This device did not work, and in December, 1653, a Committee of Officers, assisted by a few civilians, produced the exceedingly interesting draft constitution embodied in *The Instrument of Government*. This document provided, in the first place, for a drastic scheme of parliamentary reform, embracing both the revision of the franchise qualification and the redistribution of seats; parliaments were to be elected triennially, and to remain in session for not less than five months; Ireland and Scotland were, for the first time, to be represented at Westminster; but the two

points which specially concern us were: (i) that the legislative power was vested in 'one person and the people represented in parliament', i.e. in a single chamber; and (ii) that the constitution itself was to be 'rigid', the Legislature having no power of amending it. The 'single person' was to have only a suspensive veto on Bills presented to him by Parliament. If within twenty days he had not given his consent, nor succeeded in inducing Parliament to withdraw the Bill, it became law, 'provided such Bills contain nothing in them contrary to these presents'—in other words, provided they were not repugnant to the written Constitution.

The *Instrument* represented an honest attempt to regain the path of constitutional decorum, to clothe the military dictatorship with the form of law. But it met with the usual fate reserved for attempts to square the circle, to reconcile irreconcilables. The 'single chamber' when once elected showed no disposition to accept the 'fundamentals' of the *Instrument*. Despite the angry admonitions of the Protector it insisted upon questioning the 'authority by which it sat'; regarding itself, in fine, as not merely a legislative but a constituent assembly. As a result, the Protector dismissed it at the first legal opportunity (January 22, 1655). 'The people,' he declared, 'will prefer their safety to their passions, and their real security to forms, when necessity calls for support.' For the next eighteen months England was delivered over to the entirely arbitrary rule of the major-generals. But as the year 1656 advanced the Protector needed money for the Spanish war, and in September a Second Parliament assembled. Great efforts had been made to secure the election of the well-affected, but even so it was found necessary to exclude as many as one hundred irreconcilables.

This renewed ‘sifting and winnowing’ did not solve the difficulty. There were in truth only two genuine alternatives: ‘government by consent’ or government by the sword. The ‘honest republicans’, like Ludlow, wanted the former. ‘What would you have?’ asked Cromwell of Ludlow. ‘That which we fought for,’ replied the colonel, ‘that the nation might be governed by its own consent.’ ‘I am as much for government by consent as any man,’ said the Protector, ‘but where shall we find that consent?’

The question denotes the practical statesman as against the doctrinaire. Government ‘by consent’ could mean only a freely elected Parliament with constituent powers. Such a Parliament meant a Stuart restoration. And Cromwell knew it. Nevertheless he was almost pathetically anxious to keep the sword out of sight, and arrive, if by any means possible, at a constitutional settlement. ‘It is time to come to a settlement and to lay aside arbitrary proceedings so unacceptable to the nation.’ The lawyers, the merchants, and the middle party generally were of one mind with the Protector, and early in the year 1657 a demand arose from many quarters for a revision of the Constitution. Alderman Sir Christopher Pack, one of the members for the City of London, was put up to propose revision —a Second Chamber and increased power for the Protector, who was to be ‘something like a king’. By the end of March the demand took practical shape in the *Humble Petition and Advice*. The Protector was to be transformed into a king, with the right to nominate a successor; Parliament was once more to be bi-cameral; the ‘other House’ was to consist of not more than seventy and not less than forty members, nominated for life by ‘his Highness’, and approved by ‘this’ House; the Commons were again to secure control over their own elections, and none

duly elected were to be excluded; the Council of State was to be known henceforth as the Privy Council; a permanent revenue was to be secured to the king, and there was to be toleration for all: 'so that this liberty be not extended to Popery or Prelacy or to the countenancing such who publish horrible blasphemies or practice or hold for licentiousness or profaneness under the profession of Christ.' In a word, the old Constitution, so far as the circumstances of the moment would allow, was to be restored.

Cromwell was well pleased with the scheme, and, had his officers permitted, would have accepted it in its entirety. 'The things provided in the Petition,' he declared, 'do secure the liberties of the people of God so as they never before had them.' But on one point the leading officers and the 'honest republicans' were alike immovable: they would have no king. They were backed in their opposition by the extremer Puritan sects. 'We cannot but spread before your Highness our deep resentment of and heart bleedings for, the fearful apostasy which is endeavoured by some to be fastened upon you . . . by persuading you to assume that office which was one declared and engaged against by the Parliament . . . as unnecessary, burdensome and destructive to the safety and liberty of the people.'[20] So ran an address from nineteen Anabaptist ministers in London. Cromwell himself was in two minds. His reason assented to the *Humble Petition*, but policy required that he should not break with the masters of the sword. The extremists prevailed, and after five weeks of discussion and hesitation, Cromwell refused the offer of the crown.

The proposal for a revived Second Chamber was, on the contrary, carried with an unexpected degree of unanimity. The Protector pressed it strongly upon the officers. 'I tell you,' he

said, 'that unless you have some such thing as a balance we cannot be safe. Either you will encroach upon our civil liberties by excluding such as are elected to serve in Parliament—next time for aught I know you may exclude four hundred—or they will encroach upon our religious liberty. By the proceedings of this Parliament you see they stand in need of a check or balancing power, for the case of James Naylor might happen to be your case. By the same law and reason they punished Naylor they might punish an Independent or Anabaptist. By their judicial power they fall upon life and member, and doth the Instrument enable me to control it? This Instrument of Government will not do your work.'[21]

The case against a uni-cameral legislature was never put with more telling effect. 'By the proceedings of this Parliament you see they stand in need of a check or balancing power.' The appeal to recent experience was irresistible. More horrid arbitrariness had never been displayed by any government. The lawyers were especially emphatic in their demand for some bulwark against the caprice and tyranny of a single elected chamber. 'The other House,' said Thurloe, 'is to be called by writ, in the nature of the Lords' House; but is not to consist of the old Lords, but of such as have never been against the Parliament, but are to be men fearing God and of good conversation, and such as his Highness shall be fully satisfied in, both as to their interest, affection and integrity to the good cause. And we judge here that this House thus constituted will be a great security and bulwark to the honest interest, and to the good people that have been engaged therein; and will not be so uncertain as the House of Commons, which depends upon the election of the people. Those that sit in the other House are to be for life, and as any die his place is to be filled up with the

consent of the House itself, and not otherwise; so that if that House be but made good at first, it is likely to continue so for ever, as far as man can provide.'[22] The preference of the lawyers for a bi-cameral legislature is, however, only according to expectation. They frankly favoured a return as speedy as possible to the old order, if not to the old dynasty. More remarkable is the acquiescence of the soldiers. But they too had come to realize both the inconvenience—to use no harsher term—caused by the sovereignty of a single chamber, and the insufficiency of paper restrictions imposed by the *Instrument of Government*. A freely elected House of Commons meant the restoration of the 'King of the Scots'. 'On reflection, therefore, they were not sorry,' as Professor Firth pertinently remarks, 'to see a sort of Senate established as a check to the popularly elected Lower House, thinking that it would serve to maintain the principles for which they had fought against the reactionary tendencies of the nation in general. They were so much convinced of this that in 1659 the necessity of "a select Senate" became one of the chief planks in the political platform of the army.'[23]

On May 8 Cromwell communicated to the House his final decision not to 'undertake the government with the title of King'. After much debate the *Petition* was amended in accordance with the Protector's views, and in its amended form was definitely accepted on May 25. On June 26 Cromwell was installed with solemn pomp as Protector, and on January 29, 1658, he met his remodelled Parliament for the first time.

According to the terms of the Petition, the 'other House' was to consist of not more than seventy and not less than forty members, 'being such as shall be nominated by your Highness and approved by this House.' But after much debate the

approval of 'this' House was waived and the Protector was authorized to summon whom he would. The task of selection was no easy one, but Cromwell took enormous pains to perform it faithfully. 'The difficulty proves great,' wrote Thurloe, 'between those who are fit, and not willing to serve, and those who are willing and expect it, and are not fit.' At last sixty-three names were selected and writs were issued, according to the ancient form, bidding them, 'all Excuses being set aside,' to be 'personally present at Westminster . . . there to treat, confer and give your Advice with us, and with the Great Men and Nobles'. Of the sixty-three summoned, only forty-two responded; among them being Richard, son of the Protector,[24] his three sons-in-law, Fauconberg, Claypole, and Fleetwood, and his brothers-in-law, Desborough and John Jones. Of the seven English Peers summoned, only two consented to serve, one being Cromwell's son-in-law, Lord Fauconberg, the other Lord Eure, a peer of no standing or repute. Lord Say, staunch Puritan though he was, refused to countenance any Second Chamber save the real House of Lords. 'The chiefest remedy and prop to uphold this frame and building and keep it standing and steady is (and experience hath showed it to be) the Peers of England, and their powers and privileges in the House of Lords; they have been at the beam keeping both scales, King and people, in an even posture, without encroachments one upon the other to the hurt and damage of both. Long experience hath made it manifest that they have preserved the just rights and liberties of the people against the tyrannical usurpation of kings; and have also as steps and stairs upheld the Crown from falling upon the floor, by the insolency of the multitude, from the throne of government.' That being so he thought it unworthy that any ancient peer of England should so far play the traitor to his House and order as to be 'made a party, and indeed a stalking-horse and vizard, to the

design of this nominated Chamber'.[25] His sons John and Nathaniel Fiennes had no such scruples, and obeyed the Protector's summons. The latter indeed was one of the most enthusiastic apologists for the 'other House'.

But the Protector had still to reckon with the bitter and pedantic republicans in the House of Commons. Sir Arthur Haslerig, who had refused a place in the 'other' House, was foremost among the querulous critics of the new constitutional experiment. The Protector insisted upon the critical condition of affairs at home and abroad; but to no exhortations would the Commons give heed. Once again they insisted on questioning 'fundamentals', and debating the powers, position, and title to be assigned to the 'other' House. A week of this 'foolery' sufficed to exhaust the Protector's patience, and on February 4 he dissolved Parliament with some passion: 'Let God be judge between you and me.' 'Amen,' responded some of the irreconcilable republicans. Thus ended in confusion and failure the constitutional experiments of the Commonwealth and the Protectorate.

That Cromwell was genuinely anxious to restore the authority of the civil power and to re-establish parliamentary institutions can be doubted only by those who hold him to have been an actor and a hypocrite. That he signally failed is obvious; and it is worth while to pause for an instant in order to analyse the reasons for his failure.

To ascribe it entirely to the abolition of the monarchy and of the House of Lords would be uncandid, though it cannot be doubted that the absence of these balancing elements materially increased Cromwell's difficulties. Nor can it be ascribed wholly to the personality or to the political convictions of

Cromwell himself. It is true that Cromwell never gave any indication that he possessed special capacity for the task of constitutional reconstruction; it is truer still that he was unfitted alike by temperament and training for the rôle of a 'constitutional' ruler in the modern sense. He was quite as determined as Strafford or Charles I to retain in his own hands the control of the executive, and he refused to assign to any of his Parliaments anything more than a legislative authority to be exercised under the strait limitations of a written constitution. On the other hand, it is hardly matter for surprise that a Parliament which imagined that it had brought a Stuart sovereign to the dust should be reluctant to accept so limited a sphere of action and authority. The Protectorate Parliaments were clearly determined to exercise not merely legislative, but constituent powers; not only to make laws, but to revise and define the Constitution itself. The claim, though reasonable enough in theory, was inconvenient and inopportune. If the sword was ever to be sheathed; if civil government was ever to be restored, it was absolutely necessary, as Cromwell pointed out with homely good sense, to start somewhere; to agree on certain preliminary fundamentals. Parliament refused to see the necessity, and insisted upon throwing the whole Constitution into the melting pot on each successive occasion. Thus, the point at issue was precisely what it had been under the Stuart Kings: Where does *Sovereignty* reside? Does it reside in a Constitution, or in Parliament, or in the People? It is difficult to maintain that there was much moral authority behind either of the written Constitutions—the *Instrument of Government* or the *Petition and Advice*. On the other hand, to admit the sovereignty of the people in any genuine and effective sense—to summon a constituent assembly freely elected by the constituencies—would have been, beyond all question, to pave the way for a

Stuart restoration. Must *Sovereignty*, then, be vested in a Parliament, either uni-cameral or bi-cameral, elected on a notoriously restricted franchise and with manifest disregard for 'popular' rights? The dilemma was in fact complete, the problem insoluble. The more so since it was impossible to avow the naked truth that the real sovereignty in England during the interregnum was vested neither in People, nor in Parliament, nor in paper Constitutions, but in the sword. Cromwell's authority, anxious as he was to ignore or disguise the fact, rested upon the fidelity of his unconquerable ironsides. His parliamentary experiments, though undertaken in all good faith, were in consequence foredoomed to failure. The failure is, however, unusually instructive. It is a striking illustration of the truths, too often neglected by Englishmen, that parliamentary government is not for all peoples, nor for all times; that it postulates certain conditions; that its success depends on presuppositions by no means invariably fulfilled; that, if it is to work smoothly there must be a tolerable measure of agreement upon 'fundamentals'; that on 'circumstantials' men and parties may indulge in wide difference of opinion; but that on general principles of government they must be in accord. Further, and finally, it would seem to suggest the conclusion that parliamentary institutions, at any rate in England, are workable only with a legislature genuinely bi-cameral in structure, and under the ægis of a constitutional but hereditary monarchy.

For ten years the English people submitted sullenly, but in the main silently, to a military autocracy thinly disguised under the veil of a parliamentary Commonwealth, or a Protectorate limited by a written Constitution. On the death of the great Protector, himself the leader and general of an irresistible army, the sword and the robe at once came into sharp and open

conflict. Richard Cromwell, powerless either to control or to reconcile, was contemptuously pushed aside, and after a short period of confusion, the people got the opportunity—the first they had enjoyed since 1640,—of giving expression to their true political sentiment. It is supremely significant that the Convention Parliament affirmed, with its first breath, that 'The Government is and ought to be, by King, Lords, and Commons'. The experiment of a sovereign uni-cameral Parliament stood confessed, a hopeless and irremediable failure.

IV

THE POWERS AND FUNCTIONS OF THE HOUSE OF LORDS

> 'What, then, is expected from a well constituted Second Chamber is not a rival infallibility, but an additional security. It is hardly too much to say that, in this view, almost any Second Chamber is better than none.'—Sir Henry Maine.
>
> 'With a perfect Lower House it is certain that an Upper House would be scarcely of any value. If we had an ideal House of Commons perfectly representing the nation, always moderate, never passionate, abounding in men of leisure, never omitting the slow and steady forms necessary for good consideration, it is certain that we should not need a higher chamber. The work would be done so well that we should not want any one to look over or revise it. And whatever is unnecessary in government, is pernicious. . . . But though beside an ideal House of Commons the Lords would be unnecessary, and therefore pernicious, beside the actual House a revising and leisured legislature is extremely useful, if not quite necessary.'—Walter Bagehot.

We turned aside in the last chapter to examine the working of the uni-cameral experiment under the Commonwealth and Protectorate. It is time to resume the thread of the argument, and I propose, therefore, to devote this chapter to a discussion of the

legal powers and political functions of the House of Lords.

A brief word must in the first place be said as to the privileges of Peers. These attach, it must be observed, to the *person* of a Peer, and not, as in most foreign countries, to the *family*—a fact which has done much to save England from the curse of a noble caste. The fundamental political right of a Peer, who is also a Lord of Parliament, is to receive from the Sovereign a writ of summons to take his place in Parliament. By the case of the Earl of Bristol (1626) it was established that this writ cannot be withheld at the caprice or discretion of the Crown.[26] Every Lord of Parliament, therefore, not disqualified by infancy, bankruptcy, felony, incapacity to take the oath required by the Act of 1866, or by sentence of the House itself, is entitled to a writ of summons. Peers, like members of the House of Commons, enjoy the privilege of freedom from arrest, except in cases of treason, felony, or breach of the peace, and the privilege of freedom of speech. Other privileges enjoyed by Peers are the right to be tried, in cases of treason or felony, by the Peers, and the right of personal access to the Sovereign, the latter being derived from a Peer's position as an hereditary Counsellor of the Crown. Until 1868 a Peer might record his vote by proxy, and he may still enter his individual protest against any decision or vote of the House. All the above may be regarded as individual privileges attaching to the person of a Peer.[26] Collectively the Peers in Parliament possess, like the Commons, the right to determine all questions affecting the constitution of their own House, and the right to commit an individual for contempt of their orders.

The *powers* of the House of Lords are twofold: Judicial and Legislative.

The Judicial functions are in part *original*, and in part *appellate*; but both are alike derived from the antiquarian confusion between the *Curia Regis* and the *Concilium Commune Regni*, between the *Court* and the *Council*, or, to be still more technical, between the *King-in-Council* and the *King-in-his-Council-in-Parliament*. But the antiquarian point need not detain us, though it explains why the Lords exercise these judicial functions as successors in title to the *Commune Concilium*, and not the Commons who descend from a different stock.

As a Court of first instance the Lords have the right, already referred to, of trying their own members in cases of felony and treason. Such a trial is conducted by the Lord High Steward, and all the Peers of Parliament (except the spiritual Peers) are entitled to attend. To them belongs also the right of deciding, at the instance of the House of Commons, all cases of impeachment. For four hundred years—from the fourteenth century to the eighteenth—the trial of a powerful offender at the bar of the Lords on the accusation of the Commons, was the most effective, if not the only, means of enforcing the doctrine of ministerial responsibility. It was, at the best, a clumsy weapon, and not infrequently broke in the hands of those who desired to wield it. Strafford, for example, was able to defy his enemies so long as they relied upon this procedure. Since the development of the ministerial system and more particularly since the recognition of the doctrine of collective responsibility, the weapon has been virtually discarded as not merely cumbrous but obsolete. The trial of Warren Hastings was the last of the great political impeachments, though this procedure was again adopted when Lord Melville was accused of the peculation of naval funds in 1805. Since that time the device has been

dropped. It is now recognized that cases involving a criminal charge are better left to the ordinary Courts, while political blunders are sufficiently and effectually punished by the power of dismissal which the House of Commons has definitely acquired. If the purpose of this treatise were antiquarian it would be necessary to recall the fact that in the reign of Charles II the famous case of *Skinner* v. *the East India Company* (1665) raised an important question in regard to the jurisdiction of the House of Lords as a Court of first instance in civil causes. The claim was hotly contested by the House of Commons who espoused the cause of the East India Company, and raised a counter-claim of privilege, on the preposterous ground that certain members of the defendant company were members also of that House. The quarrel, thus raised, between the two Houses was unquestionably a pretty one, and it threatened to be persistent. It was only allayed after more than three years' duration by the personal intervention of the King, who persuaded both Houses to erase all records of it from their respective journals. Where victory lay it is difficult to determine. The House of Lords have not, as a matter of fact, reasserted their claim to exercise an original jurisdiction in civil cases where the parties are Commoners; but on the other hand they refused to waive their original claim and passed a resolution declaring the proceedings of the lower House in 'entertaining the scandalous petition of the East India Company against the Lords House of Parliament' to be 'a breach of the privileges of the House of Peers and contrary to the fair correspondency which ought to be between the two Houses of Parliament'.[27] But the case is important, less in reference to the judicial powers of the House of Lords, than as an illustration of the growing jealousy between the two Houses, and in the present connexion, therefore, demands no further discussion.

Far more important is the position of the House of Lords as the supreme and final Court of Appeal. This, like its other judicial functions, is an heritage from the undifferentiated *Curia* or Council of the Norman kings. When the Common Law Courts were 'thrown off' from the ordinary work of the Council, and obtained a distinctive organization and separate official staff, the King-in-Council still retained appellate and equity jurisdiction. In time the equity jurisdiction was similarly differentiated in the Chancellor's Court: but still the main body of the Council—now hardly distinguishable from the Lords in Parliament—retained the supreme appellate jurisdiction. The right thus inherited by the Peers has never seriously been challenged and remains to this day an interesting, though somewhat anomalous, survival. Almost the only disputed point in this connexion was whether an appeal lay to the House of Lords from the Equity, as well as from the Common Law, Courts. The point was raised in the famous case of *Shirley* v. *Fagg* (1675). Hardly had the passions aroused in both Houses by the case of *Skinner* v. *the East India Company* abated when they again broke out on a different issue. Sir John Fagg, a member of the House of Commons, obtained a verdict in the Court of Chancery against Dr. Thomas Shirley. Shirley appealed to the House of Lords who summoned Fagg to answer at the bar. The House of Commons espoused the cause of Fagg, 'contending (1) that members of their House were exempted by privilege from legal process during the Session of Parliament; (2) that the Lords had no appellate jurisdiction in equity cases'. [28] The House of Lords replied by an assertion of their right to hear an appeal from any inferior Court whatsoever. Neither House would give way and much confusion temporarily ensued. But the ultimate victory lay unquestionably with the Lords. Their appellate jurisdiction in equity cases has been exercised from

that time without protest.

It could not, however, be contended that the House of Lords afforded a completely satisfactory Court of Appeal. As the judicial business of the country increased in volume and intricacy its defects in this regard became deplorably apparent. 'For some years after the Revolution,' says Erskine May, 'there had not been a single Law Lord in the House—Lord Somers having heard appeals as Lord Keeper. When that distinguished lawyer was at length admitted to a seat in the House of Peers, he was the only Law Lord. During the greater part of the reigns of George II and George III, appeals had been heard by Lord Hardwicke, Lord Mansfield, Lord Thurlow, and Lord Eldon, sitting in judicial solitude; while two mute, unlearned lords were to be seen in the background, representing the collective wisdom of the Court. In later times a more decorous performance of judicial duties had been exacted by public opinion; and frequent changes of administration having multiplied ex-Chancellors, the number of Law Lords was greater than at former periods.'[29] But things were still far from satisfactory; and in 1856, as we have already seen,[30] an attempt was made to strengthen the House in its judicial capacity by the inclusion of life Peers with legal experience. That attempt was foiled by the action of the Lords themselves, and in 1873 they went near to losing for ever their historic jurisdiction. The *Supreme Court of Judicature Act* of that year extinguished it altogether, but before the Act came into operation wiser counsels prevailed, and by the Act of 1875 the clause was rescinded. A year later the appellate jurisdiction of the Lords was for the first time placed on a statutory basis by the Act of 1876, which at the same time provided for the creation immediately of two, ultimately of four, life Peers to be known as

Lords of Appeal in Ordinary. Henceforward no appeal was to be heard unless three Lords of Appeal were present.[31] These, it should be added, were further defined as the Lord Chancellor, the Lords of Appeal in Ordinary (salaried life Peers), and any other Peers who 'hold or have held high judicial office'. Of these there are now a considerable number in the House of Lords. The legal right of all Peers, learned or unlearned, to take part in the judicial work of the House remains, as we have seen, entirely unaffected. The procedure differs in no wise from the procedure in legislation. Decisions are given by vote, and should the vote of a layman be tendered it could not be refused. As a fact no such vote ever is tendered, and the judicial work is left severely to those members of the House who are confessedly competent to perform it. But it is not done exclusively by 'Lords of Appeal' and assistance in this part of its work is frequently rendered by distinguished lawyers like Lord James of Hereford who, though an ex-Attorney-General, has never technically held 'high judicial office'.

That the House of Lords does its work well as the Supreme Court of Appeal is acknowledged on all hands; that such work should fall to a body whose function is primarily legislative is one of the interesting anomalies of the English Constitution.

To that legislative function we may now pass. As one of the three branches of the legislature, the House of Lords possesses in legal theory absolutely co-ordinate authority with the King and the House of Commons; subject to one important exception. In regard to the imposition of taxation, the powers of the House of Lords are limited, if not by statute, at least by convention and precedent, which in this country are not less binding than statutes. The precise nature and extent of these limitations will be discussed presently. For the rest it may be taken as

undisputed that the powers of the Lords as regards ordinary legislation are precisely parallel to those of the Commons. Any Bill, public or private, may originate in, and be amended or rejected by, either House indifferently. Before it can become an Act it must have obtained the concurrence of the other House and of the Crown. 'Be it enacted'—so runs the historic legislative formula—'by the King's most excellent majesty, by and with the advice and consent of the lords, spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same.' Each House has power to regulate its own procedure, and Bills affecting the privileges or proceedings of either House must originate in the House concerned. On a similar principle, Bills for the restitution of Honours originate as a rule in the House of Lords.

But while the theory is as stated above the practice is widely different. In Private Bill legislation the position of the House of Lords is strictly co-ordinate with that of the Commons. Indeed, an acute American critic of English institutions has said with truth, that 'by far the most important officer of Parliament' in respect of Private Bill legislation is 'the Chairman of Committees in the House of Lords'. And he supplies the obvious reason: 'Being less busy with public affairs than the House Chairman, he is able to devote much more time to private bill legislation. He examines all the bills, even reading those introduced into the House of Commons before the Speaker's Counsel sees them.'[32] Thus in regard to private bills the House of Lords may be said to enjoy a position of superiority. But in regard to them only. With increasing uniformity, Governments—of both parties—tend to introduce all their important measures in the House of Commons. That this should be the case under a Liberal Government, intent, as most recent Liberal Governments

have been, on belittling the authority of the 'other' House, is not a matter for surprise. But why their example should be followed by Conservative ministries constitutes one of those parliamentary mysteries which no outsider can hope to penetrate. Even the leaders of the House of Lords seem to find the procedure unintelligible, and, not infrequently, formal protests have been entered against it; apparently without effect. Alike by those who (in opposition) laud and magnify the Upper House, and by those who (in power) declaim against its pretensions, the House of Commons is to an increasing degree indulged with a first view of the legislative proposals of the Executive.[33]

But they are not the less the proposals of the Executive. To say, as is sometimes said, that the power of initiation is being monopolized by the House of Commons, is flagrantly misleading. That power is enjoyed neither by the House of Commons nor by the House of Lords. In both Houses 'private members' count for less and less every year in the domain of legislation—even perhaps in that of criticism. Virtually the initiative of legislation has passed almost exclusively into the hands of the body which is primarily executive and administrative—the Cabinet. The growing autocracy of the Cabinet in this respect has become a commonplace with all commentators upon the working of English parliamentary institutions. 'The House,' says Mr. Low in his penetrating study, 'is scarcely a legislating chamber; it is a machine for discussing the legislative projects of ministers, and only one among the various instruments by which political discussion is in these days carried on.'[34] Lord Hugh Cecil,[35] speaking in the House of Commons, uttered the naked truth to its face:

> 'We often hear of the infringements of the rights

> of private members, and it cannot be denied that a transfer of political power from the House of Commons to the Cabinet is going on. . . . Why is it that nobody cares, outside these walls, about the rights of private members? Because there is a deep-seated feeling that the House is an institution which has ceased to have much authority or much repute, and that when a better institution, the Cabinet, encroaches upon the rights of a worse one it is a matter of small concern to the country.'

It is only fair to recall the fact that when Lord Hugh Cecil uttered these remarkable words the Cabinet was composed of his political friends: even so, it is difficult not to believe that he was guilty of some exaggeration. But the view of Mr. Lowell—an exceptionally sane and shrewd observer—is substantially the same, and he supports his conclusion by a series of very remarkable statistics showing the diminishing frequency with which amendments to Government Bills have been carried against the Government during the last half-century. Between 1851 and 1860 forty-seven such amendments were carried; between 1874 and 1878 not one; between 1894 and 1903 only two.[36]

Thus the House of Lords is not alone in its eclipse. Its diminishing importance in the sphere of legislation finds a parallel in that of the Commons, and both may be regarded as symptoms of a common cause—the increasing autocracy of the Cabinet, the encroachment of the Executive upon the sphere of the Legislature.[37] Whether this development is healthy or the reverse, whether it is a matter which the public may regard with the serene indifference of a Lord Hugh Cecil, is not a point with which I am immediately concerned. My purpose is to show that

while it is true that the Second Chamber has lost all effective power of legislative initiation, it has surrendered it not to the Commons but to the Cabinet. The only advantage enjoyed by the Commons over the Lords is that of a first taste of the legislative dishes served up by the ministerial chefs.

But in one important domain the House of Lords has long occupied an admittedly inferior position. It has relatively little control over money bills. The modern theory is admirably stated by Sir Erskine May: 'The Crown demands money, the Commons grant it and the Lords assent to the grant; but the Commons do not vote money unless it be required by the Crown; nor impose or augment taxes, unless they be necessary for meeting the supplies which they have voted or are about to vote, and for supplying general deficiencies in the revenue.'[38] But this theory, however firmly established it now is, has been only evolved gradually.

In this connexion we may repeat the reminder that the English Parliamentary system was historically based upon the theory of 'Estates'; that the essence of an 'Estate' is separate taxation, and that, as a matter of fact, the three 'Estates' in England—the Baronage, the Clergy, and the Commons,—were, in the beginnings of parliamentary history, absolutely independent of each other in respect of supplies voted to the Crown. That there was at one time a danger of the multiplication of these 'Estates'—a possible 'Estate' of the merchants, another of the lawyers—is a point which, though significant, need not detain us. The financial independence of the three regular 'Estates' is, however, a point of more than antiquarian significance. The Hundred Years' War with France affected the doctrine of Parliamentary taxation in two ways: on the one hand, the King being no longer able 'to live of his own' was

compelled to have more frequent recourse to Parliament for supplies; while, on the other hand, the proved inefficiency of the feudal levy compelled the engagement of professional soldiers and reduced the military value and importance of the Baronial 'Estate'. Thus by the end of the fourteenth century things were tending in the direction of the modern practice. The Estate of the Clergy having refused to come into the system of national representation, continued to make their separate grants to the King in the two Convocations of Canterbury and York. As the fiscal system was developed it became usual for the clergy to follow the example of Parliament, but the separatist theory of an independent clerical Estate was jealously maintained. 'Of this liberty of Convocation,' says Bishop Stubbs, 'the kings were carefully observant; and the parliaments not less so.'[39] On one occasion (in 1449), as the same writer reminds us, the Commons in making their grant so far presumed as to take into account the gift of the clergy. They were at once sharply reminded by the King that it was not for them but for the Convocations to decide that the tax should be voted. Thus the privilege of the Clerical Estate survived even the legislation of Henry VIII and remained intact until the Restoration.

It was otherwise with the Baronial Estate. By degrees, despite the fact that the Barons were still liable for personal military service, the Estates of Barons and Commons began to combine in grants of 'tenths and fifteenths', of tonnage and poundage, and other imposts. More than this. A formula comes into common use which gives a pre-eminence to the Commons. Grants begin to be made 'by the Commons with the advice and assent of the lords spiritual and temporal'. Since the close of the fourteenth century there has been no deviation from this formula.

The Parliament of Gloucester (1407) marks a further stage

in the growing power of the Commons over taxation. It is common to assert that the recognition of the right of the Commons to initiate money Bills dates from an incident which occurred during this famous Parliament. Personally I am doubtful whether the vast superstructure of privilege based upon the proceedings of this session can be justified by an impartial examination of the facts. But the Commons undeniably were 'greatly disturbed' by the action of the Lords in fixing the amount of grant to the King, 'saying and affirming that this was in great prejudice and derogation of their liberties'; and Henry IV, apparently with the assent of the Lords, yielded the point and agreed that 'neither house should make any report to the King on a grant made by the Commons and assented to by the Lords, or on any negotiations touching such grant, until the two houses had agreed; and that then the report should be made by the mouth of the Speaker of the Commons'.[40] Whether this was, as is generally assumed, tantamount to a claim, on the part of the Commons, to initiate all money grants, there is, I think, reason to doubt; but that from this moment the theory of 'Estates' rapidly faded, and the financial pre-eminence of the Lower House became more and more marked, is not open to question.

Everything was favourable to the extension of parliamentary privilege in the first half of the fifteenth century. The Lancastrians occupied the throne by a parliamentary title, and attempted the experiment of making Parliament the direct instrument of government. The experiment proved to be premature; a healthy reaction ensued, and nearly two hundred years elapsed before similar pretensions were urged again. The period between the accession of the Tudors in 1485 and the overthrow of the Stuart monarchy in 1649, though supremely significant in regard to Constitutional development as a whole,

is not marked by any contests of importance between the two Houses. Strife begins with the Restoration of 1660.

That Restoration was something more than a restoration of the Monarchy; it was a restoration of Parliament. For ten or twelve years Parliament had been crushed under the heel of a military dictatorship. Disguise it how we may, the fact remains that the rule of Cromwell was the rule of the sword and not of the robe. But in 1660 the Commons, like the Merry Monarch, came to their own again, still inflated with their recent triumph over the Crown and the Lords, and forgetful of the means by which it had been won. This was the real period of financial consolidation, the real beginning of the modern system of taxation. New financial expedients, by whomsoever devised, are not lightly abandoned. The Unionist party, despite ample opportunity, has never found it convenient to dispense with Sir William Harcourt's death duties; and the statesmen of the Restoration were not above adopting the financial methods of the Long Parliament. Two episodes of the Restoration are, in the present connexion, of marked significance. The clerical 'Estate' finally disappears. It is eminently characteristic of the development of English institutions that this interesting and important result should have been attained by a verbal and informal understanding between Archbishop Sheldon and the Chancellor Clarendon. Since 1664 the Convocations have ceased to make separate grants to the Crown, and the clergy have been taxed like everybody else by Parliament. With the last remnant of clerical privilege disappeared also the last relics of feudalism. Feudal tenure by military service had been abolished by the Protectorate Parliament of 1656; it momentarily revived at the Restoration, but was finally swept away by statute in 1661. Thus 'Barons' and 'Clergy' at last fall completely into the

national system; the old theory of 'Estates' has gone. Henceforward there is no distinction between classes, whether of privilege or of obligation: all are equal before the law.

This is the moment chosen by the Commons, and not unnaturally chosen, for the reassertion of their claims to exclusive, or at least pre-eminent control over taxation. The whole burden of maintaining the national services, in peace and war, now fell—apart from the 'hereditary' revenues of the Crown—as a common charge upon the nation at large. It was natural that the Commons should regard with jealousy and suspicion any attempt to tax the electors whom they represented. A pretext for a quarrel soon arose. In 1661 the Lords passed and sent down to the Commons a Bill for 'paving, repairing, and cleansing the streets and highways of Westminster'. The Commons in high dudgeon rejected the Bill, on the ground that 'it went to lay a charge upon the people', and 'that no Bill ought to begin in the Lords' House which lays any charge or tax upon any of the Commons'. To this assertion the Lords demurred, as being 'against the inherent Privileges of the House of Peers, as by several Precedents wherein Bills have begun in the Lords' House, *videlicet* 5to Elizabethae, a Bill for the Poor, and 31 Eliz. for Repair of Dover Haven, and divers other Acts, does appear'. The Commons thereupon passed a Bill of their own, and sent it up to the Lords. This time it was for the Lords to protest: but in the event,

> 'The Lords, out of their tender and dutiful Respects to His Majesty, who is much incommodated by the Neglect of those Highways and Sewers mentioned in the Bill, have for this Time in that respect alone, given Way to the Bill now in Agitation, which came from the House of

> Commons, with a Proviso of their Lordships; *videlicet*, "Provided always that nothing in the passing of this Bill, nor any thing therein contained, shall extend to the Prejudice of the Privileges of both or either of the Houses of Parliament, or any of them; but that all the Privileges of the said Houses, or either of them, shall be and remain, and be construed to be and remain, as they were before the passing of this Act, any thing therein contained to the contrary notwithstanding; with this Protestation that this Act shall not be drawn into Example to their Prejudice for the future."'[41]

The Commons refused to accept the Bill with this proviso; matters came to a deadlock, and the proposed legislation had to be abandoned.

A similar Bill of a more general nature was, however, passed in the following year; a similar impasse was threatened, but on this occasion the Lords, after formal protest from several of their members, gave way.[42]

But this was only the beginning. In 1671, and again in 1678, the Lords attempted to amend Bills of Supply sent up to them by the House of Commons, proceedings which evoked the two famous resolutions which are the *loci classici* of the constitutional lawyer. By that of 1671 the Commons affirmed that 'in all aids given to the King by the Commons, the rate or tax ought not to be altered by the Lords'.[43] That of 1678 asserted,

> 'That all aids and supplies, and aids to His Majesty in Parliament are the sole gift of the Commons; and that all Bills for the granting of any

such aids or supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit, and appoint, in such Bills, the ends, purposes, considerations, conditions, limitations, and qualifications of such Grants which ought not to be changed or altered by the House of Lords.'[44]

The importance of these resolutions of 1671 and 1678, particularly of the latter, can scarcely in the present connexion be exaggerated, for as Mr. Pike, the erudite historian of the House of Lords, has justly observed:

> 'The proceedings of later times were long regulated, in the main, by this most important resolution of the year 1678. There have been instances in which the privilege claimed by the Commons, in this respect, have not been pressed to their full extent, and in which expedients have been devised for adopting reasonable suggestions made by the Lords, but the general principle in relation to measures of importance has never been abandoned.'[45]

Alike in 1671 and in 1678 the Lords in the end gave way, but not without the following emphatic protest:

> 'Resolved, *Nemine contradicente*, that the Power exercised by the House of Peers, in making the Amendments and Abatements in the Bill, instituted, "An Act for an additional Imposition on several Foreign Commodities, and for the Encouragement of several Commodities and Manufactures of this Kingdom," both as to the

> Matter, Measure, and Time, concerning the Rates and Impositions on Merchandize, is a fundamental, inherent, and undoubted right of the House of Peers, from which they cannot depart.'[46]

What then was the general principle affirmed in these historic resolutions? It will be observed that the Lords' right of concurrence in taxation was not questioned; but, under the resolutions, they cannot legally *impose* a charge upon the people; hence they cannot 'alter or amend' a tax proposed by the Commons, though they may refuse to concur in its imposition, and, therefore, may reject it. In course of time, however, and partly, perhaps, in consequence of the ambiguity of the wording of the resolution of July 3, 1678, confusion has arisen between a tax or grant, and the aggregation of taxes contained in a modern Finance Bill, and it is now common to contend that the Lords have lost (if they ever possessed) the right to amend not only a particular tax, but the general scheme of taxation as embodied in a money Bill.

This confusion, and the difficulties arising therefrom, have unquestionably been greatly enhanced by the ingenious but somewhat vindictive device invented by Mr. Gladstone in 1861. The circumstances are worth recalling, with some precision. In 1860, a Bill for repealing the duty on paper formed part of the financial proposals of the year. The anticipated loss of revenue from this and other duties was to be met by an increase in the income tax, from ninepence to tenpence in the pound. The Income Tax Bill passed both Houses; the Paper Duty Repeal Bill, after narrowly escaping defeat in the Commons, was rejected by the Lords. To no one did this action of the Lords give greater satisfaction than to Lord Palmerston, then Prime Minister. He had already expressed his private opinion to the

Sovereign, that if the Lords rejected the Bill they would 'perform a good public service', and that 'the Government might well submit to so welcome a defeat'. But the Premier reckoned without his Chancellor of the Exchequer. Mr. Gladstone took a high line in regard to the action of the Lords, and Lord Palmerston was compelled, with very ill grace, to submit to the House of Commons a series of resolutions, reasserting in the strongest terms the privileges of the Commons in regard to taxation. The first affirmed that 'the right of granting aids and supplies to the Crown is in the Commons alone, as an essential part of their constitution, and the limitation of all such grants as to matter, manner, measure, and time is only in them'. The second, while admitting that the Lords had sometimes 'exercised the power of rejecting Bills relating to taxation by negativing the whole', nevertheless affirmed that the exercise of that power 'hath not been frequent, and is justly regarded by this House with peculiar jealousy as affecting the right of the Commons alone to grant supplies, and to provide the ways and means for the service of the year'. The third, grimly foreshadowing future action, stated 'that to guard for the future against an undue exercise of that power by the Lords, and to secure to the Commons their rightful control over taxation and supply, this House has, in its own hands, the power so to impose and remit taxes, and to frame Bills of Supply that the right of the Commons as to the matter, manner, measure, and time may be maintained inviolate'. In regard to the rejected Bill itself, one further point demands notice: the Lords had already concurred with the Commons in providing the necessary supplies for the year. By rejecting the Paper Duty Repeal Bill they did, in effect, impose a charge upon the people which the Commons had declared to be uncalled for. The late Duke of Argyll addressed himself in a temperate and closely reasoned speech particularly

to this point.[47] He said:

> ‘I am not going to deny the legal power or right of this House to refuse any Bill which may be sent up for your assent . . . I fully admit that there is no technical difference between rejecting a Bill imposing a tax and a Bill repealing a tax.’
>
> ‘But every noble Lord must feel that it does make a very serious substantial difference in respect to an unusual exercise of power whether it be exercised in relief or in the imposition of a burden on the people. The very gist of my objection to such a course is that the danger of it does not lie on technical grounds; it lies on substantial grounds. In opposing the repeal of this duty you are going to the very heart and root of the constitutional powers of the other House of Parliament. You are not invading their technical privileges; you are not transgressing your own technical privileges; but in truth and in substance you are striking at the very root of the constitutional usage which has hitherto regulated the relations between the two Houses.’

The soundness of the Duke’s argument is hardly to be disputed, and it is plain that if the Lords seriously meant war with the Commons on the question of the control of taxation, they were not particularly happy in their choice of a battle ground. But, on the other hand, this much may be said: the rejected Bill was very unpopular in the House of Commons; it had passed by the narrow majority of nine; while, as to the country at large, not all the efforts of Gladstone and Bright could stir it to an interest in the subject, or to even the simulation of

indignation against the 'unconstitutional' action of the House of Lords.

In the following session Mr. Gladstone's turn came. The veiled threat was translated into action. The Chancellor of the Exchequer not only showed his teeth, but proceeded to bite. He embodied all the financial proposals of the year, including the rejected Paper Duty Repeal Bill, in a single Bill, and challenged the House of Lords to accept or reject it as a whole. It was a bold challenge. But it was justified by success, and has set a precedent from which there has been no departure from that day to this. Mr. Gladstone's distinguished biographer does not exaggerate its significance when he writes:

> 'The abiding feature of constitutional interest in the budget of 1861 was this inclusion of the various financial proposals in a single Bill, so that the Lords must either accept the whole of them, or try the impossible performance of rejecting the whole of them. This was the affirmation in practical shape of the resolution of the House of Commons in the previous year. . . . Until now the practice had been to make the different taxes the subject of as many Bills, thus placing it in the power of the Lords to reject a given tax Bill without throwing the financial machinery wholly out of gear. By including all the taxes in a single Finance Bill the power of the Lords to override the other House was effectually arrested.'[48]

The ingenuity of Mr. Gladstone's device is not disputable. His opponents in the House of Lords had given him an opening, and he was not the man to neglect the opportunity of an effective

'score'. And score he did. But was it not at the expense of a serious derangement of the fine equipoise of our delicately-balanced Constitution? The Lords, after all, had a perfect right, denied by none, to concur in taxation. This right was deliberately abrogated, as far as the action of one branch of the Legislature can abrogate the powers of another, by the tactics of the Chancellor of the Exchequer. That was his intention; and that he claimed as his achievement. 'The House of Lords for its misconduct was deservedly extinguished in effect as to all matters of finance.'

For the moment the House of Lords bent before a very moderate storm. Whether wisely or unwisely, from the point of view of the immediate situation, it is difficult for the critic of a later generation to say. In the light of subsequent events one is tempted to believe that the opportunity of effective protest against a momentous (though not unprecedented) innovation was unfortunately neglected. The Lords were on weak ground in 1860 when they resisted; they might have taken up a position of advantage in 1861, when they were induced to acquiesce. Lord Derby's opinion seems to have been that the immediate point was not worth fighting about, and he contented himself with a formal reservation of rights for the future.

> 'We have it in our power,' he said, 'to divide the Bill which has been sent up to us by that House; and, so divided we have it in our power to adopt it, and to send it back to the Commons for acceptance or rejection. By that course we always have a remedy in our hands by which we can vindicate our privileges when we so please, and should circumstances ever arise so extreme as to justify that course, I hope your Lordships would not be

slow to vindicate your rights. But I think it would be an act of power that would undoubtedly be extreme on the present occasion.'

Subsequent leaders of that House have shown even greater caution than Lord Derby in touching questions of finance. Not perhaps since the Reform Act of 1832, certainly not since the death of the Duke of Wellington in 1852, has any statesman wielded a greater influence over the House of Lords than the late Lord Salisbury. And no statesman was ever more jealous of its honour, or more generally tenacious of its privileges. But in a speech delivered in the debates on Sir William Harcourt's Finance Bill of 1894, Lord Salisbury warned the Peers of the constitutional inconveniences, not to say anomalies, which must arise from the exercise of their undoubted rights in regard to Finance Bills. 'You cannot,' he in effect argued, 'reject a money Bill because you cannot change the Executive; to leave the existing Executive in power and yet to deprive them of the means of carrying on the government of the country would create a grave constitutional situation.' Such language, if it is to be accepted as the last word on this momentous question, means that the House of Lords must virtually surrender all its concurrent corporate rights in regard to taxation, that individual Peers must accept a position inferior to that of the meanest voter in the kingdom, and must shoulder burdens imposed upon them by the fiat of an assembly in which they have neither part nor lot.

There is another incident in the relations of the two Houses in regard to finance to which reference must be made. The provisions contained both in the Australian Commonwealth Act and in the South Africa Act of 1909[49] give to the question of 'tacking' an importance more than historical, and it is therefore

worth while to recall the circumstances under which that device was first employed. Flushed by a succession of victories over the Lords between 1660 and 1689, the Commons in 1692, and again in 1700, determined to go a step further and complete the legislative discomfiture of the Upper House by combining in one measure an ordinary Bill and a Bill of Supply. Such tactics were naturally resented by the Peers, whose case is admirably put in a notable passage by Macaulay:

> 'Not only are we to be deprived of that co-ordinate legislative power to which we are, by the constitution of the realm, entitled. We are not to be allowed even a suspensive veto. We are not to dare to remonstrate, to suggest an amendment, to offer a reason, to ask for an explanation. Whenever the other House has passed a Bill to which it is known that we have strong objections, that Bill is to be tacked to a Bill of Supply. If we alter it, we are told that we are attacking the most sacred privilege of the representatives of the people, and that we must either take the whole or reject the whole. If we reject the whole, public credit is shaken; the Royal Exchange is in confusion; the Bank stops payment; the army is disbanded; the fleet is in mutiny; the island is left, without one regiment, without one frigate, at the mercy of every enemy. The danger of throwing out a Bill of Supply is doubtless great. Yet it may on the whole be better that we should face that danger, once for all, than that we should consent to be what we are fast becoming, a body of no more importance than the Convocation.'[50]

Some hotheads in the Commons even went so far as to threaten to use the newly-invented instrument for penal proceedings against political opponents: 'They object to tacking, do they? Let them take care that they do not provoke us to tack in earnest. How would they like to have Bills of Supply with Bills of Attainder tacked to them.' Macaulay justly describes this an 'atrocious threat, worthy of the tribune of the French Convention in the worst days of the Jacobin tyranny.'[51] The overbearing insolence of the Lower House was becoming insupportable. Even the calm and judicial Hallam describes 'tacking' as a 'most reprehensible device', as tending 'to subvert the Constitution and annihilate the rights of a coequal House of Parliament.'[52] Macaulay is characteristically more emphatic:

> 'In truth the House [of Commons] was fast contracting the vices of a despot. It was proud of its antipathy to courtiers; and it was calling into existence a new set of courtiers who would flatter all its weaknesses, who would prophesy to it smooth things, and who would assuredly be, in no respect less greedy, less faithless, or less abject than the sycophants who bow in the ante-chamber of kings.'[53]

It was indeed time that a determined stand should be made, in the interests of the nation at large, by the Chamber which was not technically 'representative'.

But here the Lords were confronted by a difficulty which is perpetually recurring. The particular occasion was not a favourable one. The 'tacked' Bill was one which intrinsically commended itself to the judgement of many of the Peers, and

represented a cause likely to be popular—on broad grounds of expediency—in the country. Entirely objectionable as was the method adopted by the Commons, the Peers judged, and rightly, that the ground selected for a battle royal with the Commons must be in every respect favourable. 'The Lords,' as Macaulay wisely observed, 'must wait for some occasion on which their privileges would be bound up with the privileges of all Englishmen, for some occasion on which the constituent bodies would, if an appeal were made to them, disavow the acts of the representative body; and this was not such an occasion.'[54] Unsteady and captious as is his judgement on men, in his judgements on political issues Macaulay is rarely at fault. The wisest of the Peers were in favour of surrender. The tacked Bill was accepted, but two years later (December 9, 1702) the Lords placed it formally on record: 'That the annexing any clause or clauses to a Bill of aid or supply the matter of which is foreign to and different from the said Bill of aid or supply, is unparliamentary and tends to destruction of the constitution of the Government.'[55]

So much for the position of the House of Lords in regard to judicature, to finance and to general legislation.

Apart from these more formal functions of the Second Chamber there remains to be considered a third—of considerable importance. Bagehot said that the best way to cure a man of admiration for the House of Lords was to induce him to go and look at it. He referred to its dreary and desolate aspect in the discharge of its ordinary business. But with equal fairness it might be retorted that the surest way to instil respect for the House of Lords is to observe it on the occasion of a 'full dress' debate.

It is true that a debate in the Lords lacks one element of interest never absent from a debate in the Commons; it cannot directly determine the fate of a Ministry. The House of Lords is not (in Seeley's phrase) a 'Government-making organ'. But, nevertheless, its debates possess a compensating attribute denied, as a rule, to those in the Lower Chamber: they are real; they affect votes. Party discipline in the Commons is so strict that the result can be calculated beforehand with almost absolute certainty. In the freer atmosphere of the Lords no such calculation is possible. In the Lords there are many men on whom party allegiance sits very lightly, and some who own none at all. The House provides, therefore, an admirable arena for the discussion of matters which though of grave national importance are not yet ripe for legislative or administrative treatment, and on which party opinion is still undefined. It is not less well adapted for the discussion of topics, such as national defence, Foreign, Indian and Colonial administration, and many social questions, which never ought to be regarded as within the domain of party-politics. It is unnecessary and undesirable to particularize, but numerous illustrations will occur to the mind of every reader who follows, with attention, parliamentary proceedings. Thus the House of Lords, though claiming no right to control the Executive, is in the true sense a deliberative and consultative assembly.

So much it has seemed necessary to say in regard to the legal and constitutional functions of the Second Chamber of the Imperial Legislature. A few words may be added as to the actual place of the Peerage and the House of Lords in our modern democratic polity.

Half a century ago Bagehot emphasized the importance of the Peerage 'in its dignified capacity'. The office of an order of

nobility he declared is 'to impose on the common people—not necessarily to impose on them what is untrue, yet less what is hurtful; but still to impose on their quiescent imagination what would not otherwise be there'. He believed in it, moreover, as a balance to the power of wealth; he went, indeed, so far as to say that the existence of a Peerage 'prevents the rule of wealth—the religion of gold', to which the Anglo-Saxon is naturally prone. It saves us also from the 'idolatry of office'—common in most continental countries. As for the House of Lords in its corporate capacity, Bagehot insisted primarily on its 'revising and suspending' power; it consisted of 'temporary rejectors and palpable alterers'. As a 'bulwark against imminent revolution' he had little belief in it; but he valued it, nevertheless, as 'an index that revolution is unlikely'. Though the House of Lords could never dam the tide of revolution, it is of pre-eminent utility in dealing with legislation of anything less than first-rate interest and importance. In matters where public opinion is not powerfully moved the House of Commons, and still more the Cabinet, is apt to exercise a predominating and in some cases a mischievous influence. Here the utility of the Lords is obvious; in such cases 'the retarding Chamber will impede minor instances of parliamentary tyranny'.

Finally, the House of Lords provides what has been happily termed a 'reservoir of Cabinet ministers.' Under the strain and stress of modern political life the executive business of the country could not be efficiently performed if all the principal ministers of State were compelled to be, as some are, in constant attendance in the House of Commons. The elevation to the Peerage of Lord Morley of Blackburn is a recent and conspicuous illustration of the utility of the Upper Chamber in this respect. But for this expedient, as we know from his own

straightforward statement, the country would have been deprived of the services of Lord Morley as Secretary of State for India. Many years ago Mr. Gladstone affirmed that 'no man can efficiently discharge in conjunction, especially at a time of crisis, the duties of the Foreign Department and that attaching to the leadership of the Commons'.[1] Mr. Balfour went even further when he declared that 'this most laborious department can never be filled . . . by any man who both does his work in his office and also does his work in this House'.[56] If, then, the correspondence between Legislature and Executive on which we pride ourselves, is to be maintained, it is obvious that it can be maintained only by assigning not a few of the most onerous administrative offices to statesmen who possess or are willing to accept a seat in the Second Chamber. The House of Lords, moreover, possesses in conspicuous degree two attributes unknown to the Commons—leisure and independence. 'Besides independence to revise judicially, and power to revise effectually, [it] has leisure to revise intellectually.'

How far has the lapse of nearly half a century confirmed or weakened Bagehot's argument in favour of the House of Lords? Is it more or less necessary to the efficient working of the Constitution? Have its functions altered, or are they in the main constant?

It is not to be denied that Bagehot's remarks as to the social utility of the Peerage strike somewhat oddly on the ear to-day. Its 'dignified capacity' has almost continuously waned while the social prestige of mere wealth has, to the infinite disadvantage of society, almost as conspicuously waxed. Nor would a writer of to-day dismiss the social attractions of 'office' quite so cavalierly as Bagehot. The growth of bureaucracy in England, the multiplication of offices, great and small, have combined

with other causes to alter the perspective a good deal. People of all classes show themselves increasingly eager to secure the modest competence guaranteed by Government employment. University graduates crowd into the competitions for places in the Civil Service in preference to the larger but much less certain emoluments of Commerce or the Bar; the lower middle classes are similarly anxious to enter the ranks of the central or local administration.

But, apart from this, Bagehot's analysis of the political functions of the House of Lords is still remarkably accurate and exhaustive.

In the domain of legislation the work of the Lords is still primarily that of amendment and revision. And, by general admission, this work is done with remarkable efficiency, particularly in the case of measures of secondary party importance. In regard to the half dozen Bills on which in every Parliament the public gaze is concentrated and on which the fate of ministries depends, the exercise of this particular function is more open to criticism. The gist of the criticism is that in these cases the activity of the Upper House is wholly capricious; that when Tory Governments are in office the Lords are dumb dogs; while under Liberal Ministries they are ravening wolves tearing and mutilating the products of Liberal legislative wisdom. The charge may be exaggerated, but there is enough truth in it to cause searchings of heart to those who believe that a real revising chamber is essential to the efficient working of the parliamentary machine.

A Second Chamber must from the nature of the case tend to be more conservative, in the broader sense, than the First; it is, therefore, natural, and, indeed, inevitable, that its revising

functions should be more freely exercised when measures emanating from a Liberal Government are under discussion. But this fact, though it explains the criticism, does not wholly remove its sting. Under modern conditions of legislation, when a vast number of Bills are sent up from the House of Commons, with contradictory amendments only partially reconciled, and with many clauses imperfectly discussed or even closured 'by compartments', some competent revising body is absolutely essential, if the legislative output is intended to serve any purpose except the increase of litigation. Such work the House of Lords does undeniably well; but can it safely be entrusted with the more responsible functions which at present it performs effectively only when Liberal ministries are in power?

For the due performance of these functions certain attributes are essential. The revising body must be entirely unfettered and independent in judgement; it must be judicial in temper, and it must be representative of many and varied interests and aspects of the national life. Can these attributes be truly predicated of the existing House of Lords? President Lowell, a distinguished American publicist, 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.'[57] Such a judgement, emanating from a source conspicuous for detachment and impartiality, cannot safely be ignored. That the House has courage and independence will be generally acknowledged; but if it is lacking in judicial temper, if it is representative only of a single interest, or even of a group of interests closely allied; above all, if it has in truth become 'a tool of the Conservative Party', then the time has unquestionably arrived when the reform of the

revising chamber needs to be taken seriously in hand.

That this opinion is shared by the ablest and most representative members of the House itself I shall show in a later chapter.[58]

Meanwhile it is important to notice one supremely effective check upon the Conservative predilections of the House of Lords which no fair-minded critic will ignore. Ever since 1832 the House has always kept its finger upon the pulse of the nation. It has never rejected an important measure on which the mind of the electorate had been unmistakably and definitely expressed. Mr. Lowell, in order to illustrate his dictum that the Lords are a tool of the Tory Party, refers to their acceptance of the Trades Disputes Bill of 1906, and their rejection of the Plural Voting Bill in the same session. But the explanation is not, as Mr. Lowell supposes, that party interests were thereby served; but that the Lords believed that for the former measure the Ministry had received a mandate from the electorate, and that for the latter they had not. Whether they were right or wrong is not, for the moment, the point; that they acted on an intelligible principle is beyond dispute.

In regarding the House of Lords as an ineffective barrier to revolution, Bagehot was surely right. Hasty legislation they may retard; ill-considered legislation they may amend; but the tide of revolution they cannot stem if the political sovereign is determined to achieve it.

But this they can do: they can make sure that the 'revolutionary' change is one which is really desired by the electorate, and is not being rushed through the House of Commons at the dictation of an ambitious Cabinet, or under the goad of party discipline. And this is beyond dispute the most

important political function still left to the House of Lords. Like the Second Chambers in the two most recent and most democratic constitutions of the English-speaking world, those of United South Africa and the Australian Commonwealth, they can demand that before any given measure becomes law it shall be submitted to the deliberate judgement of the electorate.

That it is apt to exercise this function effectually only when Liberal ministries are in office is a fact which cannot be disputed, and must be deplored. A really impartial Second Chamber, charged with the duty of putting in force a referendum, would probably have referred to the people the appeal of the Nonconformists against the Education Act of 1902, just as they so referred the appeal of the liquor trade in 1908, and that of the anti-socialists in 1909.

That something might be done by reform to secure a Second Chamber better fitted to fulfil this supremely important and responsible function, I shall attempt in my concluding chapter to show. For the moment I am concerned only to contend that no constitution which claims to be democratic can afford to dispense with some safeguard of this kind. More especially must this be the case where the constitution itself is largely conventional, where written guarantees are conspicuous by their absence, and, above all, where there is no sharp line of demarcation between the spheres of the legislature and the executive.

The British ‘Democracy’ is exceptionally defenceless against the encroachment of an autocratic executive, or a self-satisfied House of Commons. We have the experiences, related in the last chapter, to show to what length of usurpation an omnipotent legislature is apt to go when relieved of all

immediate responsibility to Crown or People. We have the standing example of the Septennial Act of 1716, under which the duration of Parliament, elected for three years, was prolonged to seven, to prove that Parliament is legally sovereign and independent of the electorate. To confer this sovereignty upon a single-chamber, still more upon an executive committee of the Legislature, would be to flout the warnings of philosophy, and to ignore the teachings of experience. In every written constitution which the advanced nations of the modern world have produced, some precaution is taken for securing that at least an appeal shall lie from Philip drunk to Philip sober. But for the co-ordinate legislative authority possessed by the House of Lords there would be no such safeguard in our own.

V

THE AMERICAN SENATE

'The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six years, and each Senator shall have one vote.'—Constitution of the U.S.A., § 3.

'This masterpiece of the Constitution-makers.'—BRYCE.

'The one thoroughly successful institution which has been established since the tide of modern democracy began to run is . . . the American Senate.'—SIR HENRY MAINE.

'There is reason to expect that this branch (of the Legislature) will usually be composed with peculiar care and judgement; that (the Senators) . . . will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill-humours or temporary prejudices and propensities which in smaller societies frequently contaminate the public deliberations, beget injustice and oppression towards a part of the community, and engender schemes which, though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction, and disgust.'—ALEXANDER HAMILTON, in the *Federalist*, No. 27.

The American Senate is, with the exception of the English House of Lords, the most interesting Second Chamber in the world, and it has some claim to be regarded as, without exception, the strongest and most efficient.

In the first place, it illustrates as well or better than any other institution in the United States the essentially evolutionary and conservative character of the American Federal Constitution. Mr. Bryce, indeed, writes of this 'masterpiece of the Constitution-makers' as having been the result of 'a happy accident', but with something less than his accustomed accuracy. The assertion seems to suggest the idea, not infrequently entertained by less well informed persons, that the American Constitution sprang Athene-like from the brains of a small group of exceptionally able and exceptionally prescient publicists. To this error even Mr. Gladstone was a party. 'As the British Constitution is,' he said, 'the most subtle organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man.' Such is very far from a true version of the case. The American Constitution, though ultimately drafted by a given body of men at a given moment in the national history, was no less conspicuously than our own the resultant of a long evolutionary process. *Magna Carta* and the *Bill of Rights* were similarly drafted each at a given moment, but no one disputes the fact that there is hardly a clause in either document which does not represent a prolonged struggle for the acquisition of certain rights or liberties, and point to the *origines* of an institution in a far distant past. In America the struggle was less prolonged, and the past less distant; but it is a grotesque error to suppose that tradition was absent from the mind of those who 'made' the Constitution.

There were the Charters granted to the several colonies by the English Crown; there were the Constitutions or *Frames* drawn up by the colonists themselves, either, as in the case of Pennsylvania, under permission granted by the Crown, or, as in that of Connecticut, without it; there were the revolutionary Constitutions of 1776, drafted by the Continental Congress of 1775; there were a large number of schemes, inchoate and unrealized, projected at intervals during the previous 150 years for the promotion of union among the several colonies; above all, there was the experience gained from success and failure in the working of charters and constitutions during more than a century of the embryo nation's history. Thus the American Constitution was neither a 'pudding made from a receipt' (to adopt Arthur Young's happy phrase), nor was it, as Maine suggested, 'a version of the British Constitution as it must have presented itself to an observer in the second half of the last (i.e. the eighteenth) century';[59] still less was it, as others have maintained, modelled upon that of the United Provinces. Here and there an institution may owe something to English or Dutch models; but the Constitution as a whole was and is *native*; it bears in every limb and every feature traces of its parentage; marks of the prolonged labour through which it came to birth.

And this is especially true of the particular institution with which I am here concerned—an institution which, alike in its original conception and its practical working, has won the admiration of the civilized world.

Section III of the American Constitution runs as follows: 'The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years, and each Senator shall have one vote.' It is further provided that one-third of the Senate shall retire every two

years, and that no one shall be elected to it who (*a*) is under thirty years of age; (*b*) has not been a resident of the United States for nine years; and (*c*) is not resident in the State for which he is elected.

Two points arrest attention at once. The first is that the Senate is neither hereditary, nor nominated, nor directly elected. It represents not the peoples, but the legislatures of the constituent States of the Union. The distinction has in practice proved to be less important than the framers of the Constitution intended, and for this reason. The Senate has drawn to itself so much attention; it fills so large a space in the political life of the United States, that elections to the State legislatures are made largely, if not primarily, with a view to the election of Federal Senators. Thus it has come to be election by the people 'once removed'.

A second point is, the continuous existence of the Senate. The membership of the Senate is renewed from time to time, but its members neither come in nor go out all together. One-third of the Senate retires every two years; but two-thirds of its members are always old, and thus stability and continuity are secured. Senators change, the Senate is permanent.

The purpose which the Senate was intended to serve in the general scheme of the Constitution is thus clearly stated in the *Federalist*[60] by Alexander Hamilton himself:—

> 'Through the medium of the State legislatures, which are select bodies of men, and who are to appoint the members of the National Senate, there is reason to expect that this branch will generally be composed with peculiar care and judgement; that these circumstances promise greater

> knowledge and more comprehensive information in the national annals; and that on account of the extent of country from which will be drawn those to whose direction they will be committed they will be less apt to be tainted by the spirit of faction and more out of the reach of those occasional ill-humours or temporary prejudices and propensities which in smaller societies frequently contaminate the public deliberations, beget injustice and oppression towards a part of the community, and engender schemes which, though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction, and disgust.'

It is noticeable, however (as Sir Henry Maine has pointed out), that the mode of choosing the Senate which was ultimately adopted was not that which had commended itself to Hamilton and others, and which they had originally proposed. Hamilton would seem to have preferred indirect election by an electoral college elected on a high property qualification—on the same principle, in fact, as the election of President. His plan suggested that 'each Senator should be elected for a district, and that the number of Senators should be apportioned among the several states according to a rule roughly representing population'.

Whether this plan would have worked equally well is far from certain; still less certain is it that it would have provided a permanent solution of the difficulties which confronted the framers of the Constitution. On every ground, therefore, it is fortunate that it was not adopted.

What was the source of the scheme which was finally

embodied in the Constitution? Where are we to look for the *origines* of the American Senate? To this question many divergent answers have been given. Some point to the English House of Lords as the original. But apart from the bi-cameral form the American Congress and the English Parliament have practically nothing in common. Others find in the composition of the Senate the final and conclusive proof of the theory which traces the American Constitution to a Dutch original. And with this degree of plausibility: the States-General of the Netherlands, like the American Senate, was representative not of the people but of the states, and each state found in it, without regard to size or population, equal representation. Mr. S. G. Fisher, whose work[61] on the American Constitution is, I fancy, less known in this country than it deserves to be, scornfully repudiates both theories. According to him the Senate is derived from the scientific cultivation of a purely native germ. That germ is to be found in 'the Governor's Council of colonial times'. This institution was 'at first a mere advisory council of the Governor, afterwards a part of the legislature sitting with the assembly, then a second house of legislature sitting apart from the assembly as an upper house; sometimes appointed by the Governor, sometimes elected by the people, until it gradually became an elective body, with the idea that its members represented certain districts of land, usually the counties. It had developed thus far when the National Constitution was framed, and it was adopted in that instrument so as to equalize the states, and prevent the large ones from oppressing the smaller ones. This was accomplished by giving each state two Senators, so that large and small were alike. The language in the Constitution describing the functions of the Senate was framed principally by John Dickinson, who at that time represented Delaware—one of the smaller states—which had suffered in colonial times from

too much control by Pennsylvania.'

The Senate, then, came into being primarily as a preservative of the rights of the smaller states, and it represents the centrifugal tendencies which were the main impediment to the formation of the Union. 'The concession of equal representation in the Senate,' says Mr. Bryce, 'induced the small states to accept of representation according to population in the House of Representatives, and a series of compromises between the advocates of popular power as embodied in the President, led to the allotment of attributes and functions which have made the Senate what it is.' Behind the Senate, therefore, there is a great deal of history; and bearing in mind all that it stands for, it is not remarkable that of all the fundamental principles of the American Constitution the most rigid and unalterable should be that of equality of state representation in the Federal Senate. 'No state,' so runs the Constitution, 'can be deprived of its equal suffrage in the Senate without its own consent'—a consent which would, of course, under no circumstances be given.

Consisting originally of twenty-six members, the Senate now consists of ninety. The English Upper House consists of more than 600 members; the Prussian of about 300; the French Senate of 300, the Canadian of 87, the Australian of 36, the South African of 40. Relatively to the size and population of the Union the American Senate is one of the smallest Second Chambers in the world[62]—a fact which may in some degree account for the efficiency with which it performs the functions entrusted to it by the Constitution.

Those functions are threefold: Legislative, Judicial, and Executive.

Its legislative authority is, except in regard to finance, co-

ordinate with that of the House of Representatives, and is exercised with a freedom to which many Second Chambers are strangers. Any Bill (except a Bill to raise revenue) may originate in either House, and owing to the fact that in America the Executive does not, as in England, dominate the legislature, the Senate takes its fair share in the initiation of legislation. Finance Bills must originate in the House of Representatives, but the Senate enjoys and exercises the same powers of amendment and rejection in regard to these, as in regard to other Bills. In the event of a disagreement between the two Houses a conference committee, composed of members of both Houses, is appointed by the President of the Senate and the Speaker of the House. The report of this committee is generally accepted by both Houses. Not until the Bill is passed in identical form by the two Houses is it sent up for the approval of the President, who has the right to send it back to Congress. Should it again pass by a two-thirds vote in both Houses, the President's veto lapses and the Bill becomes law with or without his assent.

If, as sometimes happens, a Bill passes one House and the other House declines to deal with it during that session, it may start again in the following session where it left off, provided that it is in the same Congress. Should a new Congress have been elected in the interval the Bill must start on its legislative career afresh.[63]

But the part taken by the Senate in legislation is by no means its most characteristic or distinctive work. The fathers of the Constitution intended that the Senate, like the English House of Lords, should perform important judicial functions; and, unlike the House of Lords, should also have a share in the Executive. By Article I, § 2, of the Constitution the sole power of impeachment is vested in the House of Representatives; by § 3

the sole power to try impeachments is vested in the Senate. When sitting for that purpose Senators are to be on oath or affirmation. When the President of the United States is on trial, the Chief Justice is required to preside in place of the ordinary presiding officer of the Senate, who being also Vice-President of the Republic is naturally supposed to have a direct interest in the conviction and consequent removal of the President. In the trial of other officers the Vice-President presides as usual. The judicial powers of the Senate are, from the nature of the case, infrequently exercised. One President of the United States, President Johnson, was impeached in 1868, and was acquitted. Impeachment is the only means by which a federal judge can be got rid of, and in certain instances it has proved to be a clumsy, and even a brutal weapon. Four federal judges have been impeached, of whom two were convicted. In one case the device was resorted to as the only means of getting rid of a judge who had become insane.

In addition to these cases, a Secretary of War and a Senator have also been impeached. But few as have been the cases in which recourse has been had to this particular method of proceeding provided by the Constitution, it could not, as Mr. Bryce says, 'be dispensed with, and it is better that the Senate should try cases in which a political element is usually present, than that the impartiality of the Supreme Court should be exposed to the criticism it would have to bear did political questions come before it. Most senators are or have been lawyers of eminence, so that as far as legal knowledge goes they are competent members of a court.'[64]

But of all the attributes of the American Senate the most distinctive is the fact that it shares with the President two important executive functions: (i) the right of 'confirming' the

appointment of all persons nominated by the President to act as ambassadors and judges of the Supreme Court and other federal officers or ministers;[65] and (ii) the right to concur in the making of treaties. In each case two-thirds of the senators present must concur.

How has the joint executive authority of Senate and President worked in practice?

As regards the appointment of Cabinet ministers it has become customary for the Senate to approve, as a matter of course, the nomination of the President, to whom such ministers are solely responsible. In the appointment of ambassadors, consuls, judges, heads of departments, and the chief military and naval officers, the concurrence of the Senate is less of a mere form. In regard to other federal officers there has been gradually established what is known as the 'Courtesy of the Senate', by which the nomination to a federal office in any particular state is left by common consent to the senators representing that state. This arrangement is obviously advantageous to the party wire-pullers, but it is one against which many of the stronger Presidents have from time to time chafed and protested bitterly, though without effect.

In the appointment of minor officials the Senate takes no part. The Constitution permits Congress to vest in the heads of departments, or in the Courts of Law, or in the President alone, the right of nominating to such offices, and this power has been exercised to relieve the President of a large amount of inferior and troublesome patronage. Thus an Act, known as the 'Pendleton Act', was passed in June, 1883, providing for the appointment 'by the President by and with the consent of the Senate of a Civil Service Commission, consisting of three

persons, not more than two of whom shall be adherents of the same political party, under whose recommendation as representatives of the President, selections shall be made for the lower grades of the federal service upon the basis of competitive examination'. It is, in fact, an attempt to 'take the civil service out of politics'.[66] It is noticeable, however, that neither this Act, nor any similar Act, can be anything more than permissive; it cannot in any strict sense either bind the President or curtail the constitutional rights of the Senate. This could be done only by an amendment of the Constitution itself.

How has the Constitution worked in regard to the exercise of patronage? Few critics, either native or foreign, have a good word to say for it. Of the former Mr. Woodrow Wilson is admirably typical; and his opinion is expressed in no uncertain terms: 'The unfortunate, the demoralizing influences which have been allowed to determine executive appointments since President Jackson's time have affected appointments made subject to the Senate's confirmation hardly less than those made without its co-operation; senatorial scrutiny has not proved effectual for securing the proper constitution of the public service.'[67] Mr. Bryce may fairly be taken to represent the more cautious and balanced opinion of foreign critics. 'It must be admitted that the participation of the Senate causes in practice less friction and delay than might have been expected from a dual control.' 'It may be doubted whether this executive function of the Senate is now a valuable part of the Constitution. It was designed to prevent the President from making himself a tyrant by filling the great offices with his accomplices or tools. That danger has passed away, if it ever existed; and Congress has other means of muzzling an ambitious chief magistrate. The more fully responsibility for appointments can be concentrated

upon him, and the fewer the secret influences to which he is exposed, the better will his appointments be.'[68] In this temperate judgement most English students of American institutions will be ready to concur. In the discharge of its executive functions the Senate sits, debates, and votes *in camera*; and with all deference to Mr. Bryce, who regards public discussion as 'the plan most conformable to a democratic government', I cannot think that his alternative would be preferable. It is true that secret sessions may tend to obscure the responsibility both of the President and of the Senate; that they may lead to a large amount of log-rolling, and not infrequently to positive corruption. Nevertheless, public discussion of the claims of rival candidates for the highest executive and judicial offices of the State would not encourage the best men to allow themselves to be nominated, or secure for the successful candidate the support and respect of the nation as a whole. Publicity and secrecy alike have disadvantages; but in view of the fact that the responsibility for nomination rests with the President, and that the function of the Senate is limited to 'concurrence', I cannot doubt that the Senate has chosen the lesser of two evils in maintaining the confidential character of its Executive sessions.

A similar method of procedure obtains in regard to the confirmation or rejection of treaties with foreign States. The advantages and disadvantages resulting from the interposition of the Senate in this delicate function have been hotly canvassed. It is clearly repugnant to English views of propriety that diplomatic engagements should be submitted before completion to the rough and tumble of debate in either branch of the Legislature. But in defence of the rule which prevails in America there are several points to be urged. In the first place,

the Senate was in its inception less a branch of the Legislature than an appendage to the Executive. Or rather it was both. It corresponded at least as closely to the English Privy Council as to the House of Lords. Consisting of only twenty-six members, it was intended by the fathers of the Constitution to act as 'a council, qualified by its moderate size and the experience of its members, to advise and check the President in the exercise of his powers of appointing to office and concluding treaties'.[69] That there is a latent danger in this duality can hardly be denied, and had America been Europe the danger probably would long since have become apparent. But it has so far been obviated by the way in which the President has kept himself, as a rule, closely and continuously in touch with the Senatorial Committee for Foreign Policy. The Chairman of the latter body is in effect a sort of 'Parliamentary Second Secretary for Foreign Affairs'. Nevertheless, I suspect that Mr. Bryce may find it necessary to modify the following paragraph in a subsequent edition of his well-known work:

> 'European statesmen may ask what becomes under such a system of the boldness and promptitude so often needed to effect a successful coup in Foreign Policy. . . . The answer is that America is not Europe. The problems which the Foreign Office of the United States has to deal with are far fewer and usually far simpler than those of the old world. The Republic keeps consistently to her own side of the Atlantic: nor is it the least of the merits of the system of senatorial control that it has tended, by discouraging the Executive from schemes which may prove resultless, to diminish the taste for foreign enterprises, and to save the

country from being entangled with alliances, protectorates, responsibilities of all sorts, beyond its own frontiers.'[70]

That there is sense in this judgement is indisputable; but there is less of truth in it now than when it was written, some twenty years ago (1888). The Spanish War, the annexation of the Philippines, and the extension of the Monroe doctrine have done much to drag the United States into the welter of world politics. But this tendency has been due less to their own advance or aggression than to the shrinkage of the world, a shrinkage which the Americans themselves have done not a little to bring about.

But there is, I suggest, a third reason, even more conclusive, for the intervention of the Senate in the functions of the Executive. So long as the Americans cling to the theory of the rigid separation of powers; some such relaxation in practice is inevitable. The enormous and preponderating power of the Executive in England is possible only because the Executive is strictly responsible to the Parliamentary majority, and because ministers are conscious that any flagrant misuse of power, whether in domestic or in foreign affairs, would be followed by instant dismissal at the hands of the Legislature. No such power resides in the Legislature of the United States. Should the President or his ministers be guilty of a legal offence, resort may be had to impeachment. But impeachment, as the Long Parliament discovered to its chagrin in the case of Strafford, is at best a clumsy weapon with which to attack a powerful minister. For the correction of errors, as apart from crime, it is wholly inappropriate. If, therefore, the Executive is, for a fixed term, virtually immovable, the immensely important task of concluding treaties with foreign States cannot be left to the unchecked and unlimited discretion of the President. If his

responsibility is to be shared, there is no body with whom it can be shared with less inconvenience and impropriety than with the Senate.

That the Senate is no longer, owing to the inclusion of new States, the select body of councillors contemplated by the founders of the Commonwealth is true; but the difficulties arising from its inevitable and automatic enlargement have been, in great measure, obviated by the delegation of work to a series of standing committees: a committee on Finance to which all questions affecting the revenue are referred; a committee on Appropriations which advises the Senate concerning all votes for the spending of moneys; a committee on Foreign Affairs, on Railways, and so forth. This committee organization, according to Mr. Woodrow Wilson, 'may be said to be of the essence of the legislative action of the Senate', and has immense influence upon its action in all capacities.[71] Only indeed through these committees, and especially through the chairmen of committees, can the Senate keep that touch with the Executive which, denied by the theory of the Constitution, is nevertheless in practice essential to its successful working.

In conclusion, two questions may be asked and briefly answered: (i) How far has the federal Second Chamber of the United States answered the expectations and fulfilled the intentions of the framers of the Constitution? and (ii), How does it compare with the more important Second Chambers of European States, notably with the English House of Lords and the German Bundesrath?

The Senate, as we have seen, was intended to be primarily the embodiment of the federal principle in the Constitution. It was hoped that it would 'conciliate the spirit of independence in

the several States by giving each, however small, equal representation with every other, however large, in one branch of the national government.'[72] In the early days of the Republic this was a point of vast importance; the union was ill-compacted and incoherent, and the part played by the Senate in cementing it was in no sense nominal or meagre. With the growth of time and the evolution of an American national spirit, this particular function has naturally become of less importance, but it is by no means obsolete or superfluous. As compared with the House of Representatives which represents the people, the Senate represents primarily the States.

But apart from this, its elementary function, the Senate performs that of an ordinary Second Chamber. It restrains 'the impetuosity and fickleness of the popular House, and so guards against the effect of gusts of passion or sudden changes of opinion in the people'. It does, moreover, in an eminent degree, fulfil the intention of its founders by providing 'a body of men whose greater experience, longer term of membership, and comparative independence of popular election' makes them 'an element of stability in the government of the nation, enabling it to maintain its character in the eyes of foreign States, and to preserve a continuity of policy at home and abroad.'[73] How admirably the Senate has attained, in this respect, its object is admitted by all who are competent to express an opinion.

The Senate is unquestionably a stronger Second Chamber than the English House of Lords. Not only has it larger powers and more extended functions, but it exercises those powers with greater freedom and independence, and in the main with more general assent. And it is, therefore, worth while, in view of possible modifications in the structure or functions of the House of Lords, to scrutinize somewhat closely the reasons of its

superiority. In the first place, the Senate, as Mr. Bryce points out, 'has drawn the best talent of the nation, so far as that talent flows to politics, into its body, has established an intellectual supremacy, has furnished a vantage ground from which men of ability may speak with authority to their fellow citizens.'[74]

> 'The Senate,' says Mr. Woodrow Wilson, 'is just what the mode of its election and the conditions of public life in this country make it. Its members are chosen from the ranks of active politicians, in accordance with a law of natural selection to which the State Legislatures are commonly obedient; and it is probable that it contains, consequently, the best men that our system calls into politics. If these best men are not good, it is because our system of government fails to attract better men by its prizes, not because the country affords or could afford no finer material. The Senate is in fact, of course, nothing more than a part, though a considerable part, of the public service; and if the general conditions of that service be such as to starve statesmen and foster demagogues, the Senate itself will be full of the latter kind, simply because there are no others available. There cannot be a separate breed of public men reared specially for the Senate. It must be recruited from the lower branches of the representative system, of which it is only the topmost part. No stream can be purer than its sources. The Senate can have in it no better men than the best men of the House of Representatives; and if the House of Representatives attracts to

itself only inferior talent, the Senate must put up with the same sort. Thus the Senate, though it may not be as good as could be wished, is as good as it can be under the circumstances. It contains the most perfect product of our politics, whatever that product may be.'[75]

More important than the House of Lords as regards its legal functions, the Senate is not inferior to it in popular 'intelligibility'. The House of Lords is of course conspicuously fortunate in this respect. Its position rests on a principle which if no longer generally accepted is at least clearly intelligible. But the American Senate is at no disadvantage here. It also, as I have shown, is the result of a natural and native evolution, and it rests on a principle which is not less intelligible than hereditary succession. Further, it is a principle which differentiates it from the House of Representatives just as clearly as the principle of birth differentiates the hereditary House of Lords from the elected House of Commons. And to secure an intelligible differentia for a Second Chamber is, as publicists are never weary of insisting, a point of immense importance and immense difficulty in constitution-making. That difficulty has been a great stumbling-block in France, and hardly less so, as we shall see, in the case of our own colonial constitutions.[76]

The American Senate, moreover, is superior to the House of Lords in its efficiency as a revising chamber, and in the respect and confidence which it inspires. The latter advantage is due perhaps to the elective basis on which it rests, the former attribute is inseparably bound up with its restricted size. Hence the consensus of opinion among all reformers of the English House of Lords—among all at least who desire to increase and not to impair its efficiency and repute—that the first and

essential step is to reduce its overgrown and unwieldy bulk to something like the dimensions of the American Senate or of the German Bundesrath.

I have suggested some points of comparison and analogy between the American Senate and the House of Lords. A much closer analogy exists between the Senate and the German Imperial Council. That analogy will become apparent in the following chapter. Meanwhile, we may observe that the whole American Legislature is in some respects at a serious disadvantage as compared with the English Parliament. Many years ago Mr. Bagehot described the American Legislature as 'a debating society, adhering to an executive'. In view of the share in executive authority assigned by the Constitution to the Senate, the expression is perhaps not strictly accurate. But Mr. Bagehot had in view the exclusion of members of the Executive from the Legislature, the absence of that 'correspondence' on which he rightly lays stress as one of the most characteristic features of the English Constitution. The fathers of the American Commonwealth did their work at a moment when the jealousy of 'placemen' was still an active force in English politics, when the English Crown still sought to influence the Legislature by the exercise of patronage, and when Montesquieu's doctrine of the separative powers was still profoundly influential among the publicists of Western Europe. Under these circumstances it is not remarkable that the Americans, like successive constitution-makers in France, should have attempted to render the Legislature independent by excluding the members of the Executive. But by so doing they deprived Members of Congress, as Mr. Bryce pertinently points out, 'of some of the means which European legislators enjoy of learning how to administer, of learning even how to legislate in administrative topics. They

condemned them to be "architects without science, critics without experience, and censors without responsibility"'.[77] Moreover, as the same acute critic insists, the attempt to keep legislature and executive rigidly distinct has had a result not foreseen by the makers of the Constitution. It has led the 'Legislature to interfere with ordinary administration more directly and frequently than European legislatures are wont to do. It interferes by legislation, because it is debarred from interfering by interpellation'.[78]

Finally, it must be remembered that the federal legislature of the United States is, in another important respect, on an altogether lower plane than our Imperial Parliament: it is merely legislative and not constituent; it can make laws, but only within the four corners of the Constitution; the Constitution itself it cannot touch. Upon the power of the British Legislature there is, of course, no such limitation. It is hardly open to question that the restricted area of legislative activity, combined with the fact that the service in the Legislature does not, as in England, open an avenue to a place in the Executive, must in the long run affect the supply of really first-rate political talent.

Nevertheless, the American Senate holds a place among the Second Chambers of the world inferior to none. Its judicial functions are less important than those of the House of Lords; the executive functions which it shares with the President, though imposing, are not so continuous as those exercised by individual members of the English Peerage, but as a branch of the Legislature its position relatively to the House of Representatives is at once more dignified and more influential than that of our own Upper House. Consequently, in America, at any rate, the bi-cameral system is outside the region of political controversy.

VI

THE GERMAN BUNDESRATH AND THE SWISS STÄNDERATH

> 'The legislative power of the Empire shall be exercised by the Bundesrath and the Reichstag. A majority of the votes of both bodies shall be necessary and sufficient for the passage of a law.'—Art. 5 of the Constitution of the German Empire (April 16, 1871).
>
> 'The central and characteristic organ of the Empire is the *Bundesrath*, the Federal Council, which is, alike in make-up and function, the lineal successor of the Diet of the older Confederation.'—WOODROW WILSON.
>
> 'The true conception of the Bundesrath is that of an assembly of the sovereigns of the states who appear in the persons of their representatives.'—A. L. LOWELL.

Between the American Senate and the German Bundesrath there are many points of similarity, and not a few of contrast.

In Germany as in America the Second Chamber of the Legislature (if as such the Bundesrath may be provisionally regarded) constitutes, perhaps, the most characteristic feature of the federal constitution. An American critic, indeed, describes the Bundesrath or Federal Council as 'the central and characteristic organ of the Empire'. How far that judgement is justified it is the primary purpose of this chapter to consider.

Both institutions, again, have developed from a common germ—a diet of ambassadors representing separate and virtually independent States. Both retain to this day not a few marks of their origin. Both represent not the people but the component *States* of the federal union. Both stand, therefore, alike politically and historically, for a condition of things which has to some extent passed away.

But if the similarities are striking, not less so are the points of difference. While the American Senators are elected by the State *Legislatures*, the federal councillors are appointed by their respective *Executives*; they represent, indeed, not the people of the component State—even at one degree removed—but the Sovereign Princes of the Empire. Again; while the root principle of the Senate is equality of State representation, that of the Bundesrath reflects the conspicuous inequality of the States which compose the German Empire. Particularly it reflects the immense preponderance of Prussia, which possesses seventeen times the representation of the smaller States. Further, while the two Senators representing, for example, Massachusetts or Virginia, may vote in a division on separate sides, all the delegates of a German State must vote 'solid'. Their vote is in fact a State vote, and it can be given by a single delegate and subsequently raised to the power of the State representation. Thus the vote of a single Prussian delegate is counted, in the absence of his colleagues, seventeen times. The position of the Bundesrath is, to our English notions or even to those of America, curiously independent of that of the Reichstag. It may meet, for example, quite independently, and must meet on the formal requisition of two-thirds of its members. Its work, moreover, is not sessional like that of most legislatures, but continuous, and it is done not in the glare of publicity, but in

secret. Its members have the privilege of sitting and speaking in the Reichstag, and may represent to the Reichstag the views of their respective governments, whether the views happen to coincide with those of the Bundesrath or not. In many ways, therefore, the position of the Bundesrath is rather that of a Council of State, than of a legislative chamber.

It is this fact, I imagine, which has led the distinguished French publicist, M. Demombynes, to assign the Constitution of Germany to the uni-cameral category. But is his classification correct? Article 5 of the German Constitution would seem to furnish a conclusive answer: 'The legislative power of the Empire shall be exercised by the Bundesrath and the Reichstag. A majority of the votes of both bodies shall be necessary and sufficient for the passage of a law.' In view of this explicit affirmation of the necessity of the concurrence of two 'bodies' in a legislative enactment, I am unable to accept the classification of M. Demombynes. But the peculiarities in the position, procedure, and functions of the 'Federal Council' go far to explain, if not to excuse, such a classification.

These peculiarities can in fact be explained, as President Lowell justly insists, 'only by a reference to the Diet of the old Germanic Confederation. It is not an international conference, because it is part of a constitutional system, and has power to enact laws. On the other hand, it is not a deliberative assembly, because the delegates vote according to instructions from home. It is unlike any other legislative chamber, inasmuch as its members do not enjoy a fixed tenure of office and are not free to vote according to their personal convictions. . . . The true conception of the Bundesrath is that of an assembly of the sovereigns of the States who appear in the persons of their representatives.'[79]

The Bundesrath consists of fifty-eight members, appointed by the Sovereign Princes of each State of the Federal Empire, or in the case of the Free Cities by the Senate. Of these members Prussia claims seventeen in her own right, and having purchased Waldeck (1) and got a Prussian Prince appointed to the perpetual Regency of Brunswick (2), commands three other votes. Bavaria has six votes; Saxony and Würtemberg, four each; Baden and Hesse, three; Mecklenburg-Schwerin and Brunswick, two; and the other fourteen States and three Free Cities, one apiece. Alsace-Lorraine, it should be observed, is not strictly a member of the Union, but is merely Imperial territory (Reichsland). It is represented in the Reichstag, but not in the Bundesrath. Since 1879, however, it has been permitted to send four delegates to the latter, but though they sit they cannot vote. Alsace-Lorraine is, therefore, analogous, as Mr. Lowell points out, to the American Territories which similarly send to Congress representatives who have no vote.

In matters which concern particular States, and not the Empire as a whole, only the States which are directly interested are allowed to vote. This provision was originally applied not only to the Bundesrath, but also to the Reichstag, but as regards the latter was repealed in 1873.

The Imperial Chancellor, who is, under the Constitution, appointed by the Emperor and responsible to him, presides over the deliberations of the Bundesrath and supervises the conduct of its business, but he has the right to delegate his presidential functions to any other member of the Bundesrath. The Constitution further provides for the appointment by the Bundesrath and from among its own members, of eight standing committees:

1. On the army and fortresses.
2. On maritime affairs.
3. On customs duties and taxes.
4. On commerce and trade.
5. On railways, posts, and telegraphs.
6. On judicial affairs.
7. On finance.

All these committees are annually reappointed. At least four States of the Confederation, besides Prussia, must be represented on each committee, but no State has more than one vote. In the committee on the army and fortresses Bavaria must be represented, while the other members are appointed by the Emperor. The other committees are appointed by the Bundesrath itself. The eighth committee—that for foreign affairs—is also appointed in the Bundesrath, but it must always contain the delegates of Bavaria, Saxony, and Würtemberg, and two delegates selected by the Bundesrath from the other States. The Bavarian delegate is the permanent president of this committee, a provision due to the fact that its principal business is to consult with the Imperial Chancellor, who is always a Prussian delegate. It should be added that delegates do not necessarily belong to the States which they represent, and in practice some of the smaller States not uncommonly confide their interests to the same delegate, who can cast, of course, as many votes as the States which he represents possess. The Emperor is bound, under the Constitution, to afford to the members of the Bundesrath 'the customary diplomatic protection'—a further indication of the ambassadorial character of this Federal Council.

The functions of the Bundesrath, like those of the American Senate, are legislative, executive, and judicial.

Every law, as we have seen, requires the assent of the Bundesrath, and in regard to almost all legislation it has both the first and the last word. Most Bills (including finance Bills) are initiated in the Bundesrath, and all, after receiving the approval of the Reichstag, return to it before finally passing into law. Any member of the Confederation has the right 'to make propositions and introduce motions'. As regards legislation, therefore, the Bundesrath, and through the Bundesrath Prussia, is all powerful. The position of the Reichstag is markedly inferior. It has little power of initiation, and although it exercises pretty freely the power of amendment, its activity, as Mr. Lowell insists, 'is rather negative than positive, and . . . it cannot be said to direct the policy of the State either in legislation or administration.'[80]

The Bundesrath also exercises important executive functions. Many English readers will probably learn with some astonishment that even in the important matter of the declaration of war the Emperor is not (except as the dominating element in the Federal Council) omnipotent. On the contrary, except in the event of an attack upon the federal territory or its coasts, the consent of the Bundesrath is required. And it must be remembered that, strong as is the position of Prussia in the Council, it can be outvoted by a combination of the other States. To the Bundesrath again belongs the power of dissolving, with the consent of the Emperor, the Reichstag, before the completion of its quinquennial term; and the right of deciding on federal execution against a refractory State: 'If the States of the Confederation (so runs Article 19 of the Constitution) do not fulfil their constitutional duties, they may be compelled to do so by execution. This execution shall be decided upon by the Bundesrath, and carried out by the Emperor.'

Like the American Senate, the Bundesrath has important

rights also in regard to the conclusion of treaties and the appointment of officials. Article 11 of the Constitution provides that, 'so far as treaties with foreign countries relate to matters which' (under the terms of the Constitution) 'are to be regulated by imperial legislation, the consent of the Bundesrath shall be required for their conclusion, and the approval of the Reichstag shall be necessary to render them valid.' The former has a voice also in the appointment of the judges of the Supreme Court of the Empire, of the 'Chamber of Discipline', of the members of the Court of Accounts, and other officials. To these executive functions ought also perhaps to be added the privilege, already referred to, by which the Bundesrath, like a ministry of state, designates one or more of its members to commend its legislative projects to the Reichstag.

In its judicial capacity it acts as the Supreme Court of Appeal from the State Courts; it decides points in controversy between State and State, and if any constitutional question arises in a State which does not itself possess a tribunal competent to settle it, the Bundesrath must attempt, on appeal, to settle it by mediation; if this fails it must settle the matter by legislation. Finally, it acts in two ways as the 'guardian of the Constitution': it decides disputes between the Imperial Government and the Government of any State as to the interpretation of federal statutes, while no amendment to the Constitution itself can become law, if fourteen votes in the Bundesrath are cast against it. The significance of this last point can hardly be over-emphasized. It means that any constitutional amendment can be defeated by the vote of Prussia alone; by the vote of the middle States, Bavaria, Saxony, and Würtemberg; or by the vote of the single-member States acting with tolerable unanimity. The importance of their negative voice, in a Constitution which goes

into such minute detail as that of the German Empire, demands no elaborate illustration. Mr. Woodrow Wilson compares the position of the Bundesrath, not infelicitously, with that of the Roman Senate. 'It is, so to say, the residuary legatee of the Constitution. All functions not specifically entrusted to any other constitutional authority remain with it, and no power is in principle foreign to its jurisdiction.'[81]

But, it may be asked: How far does the actual authority of the Federal Council correspond with the imposing position assigned to it by the articles of the paper Constitution? To this question it is difficult for any one—particularly for a foreigner—to give a satisfactory answer. Even in Germany two contradictory answers are commonly given. It is said, on the one hand, to be the most important body in the Empire, and on the other, to be a mere nullity. 'Both are true,' says Mr. Lowell, 'it is a nullity if regarded as an independent Council, for its impulse is from without. Yet it is the most important organ in the Empire, being the instrument by which the larger States (especially Prussia) rule the Empire.'[82] This, however, may be affirmed with confidence: that of all the institutions of modern Germany the Bundesrath is the most organic, the most distinctive, and, in some respects, all but unique. That there are analogies between its position and that of the American Senate, has been already shown; but there are quite as many points of contrast. To the Second Chambers of typical Unitary States it affords, on the contrary, hardly any parallel. To the English House of Lords, in particular, it offers an extraordinary contrast. It is true that it possesses high judicial functions, and that it shares with the Lower House legislative authority. But there all similarity ends. Alike in history, in composition, in procedure, in function, and above all in principle and idea, the Bundesrath

is entirely unlike our House of Lords. The former is fundamentally federal in idea, the latter is almost exclusively unitarian. The former is composed of the plenipotentiaries of sovereign princes, the latter consists of a mainly hereditary peerage. The Bundesrath, like the old Lords of the Articles in Scotland, is probouleutic in function; the Lords in England have almost entirely lost the right, or at any rate the habit, of originating legislation. The former dictates the course of business to the Reichstag; the latter waits on the good pleasure of the Commons. The former acts almost as a ministerial council; the latter has no power to control or even to curb the vagaries of the Executive.

Whether it would be possible and desirable to give to the House of Lords something of the federal character possessed by the Bundesrath is a point which will demand consideration later on.[83] For the moment my only purpose is to insist upon the contrasts presented by the two bodies.

But between the House of Lords and the Upper House of the Prussian Legislature there is a close analogy, and therefore, although the subject belongs properly to the chapter on the Second Chambers of Unitary States, it may conveniently be interjected in this place. It is, in any case, of no overwhelming importance, for the Prussian Landtag is altogether subordinate to the Executive. Its legislative functions—though theoretically wide—amount to little more than the right to consider and amend legislative projects proposed by the Crown. Its control over the administration is not more effective. It can appoint committees of investigation, but ministers are not required to furnish them with information; it can insist upon the attendance of ministers, and ply them with interpellations, but they may refuse to answer; it can address the King, but he need not pay

any attention. In fine, as Mr. Lowell says, 'the influence of the Landtag over the administration is confined to expressing an opinion, which is not likely to have any great effect.'

This being so, the position of the Prussian House of Lords (Herrenhaus) need not long detain us. It consists of some three hundred members, belonging to five different categories: (i) Hereditary members, including the heads of the Houses of Hohenzollern-Hechigen and Hohenzollern-Sigmaringen; the heads of Houses formerly sovereign, but now incorporated in Prussia; the descendants of the Counts and Barons summoned collectively to the Chamber in 1847; and finally, those whose fathers or grandfathers have been called to the Herrenhaus by royal writ; (ii) the four chief officials of the Province of Prussia (the Chancellor, the Grand Master of the Teutonic Order, the High Marshal and the Supreme Burggraf); (iii) a number of great landed proprietors, nominated by the Crown for life, on the presentation of various persons possessing the hereditary right of presentation; (iv) members nominated by the Crown for life on the presentation of the nine universities and forty-three principal cities; and (v) members nominated for life solely by the King on his own initiative. The King may also summon to the Herrenhaus any Princes of the Blood over twenty-one years of age. Other members of the House must be at least thirty years of age. There is no limit to the numbers who may be summoned by the Crown.

The Herrenhaus has co-ordinate legislative authority with the House of Representatives, and equal powers as to initiation. Finance Bills, however, must originate in the Lower House, and may not be amended in the Upper. The Herrenhaus must accept or reject the Budget as a whole.[84]

With this brief glance at the position of the Prussian Herrenhaus we may pass to the consideration of the only Second Chamber in Europe which can be at all profitably compared with the German Bundesrath—the Ständerath of the Swiss Confederation.

The Council of States in Switzerland is differentiated from the National Council mainly, if not solely, by the fact that in the former the several Cantons enjoy equal representation. Consisting as it does of forty-four members, two from each of the twenty-two Cantons, it looks at first sight as though it were strictly analogous to the Senate of the United States, and, like the Senate and the Bundesrath, supplied the federal element in the central institutions of the country. Professor Woodrow Wilson denies, however, that the Swiss Ständerath possesses any 'such clearly defined character'. It is hazardous to express dissent—however slight—from Professor Woodrow Wilson on any point connected with the working of Federal Government, but I confess that the grounds on which he denies to the Swiss Ständerath a 'clearly defined Federal character', appear to me to be insufficient. It is true, of course, as he points out[85] that 'the mode in which its members shall be elected, the qualifications they shall possess, the length of time which they shall serve, the salary which they shall receive, and the relations they shall bear to those whom they represent, in brief, every element of their character as representatives, is left to the determination of the Cantons themselves'; and that 'the greatest variety of provisions consequently prevails'. But true as this is, and much as it may impair the analogy—in other respects—between the Swiss Ständerath and the American Senate, the fact remains that like the American Senate and the German Bundesrath, like the Second Chambers in the Canadian

Dominion and the Australian Commonwealth, the Ständerath represents the Constituent *States* of the union rather than the *people*. This being so, I find it difficult to understand on what ground a *federal* character can be denied to it. But in no other respect is it analogous either to the Bundesrath of Germany or to the American Senate. It has no special functions which differentiate it from the National Council. The initiation of legislative proposals belongs equally to the two Councils; it is, indeed, divided between them by the arrangement of their respective presidents at the commencement of each session. To neither House are the ministers responsible; in neither may they sit or vote; but in both they attend and speak when proposed legislation is under consideration, and in both they are required to answer interpellations addressed to them. In every respect the authority and functions of the two Houses are co-ordinate; in the exercise of certain electoral and judicial functions they act as a single Assembly in joint session.

The following are among the more important of the matters which fall, according to the Constitution, within the competence of the federal legislature: (i) laws on the organization and election of federal authorities; (ii) laws and ordinances on matters which the Constitution puts within the federal competence; (iii) the creation of federal offices and the rates of remuneration for them; (iv) the election of the Federal Council, of the Federal Court, of the Chancellor, and the Commander-in-chief of the federal army; (v) foreign treaties and alliances, together with the approval of treaties concluded between Cantons, or between any Canton and a foreign power; (vi) measures for national security; the declaration of war and conclusion of peace; (vii) the guarantee of the Constitutions and territory of the Cantons; internal police, amnesty and pardon;

(viii) the enforcement of the provisions of the Federal Constitution, and the fulfilment of federal obligations; (ix) the control of the federal army; (x) the annual budget; the audit of public accounts and the issue of federal loans; (xi) the supervision of the federal administration and judiciary; (xii) protests against the decisions of the Federal Council with reference to administrative conflicts; (xiii) conflicts of jurisdiction between federal authorities; and (xiv) the revision of the Federal Constitution.[86]

In all such matters the concurrence of both Houses is essential; and on the demand of eight Cantons, or 30,000 voters, any federal law must be submitted to the people by *Referendum* for acceptance or rejection. A constitutional amendment *must* be submitted to the people, and must be approved, before it can become law, both by a majority of the people and by a majority of the Cantons.

But these are attributes of the legislature as a whole. The peculiarity of the Ständerath is that it is the only Second Chamber in Europe, perhaps in the world, the functions of which are in no way differentiated from those of the other Chamber of the Legislature.

Having thus considered the Second Chambers of the American Federal Republic, and of the two Federal Powers of Europe, I propose in the next chapters to examine the constitution and working of the Second Chamber of the Legislature in the British Dominions beyond the sea.

VII

SECOND CHAMBERS IN THE OVER-SEA DOMINIONS.—CANADA

> 'The genius of Earl Grey not only devised for the greater colonies a system of government which reproduced as nearly as possible the external features of our own, but . . . breathed into the copy the inner essence of the original—the possibility of silent constitutional growth.'—Sir Henry Jenkyns.

> 'There is perhaps no more difficult question in practical politics, or one towards the solution of which the political thinker can give less help, than that of forming in a new country an Upper House.'—Professor W. E. Hearn.

The German Bundesrath and the Swiss Ständerath possess features of great interest to the student of political institutions. Of even greater interest is the history of the evolution of the American Senate. But most interesting of all, to the English student, are the Second Chambers which, without exception, form part of the Legislatures of the Over-sea Dominions of the British Crown.

In attempting to analyse the nature and to describe the working of Colonial legislatures, the warning suggested by the words quoted above from the late Sir Henry Jenkyns's admirable work on *British Rule and Jurisdiction* must be carefully observed. Jurists have agreed to divide the Constitutions of the world into 'written' and 'unwritten', or

again into ‘rigid’ and ‘flexible’. The correspondence between the two categories is not, be it noted, invariable; and even in Constitutions which are, like that of the United States, both written and rigid, it would be unsafe to rely exclusively upon the written text. But if this be true of the United States, where the Constitution approaches nearer to complete inflexibility than any other in the modern world, it is still more conspicuously true of the constitutions of the great self-governing communities which still owe allegiance to the British Crown.

The Canadian Union Act of 1840 is an instance in point. That Act was the direct legislative outcome of Lord Durham’s famous Report on Canada, published in 1839.[87] That Report with the resulting legislation is regarded, and rightly, as the Magna Carta of Colonial self-government. Lord Durham went out in 1838 with the avowed hope and intention that he might be ‘the humble instrument of conferring upon the British North American Provinces such a free and liberal Constitution as shall place them on the same scale of independence as the rest of the possessions of Great Britain’. He more than fulfilled his intention. His *Report* insisted that ‘the Crown must consent to carry the Government on by means of those in whom the representative members have confidence’. And again: ‘The responsibility to the United Legislature of all officers of the Government, except the Governor and his Secretary, should be secured by every means known to the British Constitution. The Governor . . . should be instructed that he must carry on his Government by heads of departments in whom the United Legislature shall repose confidence; and that he must look for no support from home in any contest with the Legislature except on points involving strictly Imperial interests.’ Lord John Russell, on behalf of the Imperial Government, accepted in the fullest

and frankest way the principle thus enunciated by Lord Durham. 'Your Excellency . . . must be aware that there is no surer way of earning the approbation of the Queen than by maintaining the harmony of the Executive with the legislative authorities.' Thus he wrote to the Governor-General of Canada (Lord Sydenham) in October, 1839. As to the intentions, therefore, both of the brilliant Pro-Consul and of the Government which he represented, there can be no question. But the remarkable point is that the principle so emphatically enunciated by Lord Durham and Lord John Russell finds no place in the Legislative Act of 1840. The Act merely refers to 'such executive Council . . . as may be appointed by Her Majesty' (§45). As to the mode of appointment it is silent. The fact is that here, as elsewhere, lacunæ were to be supplied by reference to English practice and precedent. A knowledge of and deference to the principles of constitutional government as understood in England is throughout presupposed. But it was not until the governorship of his son-in-law, Lord Elgin, that the practice became fully conformable to Durham's principles. In 1847 Lord Elgin was formally instructed 'to act generally on the advice of the Executive Council and to receive as members of that body those persons who might be pointed out to him as entitled to be so by their possessing the confidence of the Assembly', i.e. the Lower House of the Legislature.[88] More remarkable still is the fact that not even in the British North American Act of 1867 is there any explicit recognition of 'responsible Government'.

The warning suggested by the evolution of Canadian self-government is applicable in greater or less degree to the interpretation of all the written Constitutions of the Over-sea Dominions, and not least to those portions of them which concern the relations of the two branches of the Legislature.

In none of the great Dominions has there been any attempt to introduce the principle of a uni-cameral legislature. The provincial legislatures of Canada (and even here Quebec and Nova Scotia form exceptions) consist of one House only, but with this exception both the Federal and the State Legislatures are alike and uniformly bi-cameral. In the Federal Legislatures and in that of United South Africa the Second Chamber is known as a Senate; in the Unitary Constitutions as a Legislative Council.

In this and the following chapters an attempt will be made (i) to describe the working of the bi-cameral system in each of the great self-governing Colonies; (ii) to analyse the composition and powers, to note the mode of appointment, and to discuss the constitutional function of the Second Chamber; and (iii) to focus the results thus attained, and to draw from them some conclusions as to the value of the system as a whole.

It is natural to begin with the Dominion of Canada, since Canada, in the matter of constitutional evolution, as in much else, has shown the way to the other Over-sea Dominions.

From its acquisition by conquest in 1760 down to 1774, Canada was governed, and with admirable tact and success, under the *règne militaire*. The Quebec Act of 1774 established a Legislative Council of Crown nominees with certain restricted rights of legislation and of local and municipal taxation. A further stage was registered by the passing of Pitt's *Canada Constitutional Act* of 1791. The large influx of American loyalists after the recognition of Independence in 1783, reinforced by a considerable emigration from home, created a problem with which Pitt dealt promptly and wisely. Under one Governor and one Legislative Council there were now two

Canadas: the one French in origin and Roman Catholic in religion; the other English and Protestant. Pitt recognized the fact; divided Canada into two Colonies, Upper and Lower, and gave to both Colonies representative institutions without a 'responsible' executive. In both Colonies there was to be a bi-cameral legislature: (i) a small Legislative Council consisting of persons nominated by the Crown for life, and (ii) an elected Legislative Assembly. The arrangement worked well for a time, but the difficulty of combining a representative local legislature with an autocratic executive responsible to Downing Street soon made itself manifest, and this, in addition to fiscal, ecclesiastical, and racial complications, led to the rebellion which came to a head in 1837. This rebellion roughly arrested the attention not only of the English Government, but of the English people, and the historic mission of Lord Durham was the result. On the advice of that brilliant but impetuous statesman the Union Act of 1840 was passed. This Act provided for the union of the two Canadas into one, and for the establishment of parliamentary government, as understood in England—a bi-cameral legislature and an executive responsible to it. Under this constitution the Second Chamber (Legislative Council) was to consist of not fewer than twenty persons nominated by the Crown for life. Responsible Government as interpreted by Lord Grey in Whitehall and by Lord Elgin in Canada proved itself a conspicuous success; the friction between Legislature and Executive, almost continuous between 1791 and 1840, quickly abated; in short, the more serious of the constitutional problems was solved.

Another still remained. The nominated Second Chamber did not work smoothly, and in deference to agitation more or less persistent it was decided in 1856 to abandon the nominee

system. The existing members of the Council were to be left undisturbed, but vacancies as they occurred were to be filled by election. Each of the three divisions, Ontario, Quebec, and the Maritime Provinces, was to return twenty-four members. The electors were to be the same as those for the House of Commons, but the electoral areas were to be larger; the term of service was to be eight years instead of four; and elections were to be held biennially—twelve senators being elected at a time. Lord Elgin expressed the opinion that 'a second legislative body returned by the same constituency as the House of Assembly, under some differences with respect to time and mode of election, would be a greater check on ill-considered legislation than the Council as it was then constituted'.[89] The efficiency of the Council set up by the Act of 1840 may not have been conspicuous, but the experiment of 1856 was at least an equal failure, and even more short-lived. Meanwhile there were other problems, racial, economic, and geographical, which the Union Act of 1840, so far from solving, served only to accentuate; and before long it became obvious that nothing less than some form of federation would satisfy the aspirations and conciliate the jealousies of the various parts of British North America. The movement towards federalism gathered force under the governorship of Lord Monck, and in 1867 the Royal Assent was given to *The British North American Act*, by which a federal form of government was established in the Dominion of Canada. The original units or provinces of the Federation were four: Ontario or Upper Canada, Quebec or Lower Canada, Nova Scotia, and New Brunswick. It has now been expanded to include Manitoba, British Columbia and Vancouver, Prince Edward Island, and the provinces of Alberta and Saskatchewan recently carved out of the North-West Territories—in fact, the whole of North America subject to the British Crown.

Newfoundland alone, standing on its ancient dignity, has persistently refused to come into the British North American Federation.

The legislative system of this—the first—federal dominion under the Crown demands some detailed examination. Legislative power is vested in the King, 'an Upper House styled the Senate, and the House of Commons'; and there must be a parliamentary session 'once at least in every year'. A somewhat curiously worded clause (§ 18) provides that 'the privileges, immunities, and powers' of the Senate and House of Commons and the members thereof might be from time to time defined by Act of the Parliament of Canada, 'but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.'[90]

The Senate originally was to consist of seventy-two members, of whom twenty-four were assigned to Quebec, twenty-four to Ontario, and twenty-four to the Maritime Provinces of Nova Scotia and New Brunswick. Regarding the Maritime Provinces as a single division, the three divisions were thus, after the American mode, to have equal representation in the Senate. But this principle has not been maintained in subsequent amendments. An Act of the Imperial Legislature in 1871 authorized the Canadian Parliament to make provision for the representation therein of provinces subsequently admitted to the federation. Under these powers, four senators each have been assigned to Manitoba, Alberta, and Saskatchewan, and three to British Columbia. Section 147 of the Act of 1867 provided that Prince Edward Island, if it elected to join the federation, should be represented in the Senate by four

members, but that, in this event, the representation of the other maritime provinces, Nova Scotia and New-Brunswick respectively, should be automatically to ten each. The contemplated event having occurred, the Senate now (1910) consists of eighty-seven members apportioned to the several provinces in accordance with the above Acts.

Subject to this apportionment, Senators are appointed for life by the Governor-General—in practice on the advice of his ministers. A Senator must be thirty years of age, a British subject, a resident in the province for which he is appointed, and be possessed of property worth 4,000 dollars net in the same province. He may resign his place in the Senate at any time, and must vacate it, if (i) he is absent for two consecutive sessions; or (ii) becomes subject to foreign allegiance; or (iii) is adjudged bankrupt; or (iv) is convicted of treason or felony; or (v) ceases to be qualified.

The relations of the two Houses are defined, not too precisely, in the original *Instrument* of 1867. But the Constitution declares (§§ 53, 54) that money Bills must originate in the House of Commons and must be recommended to that House by the Governor. As to the Senate's right of amendment or rejection, the Constitution is silent. The practice is thus stated by a reliable authority: 'In the Colonies with nominee Councils' (i.e. Second Chambers) 'there is just as little chance as in the United Kingdom of throwing out an appropriation Bill dealing with general supply. On the other hand, Bills dealing with particular items are liable to rejection just as much as any ordinary piece of legislation.'[91] For an actual deadlock between the Houses there is in the *Instrument* no direct provision, but clauses 26 and 27 seem to have been framed in contemplation of the possibility of its occurrence. The former

provides that 'if at any time, on the recommendation of the Governor-General, the Queen 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 equally the three divisions of Canada, add to the Senate accordingly.' The equal representation of the three divisions in the Second Chamber is to be scrupulously maintained, but there is to be no swamping of the Upper House at the will of the Executive. Six additional members may be nominated, but no more.[92]

If these constitutional deadlocks have been avoided in the Federal Legislature of Canada, it has been due less to the intelligent precautions of the authors of the Constitution than to the operation of circumstances which they would hardly claim to have foreseen, still less to have intended.

The Canadian Senate was intended to represent two principles which if not actually contradictory are clearly distinct. On the one hand it represents the principle of Crown nomination, and so far approximates to the British House of Lords. On the other it adopts, though with unfortunate timidity, the federal idea which is the root foundation of the efficient Second Chambers of Imperial Germany and the United States. And the Canadian Senate has, it must be confessed, incurred the proverbial fate of one who halts between two opinions. Mr. Alphaeus Todd, it is true, in his classical work on parliamentary government in the Colonies, gives no hint of any shortcomings.

> 'In Colonies,' he writes, 'entrusted with the powers of local self-government . . . a Second Chamber is a necessary institution. . . . It is a counterpoise to democratic ascendency in the

> popular and most powerful assembly, it affords some protection against hasty and ill-considered legislation and action, and serves to elicit the sober second thought of the people, in contradistinction to the impulsive first thought of the Lower House.'[93]

But, however admirable the sentiment, the expression is suspiciously *a priori*. Mr. Goldwin Smith, writing from a standpoint unmistakably concrete, has a very different tale to tell. The actual working of the Canadian Senate he compares most disadvantageously with that of the American.

> 'The American Senate elected by the State Legislatures is in the full sense of the term a co-ordinate branch of the Federal Congress . . . its authority is generally regarded by Americans as the sheet-anchor of the State. . . . The Canadian Senate nominated by the Crown is, on the contrary, as nearly a cipher as it is possible for an assembly legally invested with large powers to be.'[94]

The Canadian Senate is, he declares, 'treated with ironical respect as the Upper House, and surrounded with derisive state but the ceremonious environment, the social precedence, and other attributes of the Senators are 'merely the trappings of impotence'. But Mr. Goldwin Smith is nothing if not incisive. His splendid isolation in Canadian politics is notorious, and of his strong prepossessions in favour of the United States and their institutions every one is aware. None the less, he is a singularly shrewd observer; his historic sense is keen, and his criticisms, even if mordant in tone, demand attention. Canada has now enjoyed a Second Chamber for more than a century, and the Federal Senate itself is of nearly fifty years' standing.

Nevertheless, it has so far signally failed to attain the prestige which has long since accrued to the American Senate.

How are we to account for this failure? In the first place, the Canadian Senate does not, like the English House of Lords, the American Senate, and the German Bundesrath, stand for and embody one single and intelligible principle. It possesses neither the glamour of an hereditary aristocracy, nor the solid strength of an elected assembly, nor the utility of an upper chamber representing the federal as opposed to the national idea. The attempt to introduce into Canadian institutions the principle of European aristocracy was wisely abandoned more than a century ago. But the flavour still clings faintly round the Canadian Senate, though it preserves none of the advantages which belong to aristocratic assemblies. Nor has it ever frankly stood forth as the champion of the federal principle. This principle was recognized in its constitution, and, as originally designed, afforded equal representation to each of the three divisions into which the Dominion was divided. But the principle of federalism was from the first accepted with reluctance by some of the most powerful statesmen in Canada, and was neutralized by the system of nomination. Sir John Macdonald, in particular, was far from cordial towards the federal system, and, though not strong enough in 1867 to resist the centrifugal forces which were then in operation, he found himself soon afterwards in a position to infuse institutions, avowedly federal, with a definite unitarian bias.

It is, indeed, hardly too much to say that a Senate, devised with the idea of giving representation to provincial interests, has been manipulated in such a way as to subserve primarily the interests of the central executive.

This points to a second reason for the failure of the Canadian Senate. Mr. Alphaeus Todd may celebrate in triumphant paean the virtues of an institution 'free from the trammels of party'; of grave and reverend senators 'able to deliberate upon all public questions on their merits'.[95] Such was doubtless the ideal which the authors of the Federal Constitution of Canada set before themselves. The grim reality is something vastly different. Almost from the first the Senatorial nominations have been dictated by party exigencies, naked and unashamed. For good or evil the statesmen of the mid-Victorian era, both at home and in the Colonies, had 'responsible government' on the brain. Macdonald was determined that if in Canada the phrase was to mean anything it should mean the exclusive control of patronage, in particular the patronage of senatorial nominations. In this way he sought to neutralize some of the vicious tendencies inherent in the Dominion Act. The Senate, federal in idea, should become a facile instrument in the hands of the Ministry for the time being. For nearly a generation that Ministry was Sir John Macdonald's. Thus, writing in 1891, Mr. Goldwin Smith was able to affirm without fear of contradiction:

> 'Of the seventy-six senators all but nine have now been nominated by a single party leader, who has exercised his power for a party purpose, if for no narrower object. . . . Money spent for the party in election contests and faithful adherence to the person of its chief, especially when he most needs support against the moral sentiment of the public, are believed to be the surest titles to a seat in the Canadian House of Lords.'[96]

Once again Mr. Goldwin Smith may be thought to weaken a

strong case by over-emphasis, but that the criticism is substantially accurate is hardly open to dispute. And the example set by Macdonald has been bettered by the most brilliant of his successors. Macdonald is said during his long tenure of power to have appointed one Liberal to the Senate. Sir Wilfrid Laurier is believed to be guiltless of even this degree of weakness towards his Conservative opponents. It must not, however, be inferred that this distinguished statesman is satisfied with the present position of the Senate. On the contrary, he has forcibly demonstrated the evils of the existing system, and has advocated the substitution of an Upper Chamber elected, according to the American method, by the legislatures of the constituent provinces.

Even this amendment would not put the Canadian Senate in a position parallel to that of the United States. The latter body, as we have seen, performs important functions apart from its co-ordinate share in legislation. It has a special part to play in the judicial and in the executive work of the country. The Canadian Senate acts as a judicial tribunal in divorce cases: indeed the severe critic already quoted declares this to be almost its only serious business. But it has no share in the Executive. It suffers, therefore, as compared with the American Second Chamber in dignity and variety of functions.

One thing, however, may be said of it—whether creditable or the reverse is a question to be determined by the individual reader. The occasions of conflict between itself and the House of Commons are neither numerous nor important. Sir John Macdonald at least deserves the credit of having reduced to a minimum the possibility of a constitutional deadlock. For the first thirty years after the inauguration of the Dominion the Conservatives were almost uninterruptedly in power. For the

last fifteen the Liberals have enjoyed an equally unbroken tenure. Starting in 1867 with an equal number of Conservatives and Liberals, the Senate gradually assumed, in each of the two well-defined periods into which recent party history divides, the hue of the dominant party. There was, of course, an awkward moment of transition; and so long as it lasted the Conservative majority in the Senate thwarted with some success the will of a Liberal Ministry and a Liberal Lower House. But Macdonald's senators gradually paid the common toll of humanity; they have been one by one replaced by the nominees of Sir Wilfrid Laurier, and the Senators now serve the Liberal Ministry with a devotion not less complete than that which was accorded to its Conservative predecessors.

That this result fails to fulfil the intentions of the founders of responsible government in Canada cannot be denied. It was hoped that the Senate, limited in numbers and surrounded with a certain dignity, would gradually come to consist of men of real eminence in various walks of life, and would by its personnel command such respect as would enable it to perform effectively the traditional functions of an Upper House; that it would impose delays upon ill-conceived legislative projects; that it would give time to the electorate for 'sober second thoughts'; that it would secure the country against political surprises, and would circumvent unscrupulous party stratagems. The Senate has in every respect disappointed the hopes of its sponsors. The typical senator conforms to one of three types: he is either a generous subscriber to party funds—a type not unknown even in hereditary chambers; or a successful business man who has been or may be useful to some powerful interest favoured by the dominant political party; or a mere party hack, rewarded—not perhaps illegitimately—for political services or political

complaisance by the dignity of a Senatorship, with a life income of £500 a year and a railway pass. In this connexion a story quoted of Sir John Macdonald by Mr. Goldwin Smith is, if accurate, not insignificant. Referring to the selection of a candidate for the House of Commons, Macdonald wrote: 'From all I can learn W. W—— will run the best. He will very likely object; but if he is the best man you can easily hint to him that if he runs for West Montreal and carries it, we will consider that he has a claim for an early seat in the Senate. This is the great object of his ambition.'[97] It is not suggested that there is anything peculiarly immoral, in a political sense, about the proposed transaction, nor that it would be difficult to find similar cases nearer home, but the story does serve to illustrate the somewhat wide divergence between the anticipations of the idealists and the practical working of an Upper House nominated by the Ministry of the day.

That considerable dissatisfaction exists in regard to the Senate in Canada is indisputable; but it is less easy to gauge the force and direction of public opinion as to reform. In Canada, as in Great Britain, there is undoubtedly a section of opinion which favours the abolition of the Second Chamber; and if the choice lay between its abolition and its retention in the present form this party would probably receive a considerable accession of recruits. But it is difficult to believe that the Dominion is really impaled upon the horns of this dilemma. Is it not still possible to do what most impartial observers now agree ought to have been done in 1867: to make the Senate really representative of the constituent provinces, and to select it by a process of double election; in a word to follow the American example?

The timid half measures adopted in 1867 have satisfied nobody but the party wire-pullers. A frank acceptance of the

federal and elective principles might still go far to win for the Senate such a measure of political prestige and popular confidence as can alone enable it to realize the objects for which a Second Chamber presumably exists.

Against reform on these lines two objections will probably be urged. It may be said (i) that the division of powers between the Federal Government and the State Governments has proceeded on totally different principles in America and in Canada; and (ii) that while Canada has borrowed from the mother country the cabinet principle, America has not.

Both statements are true, and constitute powerful and relevant arguments in relation to the place of the Senate in the Constitution. The American Constitution is fundamentally and genuinely federal; the Federal Government enjoys only such powers as are definitely delegated to it by the Constitution; the 'unallotted residue of powers' resides in the constituent States. In Canada it is otherwise. Section 92 of the British North American Act enumerates the 'classes of subjects' in relation to which the Provincial legislatures may 'exclusively make laws', while Section 91 declares that 'it shall be lawful for the Queen, by and with advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces'. The difference thus accentuated between Canada and America is, in truth, fundamental. It proves to demonstration the unitary bias of Canadian federalism, and distinguishes it not only from that of the United States, but not less strikingly, as we shall see, from that of the Australian Commonwealth. Whether under these circumstances it would be wise to give to the Canadian Senate a

'frankly federal' character; whether to do so would not be running counter to the genius of the Constitution, are questions on which it would be presumptuous for a writer, unqualified by birth or by long residence in the Dominion, to pronounce dogmatically. But this much may be said: that experience has proved how dangerous a thing it is to tamper with the genius of a Constitution, even for the purpose of amending proved and acknowledged deficiencies, and that Burke is, as usual, right in insisting that it is no small part of political wisdom to know how much of an evil to suffer patiently. With this trite reflection we may leave the first criticism urged by the opponents of constitutional change in Canada.

Another, still more formidable, remains. Would a federal Senate, strengthened by the application of the elective principle, be consistent with the smooth working of the cabinet system as understood in England, and successfully transplanted to the daughter-lands? On this point American experience sheds no light. All that their publicists can tell us is that they have deliberately preferred the federal to the cabinet principle, and that 'they have made no attempt to reconcile them'. The Australian Commonwealth will in time, afford much help; but the experience of the reconciliation is as yet too short to be of much practical use in guiding Canadian reformers to a wise decision.

Nevertheless it seems probable that Canada will be compelled to follow the example of Australia under penalty of incurring the risks attendant on a uni-cameral legislature. The existing Senate has little to recommend it; it lacks both dignity and utility. The prolonged ascendancies of two great statesmen; the all but continuous domination of the two great parties have so far averted a deadlock and have tended to obscure the

unquestionable failure of the Second Chamber devised by the Constitution of 1867. Should different conditions prevail in the near future, should party oscillations be as rapid and violent in Canada as elsewhere, it is difficult to believe that the Senate could in its present form survive. To put the Second Chamber upon a basis at once firm, dignified, and intelligible, would seem therefore to be the obvious duty of conservative statesmanship in the Dominion.

VIII

SECOND CHAMBERS IN THE OVER-SEA DOMINIONS—AUSTRALIA

> 'All those checks and balances in the English and American Constitutions by which the censors of Democracy used to set such store have here dwindled down to one only, viz. the existence of two Chambers.'—Bryce on *The Australian Commonwealth*.

Between the Federal Constitution of Australia and that of British North America there are many striking and important points of difference, and none, perhaps, is of greater significance than that presented by the constitutional position and powers of the federal Second Chamber. But between the earlier stages of political evolution in the two cases there is a close resemblance. Colonial government is frequently described as having exhibited a symmetrical development from Crown Colony government to Representative Institutions without a responsible Executive; thence to 'responsible government and finally to Federation. The formula, though open to criticism as a generalization,[98] indicates accurately enough the stages through which Canada and the Australian Colonies have alike passed. The former having been described in the previous chapter, it will not be necessary to describe in like detail the stages in the constitutional evolution of the several Australian Colonies prior to the consummation of the existing Federal Constitution of 1900.

New South Wales—the Mother-State of most of the Australian Colonies—rediscovered by Cook in 1770, was first utilized as a penal settlement in 1787, in consequence of the natural refusal of the Carolinas any longer to receive English convicts. For thirty years it remained to all intents and purposes a convict settlement, and nothing more; but the pressure of drought led to the exploration of the Blue Mountains in 1813; it was discovered that New South Wales offered incomparable facilities for sheep grazing, and in 1821 the Colony was opened to free immigrants. For a time the Free-settlers and the 'Emancipists' lived side by side, but in 1840 the transportation of convicts was forbidden by an Order in Council, and New South Wales became the home of freemen.

This change, combined with the fact that in the same year Canada received the privilege of responsible government, naturally aroused a desire for a change of system in Australia. Hitherto the Colony had been governed under strict military law, and, even so, the task of government, as may be imagined, was difficult enough. But in 1842 a Legislative Council, consisting of twelve nominated, and twenty-four elected members, was established. This did not long satisfy aspirations stimulated by the example of Canada, and in 1850 an Act was passed by the Imperial Parliament, which gave general powers to the several Australian Colonies to settle for themselves the exact form of their Constitutions. They quickly acted on this permission, and in this way the parent Colony of New South Wales, with its offshoots, Victoria, Tasmania, and South Australia, attained to the dignity of responsible government in 1855. In each case provision was made for a bi-cameral legislature, and an executive responsible to the legislature. In New South Wales, the members of the Legislative Council or Second Chamber

were to be nominated for life by the Governor; in Victoria and Tasmania they were to be elected for a term of six years, and in South Australia for a term of nine. Queensland, another offshoot of New South Wales, was entrusted with responsible government from its first establishment as an independent colony in 1859. New Zealand attained to the same dignity in 1856, and Western Australia in 1890.

A more particular word must be added as to the position of the Second Chamber in the several Colonies which now form the Australian Commonwealth. For without such a preliminary word it would be difficult to render intelligible the provisions which experience and prudence have combined to dictate in the Federal Act of 1900.

In New South Wales the Legislative Council must consist of not less than twenty-one members. Unless they happen to be ministers, the members are unpaid, but they travel free on the railways of the State. To the number of nominees there appears to be no legal limit, and the Council at present (1910) consists of sixty-one members. In this respect the Second Chamber of New South Wales is peculiar. In nearly all other Colonies the size of the Upper Chamber is precisely defined by statute, and the absence of any such provision in this case has led on at least one occasion to considerable difficulties. The most notorious case was that of Sir Charles Cowper, who swamped the Upper House with his nominees. The Governor, Sir John Young, was rebuked by the Home Government for permitting this, and a serious monition was issued from Whitehall to the effect that the 'number of Legislative Councillors should be limited to what is convenient, and that no nominations should ever be made merely for the purpose of strengthening the party which happens to be in power.'[99]

So things remained until the régime of Sir Henry Parkes, who reopened the question by a demand that the relations between the Executive and the Legislative Council should be readjusted so as to bring them into conformity with recent English practice. There had been various disputes, chiefly on fiscal questions, between the two Chambers, and Parkes definitely asked for a recognition of the principle that ministers might recommend to the Governor the creation of Councillors. Mindful of the rebuke to Sir John Young, the Governor referred the matter to the Secretary of State, who while disclaiming a desire to interfere in the domestic concerns of the Colony demurred to the proposed increase of members. But in 1889 Parkes was more successful in obtaining from Lord Carrington permission to add members to the Legislative Chamber at the convenience and discretion of the Executive. That principle, closely akin to one which has long prevailed in the mother country, may now be regarded as securely enshrined among the constitutional conventions of the Colony.[100]

Queensland, alone of the Australian Colonies, has modelled its Second Chamber upon that of the parent Colony. The Legislative Council now consists of forty-eight members, nominated by the Governor for life. As in New South Wales there is no limit of numbers. But this fact has not by any means averted friction between the two Houses. In 1885 the quarrel came to a head in reference to the claim of the Second Chamber to amend money Bills. An appeal to the Privy Council resulted in a decision adverse to the claim of the Legislative Council. 'It was held that the position of the Council was analogous to that of the House of Lords, and that the control of supply rested with the Lower House, subject merely to a right of rejection, where such right could be exercised by the Lords.'[101] In 1907 another

deadlock between the two Houses occurred. More than one important Bill proposed by the Government was rejected in the Upper House, and the Premier, Mr. Kidston, asked the Governor to allow him to appeal to the country. Lord Chelmsford refused; the Kidston Ministry resigned, and the leader of the opposition took office. The House of Assembly refused supplies, and Lord Chelmsford thereupon dissolved Parliament. The country returned the Progressives to power, and the final result was an important revision of the Constitution. An Act was passed to repeal the provision of the Constitution Act of 1867, whereby a two-thirds majority in both Houses was required for an amendment in the composition of the Council, and a further guarantee was taken against a deadlock between the two Houses in the future. A Bill which has been passed by the Assembly and rejected by the Council, and again in a subsequent session a second time passed and rejected, may be submitted by *referendum* to the electorate. If it is supported by a simple majority of those voting, it is forthwith presented to the Governor for his assent. By this means the will of the Lower House can be made to prevail 'within the limits of a single Parliament', but only provided that the proposed measure obtains the specific assent of the electorate.[102]

In the existing Constitution of South Australia, also, there is a provision approximating to a *referendum*. The Second Chamber there, unlike that of New South Wales and of Queensland, is not nominated, but elected. It consists of eighteen members elected for each of the four districts into which the Colony is divided, by electors who are possessed of a fairly substantial property qualification. Half the members of the Council retire every three years, and are not re-eligible. Members must be thirty years of age, and have been resident in

the State for three years. They receive £200 a year, and a free railway pass. Except under special circumstances, to be noted presently, the Council cannot be dissolved by the Executive. Despite—or perhaps in consequence of—the elective character of the Upper House, the relations between the two Houses have not been monotonously smooth. Early in the sixties the Lower House attempted to ignore the existence of the Council in regard to supply, until its usurpation was checked by the refusal of the Governor to sanction the issue of funds except under the authority of Bills which had received the assent of both Houses. Friction nevertheless continued, until in 1881 a device was adopted to put a stop to deadlocks between the Houses. Under that Act, as amended in 1901 and 1908, it is provided that if a Bill is twice passed by the Assembly, and either twice rejected by the Council or amended in a way unacceptable to the Assembly, the Governor may either dissolve *both* Houses, or may call up by election to the Second Chamber not more than nine additional members. Here again it must be noted that no Bill can be forced through the Upper House without an appeal to the electors of one or both Houses—according to the discretion of the Governor. Should the Upper House remain obdurate after such an appeal, there would seem to be no further constitutional means of bringing the two Houses into agreement.

Not widely dissimilar is the position of the Second Chambers in Tasmania and Western Australia. In the former the Legislative Council consists of eighteen members, elected for six years, by electors possessing a moderate property qualification. Money Bills must originate in the Assembly, but may be rejected and even amended by the Council, which has persistently maintained a strictly co-ordinate right in regard to general legislation. In Western Australia the Legislative Council

was at first nominated, but provision was made that as soon as the white population of the colony reached 60,000 it should become elective. The Council now consists of thirty members, elected for a period of six years by the ten electoral provinces into which the Colony is divided. The electors must possess a fairly high property qualification. Members must be thirty years of age, and have been resident in the Colony for two years. They receive £200 a year and a free railway pass. The Council has co-ordinate powers in general legislation, and in regard to money Bills it may return a Bill to the Lower House, with a request for alteration, but cannot insist upon the alteration should the Assembly refuse it.

Of all the States which now constitute the Commonwealth, the experience of Victoria, as regards the point under discussion, has been the most varied, and perhaps the most instructive. That Second Chamber is said by one who speaks with authority, to be 'from the democratic point of view the most objectionable of all the Australian Upper Houses'.[103] But it is not easy for an outsider to understand the ground for this objection, unless it be that conflicts between the two Chambers have been in Victoria unusually frequent, bitter, and prolonged.

The Victorian Legislative Council consists of thirty-four members, elected for six years. Half the members retire every three years. They are unpaid, and must possess estate of the net annual value of £50. The electors also, unless they are University graduates, or are otherwise qualified by one of several 'fancy' franchises, must possess freehold property worth £10 a year, or leasehold worth £15. It may be that this property qualification has accentuated the friction which has repeatedly manifested itself between the two Houses, and has turned largely upon the question of 'tacking'.[103] In 1866 the Council

rejected a Bill for the introduction of a high protective tariff, which had been 'tacked' by the Assembly to the Appropriation Act. The Assembly 'thereupon induced the Governor to permit the levy of duties merely on the strength of a resolution of the Assembly, to borrow money without a law, and to pay official salaries without an Appropriation Act'.[104] For this conduct the Governor was sternly reprimanded by the Secretary of State, and ultimately recalled. The Assembly retorted by voting a gratuity of £20,000 to Lady Darling, the wife of the retiring Governor, and, to coerce the Council into accepting it, tacked it on to an Appropriation Bill. The Council rejected the Bill, and a deadlock ensued, which was terminated only by the intimation from the Governor that he would prefer not to accept the gratuity.[105] In 1894 the Council rejected a budget, on the ground that the proposal to levy a tax upon unimproved land values raised a principle which ought to be submitted to the electorate; and in the following session the Council rejected an electoral Bill for the abolition of plural voting and the enfranchisement of women.[106] Not until 1903 was any solution reached of the constitutional difficulties between the two Houses. In that year the Council was formally invested with the right of suggesting alterations in money Bills, and at the same time provision was made for a dissolution of the Council in the event of a deadlock.[107]

It will be seen, therefore, that the disputes between the two Legislative Chambers in the several Colonies of Australia have been neither infrequent nor insignificant, and have been most frequent and most bitter in the Upper Houses which are constituted on an elected basis. On this point the testimony of Mr. Bernard Wise is unequivocal. He declares that of all the devices employed to bring the two Chambers into harmony the

most effective has been the constitution of the Upper House by nominees of the Governor-in-Council. 'This plan gave the Second Chamber something of the influence and attributes of the House of Lords. It was constrained by its own traditions to yield before any clear manifestation of the popular will and could at any time be coerced by the appointment of new members.' On the other hand, the apparently more democratic device of elective Upper Chambers, as in Victoria and South Australia, has proved a constant source of political trouble. 'On whatever suffrage or by whatever electorate a Legislative Council was elected, it could resist any measure of the Assembly so long as it retained the support of its own constituents, and this could only be ascertained by a General Election which would be punitive to the Assembly also.'[108] In view of the constitutional disputes detailed above, it is the more remarkable that in the long discussions which preceded the consummation of the Federal Commonwealth, no proposal for the erection of a uni-cameral legislature ever obtained any serious or influential support.[109]

The foregoing analysis of the conditions prevailing in the State Legislatures may, it is feared, have proved somewhat tedious to the reader, but several considerations rendered such an examination indispensable. It must always be remembered that in Australia, unlike Canada, the residue of powers not specifically assigned to the Commonwealth is vested in the States. Consequently some knowledge of the State Constitutions is essential to an understanding of the corresponding provisions in the Commonwealth Act. The framers of that Act were familiar with the working of the Colonial Constitutions; most of them had had personal experience of the difficulties encountered and of the solutions attempted,—frequently, as we have seen,

with indifferent success. It is not, therefore, remarkable that they should have attempted to define the relations between the two Houses of the Legislature with unusual precision, and should have adopted precautions unusually elaborate for averting or terminating constitutional deadlocks. But it is, under the circumstances, unmistakably significant that they should have deliberately resolved to create a Second Chamber which is in some respects (to be hereafter specified) the most powerful in the British Dominions.

From this as from other points of view the Commonwealth Constitution is of exceptional interest to the student of political science. It represents, as Mr. Bryce suggestively remarks, the quintessence of the political experience of the world down to the close of the nineteenth century:—

> 'Every creation of a new scheme of government is a precious addition to the political resources of mankind. It represents a survey and scrutiny of the constitutional experience of the past. It embodies an experiment full of instruction for the future. The statesmen of the Convention which framed this latest addition of the world's stock of Instruments of Government had passed in review all previous experiments, had found in them examples to follow and other examples to shun, had drawn from them the best essence of the teachings they were fitted to impart. When the Convention prepared its highly finished scheme of polity, it delivered its judgement upon the work of all who had gone before, while contributing to the materials which will be available for all who come hereafter to the work of building up a State.'[110]

It represents also the high-water mark of popular government; in every section it is interpenetrated by the spirit of Democracy. And it came slowly to the birth. The expediency, if not the necessity, of some form of union among the several Colonies in Australia, became obvious at a very early stage in the history of English settlement on that continent. So long ago as 1849 the Committee for Trade and Plantations, to which Earl Grey referred the question of the better government of the Australian Colonies, adumbrated a scheme. They recommended that there should be a Governor-General for all Australia, who should have power from time to time to summon a General Assembly representative of all the Colonies with power to legislate on certain matters of common concern, and to establish a General Supreme Court of Judicature, A Bill framed on these lines was submitted to the Imperial Parliament in 1850, but was received without enthusiasm either in the Colonies or at home, and its main proposals were dropped. For ten years, however (1851-61), the office of Governor-General was maintained. But the time for closer union was not yet; and not until 1884 were any definite steps taken to that end. The story of Australian federation may, however, be read in the admirable work of Mr. Harrison Moore[111] or in Mr. Bryce's brilliant essay, and cannot in this place be retold. Enough to say that the Act which received Queen Victoria's Royal Assent in 1900 was the outcome of ten years' almost continuous work. It began with an intercolonial conference of Ministers at Melbourne in 1890; in 1891 Delegates from all the Australian Parliaments met, and drafted a Bill which was temporarily hung up by the severe financial crisis of 1893; the Prime Ministers again met at Hobart in 1895, with the result that enabling Acts were passed by the several Colonial Parliaments under which special Delegates were elected by popular vote to a Convention which met at

Adelaide in 1897. In this Convention the work was practically accomplished: a Constitution based mainly on the scheme of 1891 was drafted, and was submitted to the several Colonial Legislatures, and by them was freely amended. The Draft as thus amended was reconsidered by the Adelaide Convention, and was by it submitted to a *plébiscite* in each Colony. Only New South Wales failed to ratify it by the prescribed majority, but after further amendment at the hands of a Second Conference of Premiers the assent of New South Wales was obtained, and the Constitution in its penultimate shape was sent home for the consideration of the Imperial Parliament. With one not unimportant amendment it was approved at Westminster and received the Royal Assent in the last year of Queen Victoria's reign. That assent was more than formal, for it was accompanied by the Queen's fervent prayer 'that the inauguration of the Commonwealth may ensure the increased prosperity and well being of my loyal and beloved subjects in Australia'.

This bare enumeration of the stages through which the Commonwealth Constitution passed has been inflicted upon the reader of set purpose. It is important that he should realize that no Constitution was ever brought into being with more circumspection and deliberation, with more intense anxiety to omit nothing that could contribute towards, to include nothing that could militate against, the successful consummation of Australian federal unity.

With the general results which have been thus attained I am not here concerned. But it is pertinent to insist that upon no part of the scheme was more meticulous care and criticism expended than upon the Constitution of the Legislature, and more particularly that of the Second Chamber.

The root principle of the Senate is most graphically suggested by the alternative titles which were considered for it: the *House of the States*, or the *States Assembly*. Like the American Senate and the German Bundesrath, it represents the federal principle; it stands for the Constituent States. But with this important difference. While the Bundesrath represents the ruling princes of States which are technically Sovereign—in other words, the State Executives; while the American Senate represents the State Legislatures, the Australian Senate represents the *peoples* of the States. But like the American Senate, it accords to each State equal representation—a principle not asserted without strong and intelligible protests from the larger States. To the smaller States, on the other hand, this principle was the condition precedent, the 'sheet anchor' of their rights and liberties. And, once asserted, it is fundamental and (except in unimaginable conditions) unalterable.

The Senate consists at present of thirty-six members—six for each State; but it is provided by the Constitution (§ 7) that 'Parliament may make laws increasing or diminishing the number of Senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six Senators'. Further: in the section defining the machinery for constitutional amendment (§ 128) it is provided that 'no alteration diminishing the proportionate representation of any State in either House of the Parliament . . . shall become law unless the majority of the electors voting in that State approve the proposed law'. The Senators are to be 'directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate' (§ 7). The latter stipulation has proved to be, perhaps unexpectedly, important. The voting is by *scrutin de*

liste: each voter has as many votes as there are places to be filled. This method, as is well known, permits, if it does not encourage, a good deal of political manipulation, and enables a well-organized majority to sweep the board. But its significance in relation to senatorial elections in Australia can only be appreciated to the full if it is remembered that the qualification of a Senator is identical with that of a member of the House of Representatives, and that the electors to both Houses are the same. The power of the Senate is thus drawn from precisely the same source as the Lower House, and it is drawn, as Mr. Wise points out, 'in the concentrated form of support from large constituencies'. With the result that it is the only Upper House in the world which is less conservative than the Lower. It should be added that the Senate is elected for six years, while the Lower House is elected for three, and that half the Senators retire triennially. The provision for filling casual vacancies is, as Mr. Harrison Moore says, 'curiously complex and minute.' If the vacancy is notified while the State Parliament is sitting, the Houses of Parliament of the State 'shall, sitting and voting together, choose a person to hold the place until the expiration of the term or until the election of a successor . . . whichever shall first happen'. If the State Parliament is not in session 'the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until fourteen days after the beginning of the next session of the Parliament of the State or until the election of a successor, whichever first happens. At the next election of members of the House of Representatives or at the next election of Senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term' (§ 15). These minute regulations at any rate testify to the extreme importance which is

attached by the most democratic community in the world to membership of the Second Chamber.

One or two other points in regard to the composition and procedure of the Senate demand attention. Unlike the German Bundesrath, it is, though federal in constitution, 'unitary in action.' It is expressly provided (§ 11) that 'the Senate may proceed to the dispatch of business notwithstanding the failure of any State to provide for its representation in the Senate' and (§ 22) that the presence of one-third of its members (until the Parliament otherwise provides) shall form a quorum. Another point which marks a contrast between the Senate and the Bundesrath is that in the Senate the voting is personal and not according to States. Each Senator has one vote, and any question which may arise is determined by a simple majority.

A noticeable attribute of the Senate, but one which it shares with Second Chambers in general, is that of 'perpetual existence'. Except in the event of a constitutional deadlock, it cannot be dissolved. Thus the Senate, unlike the Lower House, is never, except under the circumstances alluded to, wholly new or wholly old.[112]

The qualification for senatorships is exceptionally easy. A Senator must be of full age; he must be a natural-born subject of the King, or a subject naturalized according to the laws of the United Kingdom or any of the constituent States; and his 'qualification' must be 'in each State that which is prescribed by this Constitution or by the Parliament, as the qualification for electors of members of the House of Representatives' (§ 8). No person may continue to sit, in either House, under heavy penalties, who is convicted of serious crime, or becomes bankrupt, or 'has any direct or indirect pecuniary interest in any

agreement with the public service of the Commonwealth', or 'holds any office of profit under the Crown or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth'. But it is provided that this last disqualification shall not exclude Ministers of the Commonwealth or the States, and elsewhere (§ 64) it is expressly laid down that 'no Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a member of the House of Representatives'. Not even in the United Kingdom itself is the correspondence between Legislature and Executive so closely and securely guaranteed. In regard to remuneration Senators and members of the Lower House are treated alike—each receiving £400 a year.

The functions of the Senate, unlike those of the House of Lords and of the American Senate, are purely legislative; but, subject to an exception to be noted presently, the Senate has 'equal power with the House of Representatives, in respect of all proposed laws' (§ 53).

As regards finance the provisions of the Constitution are of peculiar interest. Money Bills must originate in the Lower House. The Senate may reject but may not amend them, though it may 'at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting by message the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications'. Moreover, the precautions against 'tacking' and against the introduction of any alien substance into a finance Bill are exceptionally minute and specific. Thus, under Section 53, 'a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing

provisions for the imposition of fines,' &c. Under Section 54 it is provided that 'the proposed law which appropriates revenue or moneys for the ordinary annual service of the Government shall deal only with such appropriation'. Section 55 enacts that

> 'Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.
>
> Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.'

These provisions not only afford guarantees against tacking, but no less effectually provide against the device which, following the lead of Mr. Gladstone, the British House of Commons has employed since 1861. There can be no 'omnibus' Budget under the Constitution of the Australian Commonwealth. Thus, as Mr. Harrison Moore justly observes:

> 'The Constitution . . . prevents the House of Representatives from taking a course which might justify or excuse the Senate in rejecting an Appropriation Bill. In the balance of power in the Commonwealth, it is a factor not to be neglected that, while the Senate has a recognized power over Money Bills beyond that of any other Second Chamber in the British Dominions, it can hardly exercise the extreme power of rejecting the Bill for the "ordinary annual services of the Government"

upon any other ground than that the Ministry owes responsibility to the Upper not less than to the Lower House. That is a position which in the future the Senate, as the House of the States as well as the Second Chamber, may take up; but it is a position from which, even in the history of Parliamentary Government in the Colonies, the strongest supporters of the Upper House have generally shrunk.'[113]

In view of the experience gathered in the working of the State Constitutions it was natural that the authors of the Commonwealth Act should be at special pains to devise effective machinery for the solution of 'deadlocks'. The originality and ingenuity of the Section (§ 57) dealing with this matter justifies quotation *in extenso*:

'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 such a 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 Queen's assent.'

The machinery here described was devised, as is well known, after the consideration of many alternative solutions. One party, that of the National Democrats, favoured a Referendum, an appeal to the whole body of electors in the Commonwealth. But this solution was naturally distasteful to the

smaller States. Others preferred the remedy of dissolution 'to be applied alternatively, simultaneously, or successively to the Senate and the House'.[114] The device ultimately adopted was inspired, according to Mr. Harrison Moore, partly by the experience of South Australia, but, more specifically, as regards the joint sitting, by the Norwegian system, 'according to which the two Chambers (or rather the two parts into which the House is divided) meet as one for the purpose of composing their differences.' But whatever the source of the inspiration, the device is undeniably ingenious and makes effective provision against the weaknesses and dangers which have been all too clearly revealed in the Constitutions of the several states.

It is to be observed that on any Bill, whether dealing with finance or not, the Senate can 'force a dissolution'; that the Lower House cannot override the will of the Senate until after an appeal to the electorate, and then only if the will of the electors is declared with emphasis. In this connexion the importance of the stipulation that the numbers of the House must always be double those of the Senate becomes apparent. But for this provision[115] the balance contemplated by the authors of the Constitution might be seriously disturbed. As it is, the will of the people, as measured by population, must in the last resort prevail against the will of the States, as revealed in the composition and voting strength of the Senate—a further illustration of the democratic spirit by which every part of the Constitution is permeated.

There remains to be noticed the position of the Senate in the machinery devised for constitutional revision. In the Canadian Dominion there is no such machinery. The source of Canada's Constitution is an Act of the Imperial Legislature, and to the same source she must look for the amendment of it. In the United

States the precautions against hasty and ill-considered amendments are such as almost to preclude amendment altogether. In the Australian Commonwealth the machinery, though elaborate, is decidedly less complicated and less cumbrous.

Every proposed law for the alteration of the Constitution must be passed by an absolute majority of each House, and must then, after an interval of not less than two and not more than six months, be submitted to the electors in each State. The amendment to become law must be approved by (i) a majority of States, and (ii) a majority of electors in the Commonwealth as a whole. But here as elsewhere State rights are rigidly safeguarded, for, 'no alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise affecting the limits of the State . . . shall become law unless the majority of the electors voting in that State approve the proposed law.'

For the event of disagreement on constitutional amendments there is special and interesting provision. Such amendments may, be it noted, originate in either House, but should the Houses differ, the originating House may, after an interval of three months (even in the same session), again pass the amending Bill, and, in the event of a second rejection, the Governor-General may submit it to the electors. Their decision is final. The wording of the clause—'the Governor-General may submit'—would appear to leave to the Executive in such cases a discretion as to the employment of the referendum. But it is obvious that a Ministry, anxious for revision, and backed by either House of the Legislature, would never hesitate to submit

its proposals to the electorate.

The intentional ambiguity of the last sentence raises a question which must, if possible, be answered before the discussion of the position of the Second Chamber can be regarded as complete.

To whom is the Ministry responsible? To the Senate, or to the House of Representatives, or to both Houses?

The question cannot be answered by the simple assertion that a Cabinet is invariably responsible to the democratic Chamber. For in the Commonwealth it is difficult to say which of the two Chambers is the more 'democratic'. In practice, the Senate, unique in this as in other respects among Second Chambers, has proved to be, if not the more democratic, certainly the less conservative. Being elected, as we have seen, by 'general ticket', the Senate has been captured by the best disciplined party. That party, in most of the Australian States, has been the Labour party, and the consequence is that we have had the unique spectacle of an Upper House which has exhibited many of the characteristic features of a Labour Convention. 'The Chamber,' says Mr. Brand, 'which is usually supposed to act as a drag on revolutionary legislation, has largely occupied itself in passing academic resolutions in favour of the nationalization of all means employed in the production and distribution of wealth and other projects of a Socialistic character.'[116]

The menace to the Cabinet principle involved in the existence of two Chambers, virtually co-ordinate, and, still more in the formation of a federal union, was not unforeseen. 'Either federation will destroy responsible government, or responsible government will destroy federation. . . . There cannot be a responsible government which is responsible to two

Houses.'[117] So spake Sir Richard Baker, afterwards the first President of the Senate. And that he expressed the misgivings of many thoughtful minds cannot be doubted. 'Australians,' said Mr. Bryce, 'evidently expect that the usage hitherto prevailing in all the Colonies of letting the Ministry be installed or ejected by the larger House will be followed. Nevertheless, the relations of the Commonwealth Houses are so novel and peculiar that the experience of the new Government in working them out will deserve to be watched with the closest attention by all students of politics.' The decade which has elapsed since Mr. Bryce wrote has certainly not diminished the interest with which the Australian experiment is watched. But even yet it is impossible to say with certainty how it will work out. It is, however, clear that the Commonwealth has not impaled itself on either horn of the dilemma suggested by Sir Richard Baker. Responsible government has not proved to be incompatible with the maintenance of effective federal unity. As to the soundness of his other constitutional aphorism it is too soon to pronounce definitely. Mr. Bernard Wise has expressed the opinion—and few men are better entitled to do so—'that the usefulness of the Senate as a revising and legislative Chamber has been due to the obliteration of its original functions as a States House.' And in this sense responsible government is 'killing Federation'.[118] But even if the opinion be sound, the 'sense' is admittedly restricted. The Second Chamber may have proved to be a somewhat less centrifugal force in the Constitution than was intended and anticipated, but it nevertheless stands for the federal as opposed to the national idea, and it is still 'the sheet anchor' of the smaller States. In the last resort, it is true, the will of the nation does prevail against that of the States. This was the deliberate intention of the Act. But in practical politics last resorts are not quickly or frequently reached. Compromise is of

the essence of the party system—particularly of the party system as worked and interpreted by men of English blood. The working of the Commonwealth Constitution has proved to be no exception to this rule. And in no respect has the spirit of compromise been more conspicuous or more essential than in the working of 'responsible government' under two Chambers, equally democratic in structure, in origin, and in personnel, but representative, nevertheless, of ideals which are distinct and which might easily become conflicting.

IX

SECOND CHAMBERS IN THE OVER-SEA DOMINIONS—SOUTH AFRICA

[Greek: Αεγεται τις παροιμια οτι αει Φερει Αιβυη τι καινον.][Aegetai tis paroimia oti aei pherei Aibiê ti kainon./Legetai tis paroimia oti aei Pherei Libuê ti kainon.]

ARISTOTLE.

(As the proverb goes, 'Africa is for ever producing some novelty.')

The last four chapters have been concerned with Constitutions which, differing widely in other respects, are alike in this: they are all federal, and their federal character is reflected and embodied more particularly in their respective Second Chambers.

We now proceed to the analysis of a Constitution which, though federal in appearance and actually federal in several respects, must nevertheless be scientifically catalogued as unitary. Despite this fact, the Second Chamber of United South Africa will be, at all events for the first years of its existence, essentially federal in character. This paradox, not the sole nor perhaps the most striking, is eminently characteristic of a paradoxical Constitution. But it does not render the Second Chamber less worthy of the attention of the student of Institutions.

To follow in detail the constitutional evolution of the four Provinces which now compose the South Africa Union would

be as tedious as it is, after the recital contained in the two previous chapters, unnecessary. It is enough to say that Cape Colony attained to the dignity of 'responsible' government in 1872, Natal in 1893, the Transvaal in 1906, and the Orange River Colony in 1907. In all these Colonies the Legislature is bi-cameral. In the Cape Colony the Upper House or Legislative Council consists of twenty-six members, elected for seven years by the electors who elect the Assembly. The Chief Justice is *ex-officio* President of the Council. Members of the Council must possess immovable property worth £2,000, or movable worth £4,000. They receive £1 1*s.* per day during the session of Parliament, with a further allowance of 15*s.* a day if they reside more than fifteen miles away from Cape Town. Here, as elsewhere, money Bills must originate in the Assembly, but the Council may reject or amend them, provided the amendment does not increase the burden upon the people. The Governor has the right, however, to dissolve the Council simultaneously with the Assembly, though he may dissolve the latter alone. Ministers may speak in either House, though they can vote only in the House of which they are members, and from a recent instance[119] it would appear that they acknowledge responsibility to both Houses indifferently.

In Natal the Council consists of thirteen members nominated for a period of ten years by the Governor on the advice of his ministers. Half the members retire every five years. Members must be thirty years of age; must have resided for ten years in the Colony, and must possess real property worth £500. The Council is precluded from amending money Bills, but it can and does reject them.

In the Responsible Constitutions lately conceded by Letters Patent to the Transvaal and Orange River Colonies it was

provided that the Council should consist of fifteen and eleven members respectively, and that they should be nominated in the first instance by the Governor, but ultimately be elected, for a period of five years. The provision for the solution of deadlocks is in both Colonies as follows:

> 'If the Assembly twice passes in successive sessions a law and the Council rejects it, or makes amendments in which the Assembly will not agree, then the Governor may, if he thinks fit, either convene a joint session of the two Houses or dissolve the Assembly, or, if the Council is elective, both Houses. If, on reassembling, the Assembly again passes the law and the Council rejects it, the Governor may hold a joint session. In either case of a joint session the law is to be voted upon by the members of the two Houses sitting as one body, and if it receives an absolute majority of the votes of the members of the two Houses taken together, it is to be deemed to have been passed, and is to be presented for the Governor's assent.'[120]

These details are, in the case of the Cape Colony and Natal, of merely historical, and in that of the Transvaal and the Orange River Colony, of merely academic interest. For it is a peculiar and indeed unique feature of the South Africa Act (1909) that the existing Colonial Constitutions are to be entirely swept away. In accordance with the essentially unitary character of the new Constitution the Colonies will be reduced to the status of Provinces, endowed with control only over purely local affairs. But before they finally disappear the existing Colonial Parliaments will be called upon to discharge one important

function, viz. to assist in the creation of the first Senate of the South Africa Union.

That Senate is, for the first ten years after the establishment of the Union, to be constituted as follows: (*a*) eight Senators to be nominated for a term of ten years, by the Governor-General in Council; and (*b*) eight Senators elected by each of the four original provinces.

The Senate, therefore, will consist of forty members. Of the eight to be nominated by the Governor-General four are to be selected 'on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa'. The eight members representing each province are to be elected, also for ten years, in a joint session of the two Houses of the existing Colonial Legislatures. They will be elected on the principle of proportional representation according to the system familiarized to us in England by Lord Courtney of Penwith and known as that of the single transferable vote.

These provisions are to be in force for ten years only; after the expiration of that period the South African Parliament may provide for the constitution of the Senate in any manner it may see fit, or it may leave things as they are. In the latter event the elected members of the Senate will in future be chosen by the Provincial Council of each province acting conjointly with the members of the House of Assembly representing that province in the Union Parliament. The reasons which underlie the temporary character of provisions of first-rate importance are curious and characteristic. There was, in the first place, an ardent desire to emphasize one of the outstanding features of the

Constitution as a whole: its essentially unitary character. Of unitary constitutions there is no more striking attribute than the 'sovereignty' of the Legislature. To this specific test the South African Constitution reacts. Parliament is as nearly 'supreme' as a Colonial Parliament can be. It is, of course, subject, as every Parliament in the Empire is and must be, to the ultimate jurisdiction of the Imperial Parliament. But as regards South Africa it is supreme. There is no law which it cannot make, amend, or repeal. For constitutional amendments there is provided a special machinery, but it is not machinery which, like that in the United States, impinges upon the Sovereign authority of Parliament. Thus Parliament is frankly constituent as well as legislative; and in no particular is its constituent authority more clearly emphasized than in the provision which specifically places at its discretion the ultimate constitution and structure of the Upper House.

But, according to a high authority, there was another motive which inspired this interesting chapter of the Constitution. It was hoped by the leaders of South African opinion that after the lapse of a few years, when experience had been gained as to the working of the new centripetal institutions, and the advantages of union had been more generally recognized, 'provincial feeling would have so far given way to national feeling that it might be possible at the end of that time to make a nearer approach to the unitary principle.'[121] For this, as we must constantly bear in mind, was the goal of the Constitution—not a federal but a united South Africa.

The qualifications for Senatorship are five in number, and, with one exception, of the usual kind. A Senator must (i) be not less than thirty years of age; (ii) possess the qualification of a voter for the election of members of the House of Assembly in

one of the provinces; (iii) have resided for five years within the Union; (iv) in the case of an elected Senator, possess real property of the net value of £500; and (v) be a British subject of European descent. The last-mentioned qualification strikes a note which resounds throughout the Instrument, and it was the note which aroused the severest criticism in the Imperial Parliament. It is no part of my purpose to re-argue this difficult question. Those who desire to see the case for the Constitution stated with sanity and restraint may be referred to the admirable treatise of Mr. R. H. Brand.[122] In his conclusions I entirely concur. It was a tempting and indeed a legitimate opportunity for the leaders of a certain section of British opinion. The protection of the 'native' population in British dominions throughout the world, is, in truth, the peculiar and cherished prerogative of Imperial Parliament. But even in the exercise of prerogative there must be some consistency. To make an immense and far-reaching concession of self-government, to confer upon a distant dependency the heaviest responsibilities, and to deny to its citizens the right to deal as they will in their wisdom, or even in their folly, with a question of vital and overwhelming importance, is surely the part, not of statesmanship, but of political ineptitude. The proper handling of the native problem is, as Mr. Brand says,

> 'a matter of life and death to the inhabitants of South Africa. They cannot be expected willingly to entrust it to those who have no immediate responsibility and who would not suffer in life or property from any mistakes they might make. It would be like asking the British nation to submit its naval policy to the determination of South Africa. . . . The British Parliament might as well be

restricted from legislating for women.'[123]

It may be repugnant to the canons of doctrinaire democracy to assent to a clause restricting membership of either House to 'men of European descent', but to have insisted on its deletion would have meant the postponement of Union in South Africa to the Greek Kalends. In view of the gravity and complexity of the problems with which South Africa is confronted—problems which a divided South Africa could not even face, and even a united South Africa may fail to solve, it will surely be held that the Imperial Parliament exhibited wisdom in declining to accept the responsibility of such postponement.

To return to the Constitution, procedure, and functions of the Senate. The President is to be elected from among the Senators and to have a casting vote. Otherwise questions are to be determined by a simple majority. Twelve members form a quorum. The Governor-General may dissolve the Senate simultaneously with the House of Assembly, or may dissolve the latter alone. But it is provided in the Act (§ 20) that the Senate shall not be dissolved within a period of ten years after the establishment of the Union, and that the dissolution shall not affect the nominated Senators. All Senators, like members of the House of Assembly, are to receive £400 a year, but to forfeit £3 a day for every day of absence during the session. Each House has power to make rules and orders regulating its own procedure.

The relations of the two Houses are defined with precision. Money Bills must originate in the House of Assembly, but it is provided—

(1) That 'A Bill shall not be taken to appropriate revenue or moneys or to impose

taxation by reason only of its containing provisions for the imposition or appropriation of lines or other pecuniary penalties'; and (2) that 'Any Bill which appropriates revenue or moneys for the ordinary annual services shall deal only with such appropriation.'

The South African Senate can, like the Australian, reject, but cannot amend, a money Bill. As regards both money Bills and ordinary legislation the Senate possess only a suspensive veto. If a Bill passes the House of Assembly in two successive sessions, and is twice rejected by the Senate or receives at the hands of the Senate amendments to which the House will not agree, the Governor-General may, during the second session, convene a joint sitting, and the Bill, if then passed by a simple majority of the members of both Houses, shall be deemed to have been duly passed by Parliament, and may be presented for the Royal Assent. In the case of a money Bill the procedure is even more stringent; for the joint sitting may be convened during *the same session* in which the Senate 'rejects or fails to pass such Bill'.

The solution thus provided for a deadlock is generally similar to that of the Australian Commonwealth Act, but with this essential difference: The Australian Act provides for an appeal to the electorate; in the South African scheme there is no such provision. The difference between the two schemes may perhaps be connected with the more democratic character of the Australian Constitution, and still more directly with the fact that the South African Parliament, unlike the Australian, is competent to amend even the Constitution itself.

This competence is asserted in express terms in the

Instrument itself. Section 152 declares: 'Parliament may by law repeal or alter any of the provisions of this Act, provided that no provision thereof for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered.' Certain portions of the Act[124]—those dealing with the Constitution and election of the House of Assembly, and that relating to the equality of English and Dutch languages—cannot be repealed or altered except by a two-thirds majority in a joint sitting of the two Chambers.

It will be obvious from the foregoing paragraphs that the South African Constitution is, as might be anticipated from its unitary character, much closer to the English original than is that of Australia. Particularly is this true of the relations between the Legislature and the Executive. In Australia, as we have seen, there is considerable doubt whether the Cabinet system will prove to be compatible with federalism; whether the Executive is responsible to one or to both Houses of the Legislature. In South Africa there is no doubt as to the predominance of the Assembly; to it the Executive will be responsible. The will of the Assembly, numbering one hundred and twenty-one members against forty Senators, can be made to prevail 'within the limits of a single Parliament', and, in the case of money Bills, within the limits of a single session. On the other hand, the Senate is in composition less democratic than that of Australia. Consisting partly of nominees, and partly of members elected by a process of double election, it has no such immediate touch with the people as the 'House of the States' in the Australian Commonwealth. What its precise place may prove to be in the working of the South African Constitution it is not possible to predict; time alone can tell. For much in the South African Instrument is left to the solvent of time. Its most striking

characteristic is, indeed, as Mr. Brand well says, its trust in the future. And he proceeds:—

> 'In other countries people and States have usually been most loath to part with one tittle of their independence or individuality, and constitutions have for the most part taken the form of very definite contracts of partnership, setting forth in precise language exactly what each partner surrenders and what he retains. The partners have generally been full of suspicion both of one another and of the new government which they were creating. There is little of this spirit in the South Africa Act. The people of South Africa are, in General Smuts's words, called upon to pool their patriotism as well as their material resources. . . . The spirit of trust in the new government to be created is evident in every part of the Act. Its most striking manifestation is in the principle of the supremacy of Parliament; but it is apparent also in the willingness of the colonies to assent to the complete repeal of their present Constitutions; in the power granted to Parliament to recreate the Senate in any form it likes at the end of ten years; in the determination to leave the supremely important question of the financial relations between the central government and the provinces to be settled by Parliament. The Constitution breathes also a new spirit of trust between the two dominant white races.'[125]

But enough of South Africa. One question still remains to be asked before we dismiss this portion of our subject. What

conclusions, if any, can be drawn from the analysis of the legislative systems in the British Over-sea Dominions?

One point emerges clearly. Despite experiences not uniformly encouraging, not one of the young Democracies has elected, in the final stage of its constitutional evolution, to discard the bi-cameral system. The Act which brought into being the federal Dominion of Canada was framed so immediately under the guidance of the Home Government that a departure from the traditional system would have been, under the circumstances, surprising. But neither in the case of the Australian Commonwealth nor in that of South Africa was the slightest pressure exerted in favour of a bi-cameral legislature. Australian statesmen were not ignorant of some inconveniences attaching to the system. Alike in New South Wales, where the Legislative Council is nominated, and Victoria, where it is elected, differences between the two Houses had been so frequent and acute as to bring the several Colonies to the verge of revolution. But this notwithstanding, the idea of a uni-cameral legislature for the Commonwealth was never for an instant seriously entertained. Australian democracy, it is clear, paid no heed to the dilemma on the horns of which France was for a time impaled. And as in Australia, so in South Africa. The provinces of the latter had, it is true, much less experience of the working of responsible government. But two out of the four provinces possessed (what Australia did not) experience of a single-chambered legislature. The secrets of the Durban and Capetown Conventions have not been revealed. It would be interesting to know whether the Transvaal or Orange State Delegates betrayed any hankerings after the system to which in the days of independence they were accustomed. If they did, the predilection was obviously not strong enough to prevail against

the views of their colleagues from Cape Colony and Natal.

Another point deserves notice. An elected Second Chamber is not necessarily more democratic than a nominated body. On the contrary, some of the best Australian opinion tends to the conclusion that the nominated body is apt to be more sensible of the conventional restrictions upon the activity of a Second Chamber, in that it more closely approximates to the position of an hereditary House of Lords. On the other hand, it is beyond dispute that of all the Second Chambers in the Empire the one which is most closely in touch with a democratic electorate is, in many respects, the strongest.

A third point, worthy of observation, is the extreme care and elaboration with which both Australia and South Africa have provided for the adjustment of differences between the two Chambers. The machinery thus devised I have thought it advisable to depict in some detail, transcribing, as a rule, the *ipsissima verba* of the Instruments. These expedients are certainly interesting, and may perhaps, *mutatis mutandis*, be deemed applicable to other circumstances.

But between the Upper House of the Imperial Parliament and those of Germany, Switzerland, the United States, and the British Dominions over-sea, there is this essential and fundamental difference: the former has its place in a unitary Constitution; the latter all stand for the federal principle in their respective Constitutions. This broad distinction must necessarily, to some extent, vitiate comparisons. It will be well, therefore, to complete our survey of typical Second Chambers by a glance at the experiments of which France has been the fertile field.

X

THE FRENCH SENATE

> ‘On trouve chez les Français, dans leurs relations avec l’Europe aussi bien que dans leur histoire intérieure, à côté de cet esprit de mesure et de ces sages tempéraments qui font les grandes politiques et les époques prospères, des bouffées d’ambition romanesque, une sorte d’ivresse conquérante, un goût capricieux de gloire et d’aventures. On reconnaît en eux avec cette modération dans la force, qui est la nature même du génie français, cet appétit de l’impossible qui en est le dérèglement.’—Albert Sorel.

Mrs. Browning has rebuked Englishmen for calling the French light:

> ‘The English have a scornful insular way Of calling the French light. The levity Is in the judgement only, which yet stands, For say a foolish thing but oft enough (And here’s the secret of a hundred creeds, Men get opinions as boys learn to spell, By iteration chiefly), the same thing Shall pass at last for absolutely wise, And not with fools exclusively. And so We say the French are light.’

To this charge English jurists are particularly obnoxious. The constitutional evolution of France offers contrasts so striking to the points on which we most pride ourselves, that it is not easy for Englishmen to avoid the tone, half contemptuous, half patronizing, to which Mrs. Browning, in common with

French writers, not unjustly takes exception. But Professor A. V. Dicey,[126] writing of the rigidity of French Constitutions, suggests a more correct view.

> 'An English critic smiles at the labour wasted in France on the attempt to make immutable Constitutions which, on an average, have lasted about ten years apiece. . . . But the irony of Fate does not convict its victims of folly, and, if we look at the state of the world as it stood when France began her experiments in Constitution-making, there was nothing ridiculous in the idea that the fundamental laws of a country ought to be changed but slowly, or in the anticipation that the institutions of France would not require frequent alteration.

But, in fact, English publicists have special cause for gratitude to France, which for the last century and a quarter has provided for the students of political science a laboratory of constitutional experiments.

Down to the great revolution of 1789, the political development of France was orderly and logical in no common degree. Bishop Stubbs, indeed, finds in France the most perfect example of the 'logical career' of feudal government: disruptive aristocracy, administrative monarchy, democratic excess—each in turn prevailed. 'The constitutional history of France is thus,' he says, 'the summation of the series of feudal development in a logical sequence which is indeed unparalleled in the history of any great State, but which is thoroughly in harmony with the national character, forming it and being formed by it.'[127]

But this orderly development was arrested by the explosion

of 1789. Down to that year the States-General, when at long intervals it met, retained the original tri-cameral form—a form long since abandoned in England. It was, in truth, an assembly of the three Estates.

Since 1789 France has afforded an extraordinarily fertile soil for the cultivation of constitutional bacilli: the short-lived experiment of limited monarchy under the elder Bourbon line (1791); the uni-cameral Republic of 1793; the bi-cameral and Directorial Republic of 1795; the Consulate, with its tri-cameral legislature of 1799; the Napoleonic Empire of 1804; the Legitimist monarchy of 1814; the Napoleonic Restoration of 1815 with the Constitution amended under the *Acte Additionnel*; the Bourbon Restoration of 1815, under the *Constitutional Charter* of 1814; the Orleanist Charter of 1830; the Second Republic of 1848; the Second Empire of 1852, and finally the Third Republic of 1870, definitely established by a series of Constitutional Laws passed in 1875.[128] Such are, in barest outline, the constitutional vicissitudes to which France has been exposed during the last one hundred and twenty years. It will be observed that the Constitution of 1875 has already attained a length of days unknown to any of its predecessors.

With the details of these Constitutions I must not permit myself to be concerned except in so far as they throw light upon the problem of the structure of the Legislature. But in this regard they are not less various than instructive.

The States-General under the ancient monarchy of France was, as we have seen, tri-cameral in structure: the three *Estates* voting separately *par ordre*. But by 1789 the most recent precedent was one hundred and seventy-five years old.

It was, therefore, natural enough that the question of

procedure, whether votes should be taken *par ordre* or *par tête*, should have been hotly debated in the first days of the States-General convoked by Louis XVI in 1789. The Third Estate, after a moment's hesitation, invited the Nobles and Clergy to join them (June 10), and declared themselves (June 20) the *National Assembly*, The King, in the Royal Séance of June 23, dissolved the Assembly, and bade the three Orders deliberate and vote, in the ancient fashion, apart. Flagrant defiance of this order was the first overt act of revolution. Clergy and Nobles, or many of them, joined the Third Estate, and from the joint deliberations of this *Constituent Assembly* there issued the Constitution of 1791.

In the debates which preceded its promulgation, there was no question which exercised more acutely the mind of the Assembly than that of the form of the future Legislature. The *Comité de Constitution*, appointed on July 14 to draft the new Constitution, reported strongly in favour of a bi-cameral legislature on the English model. Mounier, the chairman of the Committee, cordially supported its recommendation. But the Assembly would have none of it. Deeply imbued with the doctrinaire and unhistorical philosophy of Rousseau, unconvinced even by the recent example of America, and beguiled by the eloquence of Mirabeau, who for once was on the side of the doctrinaires, the Assembly decided by the overwhelming majority of 849 to 89 in favour of a single chamber. The mere fact that England adhered to the antiquated bi-cameral form was enough for many of the hot-heads of '89. But Mirabeau was no hot-head. He had, as has been said, 'the enthusiastic moderation, the fervent common sense which is the most rare and precious quality of genius, and which is especially valuable to the political reformer.'[129] He was against a Senate or a House of Peers, but he recoiled from the

idea of the unchecked despotism of a single chamber and, in order to avert it, he fought desperately for the retention of the 'absolute veto' of the King.

> 'La nature des choses ne tournant pas nécessairement le choix de ces représentants vers les plus dignes, mais vers ceux que leur situation, leur fortune, et des circonstances particulières désignent comme pouvant faire le plus volontiers le sacrifice de leur temps à la chose publique, il résultera toujours, du choix de ces répresentants du peuple, une espèce d'aristocratie de fait, qui, tendant sans cesse à acquérir une consistance légale, deviendra également hostile pour le monarque à qui elle voudra s'égaler, et pour le peuple qu'elle cherchera toujours à tenir dans l'abaissement.'[130]

But Mirabeau fought in vain. A merely 'suspensive veto' of the Crown, coupled with a single-chambered Legislature, consisting of 745 elected members, were cardinal features of the Constitution of 1791.

The *Legislative Assembly* lived only long enough to suspend the monarchy and to convoke a national convention, which met on September 21, 1792. The *Convention* having formally abolished the monarchy, and proclaimed a Republic, was presently delivered of the stillborn *Constitution of* 1793. Under this Constitution, which never actually came into effect, the legislative function was to have been confided to a single chamber, annually elected by universal suffrage, on the basis of one member for every 40,000 men. One check only was imposed upon the power of the Legislature. A right of protest

was reserved to the people against any proposed law. Should a protest be raised the project was to be submitted to a referendum at the hands of the primary electoral assemblies. But these provisions never became operative, and, before it dispersed, the *Convention* had so far regained its sanity as to decree the *Constitution du 5 fructidor de l'an III*.

This Instrument, known as the Directorial Constitution of 1795, and justly described by Mr. Dicey as 'the most interesting among the French experiments in the art of constitution-making provided for a Legislature of two Houses: the *Conseil des Cinq-Cents* and the *Conseil des Anciens*. Both Councils were elected by a process of double election, and one-third of each was renewed annually. The Cinq-Cents alone had the right to initiate legislation, the Anciens possessed only a right of veto. Constitutional amendments were not within the competence of the Legislature; they had to be promulgated by a special constituent assembly (Assemblée de révision), expressly summoned for the purpose, and to be subsequently approved by the primary electoral assemblies. To these primary assemblies the Constitution de l'an III was itself submitted.

But already, within six years of its initiation, the single-chamber experiment, beloved of the doctrinaires, had been abandoned, and France, gradually returning to normal health after the wild orgies of the Revolution, declined any longer to be scared by the dilemma propounded by the most famous of her constitutional architects.

Never again, except for a brief space, under the Second Republic of 1848, did France renew the crazy experiment.

The Directory offered the nearest approach to constitutional government enjoyed by France during the revolutionary period.

But it was far from complete and satisfying; still less was it permanent. As Thiers well said:

> 'Constitutional Government is a chimera at the conclusion of a Revolution such as that of France. It is not under shelter of legal authority that parties whose passions have been so violently excited can arrange themselves and repose; a more vigorous power is required to restrain them, to fuse their still burning elements, and protect them against foreign violence. That power is the Empire of the sword.'

The path for the Empire of the sword was cleared by the *Coup d'État* of the 18^{me} Brumaire, and a few weeks later the Constitution of the year VIII (or *Consulate Constitution*) was promulgated. The Legislature, under this fantastic scheme, was not bi-cameral, but tri-cameral. It consisted of (i) a Senate of 80 members; (ii) a Tribunate of 100 members; and (iii) a *Corps Législatif* of 300 members. The Senators, who were to be not less than forty years of age, were irremovable. Fifty-six senators were in the first instance nominated by the Consuls; the remaining twenty-four were to be co-opted by the Senate itself from a list of seventy-two presented in equal proportions by the Tribunate, the *Corps Législatif*, and the First Consul. The Senate was charged with two duties: that of selecting (from a list of 5,000 sent up by the Departments) the members of the two other bodies; and that of vetoing any unconstitutional measures passed by them. The Tribunate consisted of 100 members, of not less than twenty-five years of age, nominated by the Senate, and renewable by fifths every five years. Its sole function was to discuss legislative projects, without voting upon them. The members of the *Corps Législatif*, likewise nominated by the

Senate, had to be not less than thirty years of age, and were similarly renewable quinquennially. Their function was to vote, by ballot, on laws, without discussion, but after listening to a debate conducted by three members of the Tribunate and three members of the Council of State. To the latter body, which was primarily probouleutic, belonged the sole right of initiation.

Never was political ingenuity carried further in devising checks and balances, and never with less permanent result. Within two years the *Constitution de l'an VIII* was cut into ribbons by Napoleon, who became Consul for life, increased the numbers and functions of the Senate (now nominated largely by himself), and reduced the Tribunate to impotence. In 1804 the Consulate was transformed into an hereditary Empire, and to the Senate were added Princes of the Imperial family, great dignitaries of the Empire, and certain citizens nominated by the Emperor.

On the downfall of Napoleon, in April, 1814, a new Constitution was promulgated by the Senate and *Corps Législatif*. It included the hereditary Monarchy and two Legislative Chambers, of which the Upper was to be nominated by the King and to be irremovable and hereditary. Louis XVIII, on his restoration, refused to endorse these arrangements, and issued in their place the *Constitutional Charter* of 1814. This Charter confided the legislative power to the King and two Chambers, but reserved to the former the sole initiative. The Chamber of Peers was to consist of an unlimited number of members sitting either by hereditary title or nominated for life by the King. It was to sit in secret; and, besides its legislative functions, was to act as a High Court of Justice, and in particular to decide impeachments preferred against Ministers by the Lower House. The return of Napoleon in 1815 was

followed by the publication of the *Acte Additionnel*. This Act virtually re-established the Institutions in force before the overthrow of the Empire; but the sole initiative in legislation was reserved to the Emperor. The Senate was transformed into a Chamber of Peers composed of hereditary members selected by the Emperor. On the second restoration of the legitimate monarchy, the charter of 1814 was resuscitated.

So matters rested until the bourgeois revolution of 1830. The Orleanist monarchy did little to amend the framework of the Constitution established in 1815. Louis-Philippe bestowed upon the Chambers a right of initiation concurrent with his own; the sessions of the Upper House were no longer to be secret, and Peers were to be selected by the King only from certain definite categories, and were to be nominated only for life: it ceased, therefore, to be an hereditary body. One point, vital according to English ideas, was left indeterminate. Ministers were to be responsible; but to whom? Was the bourgeois monarch to sit upon 'a throne surrounded by republican institutions', according to the catchword of the Hôtel de Ville? Was Louis-Philippe to be a king who, according to the classic phrase of Thiers, 'reigned, but did not govern'? Or was he to be a king in the Bourbon sense? The point was not really decided during the whole of the Orleanist régime. Louis-Philippe himself was exceedingly tenacious of the control of the executive. 'They shall not,' he was wont to say, 'prevent my driving my own carriage.' In any case, he proved to be singularly inexpert at the coachman's job.

In 1848 the Citizen Monarchy collapsed, and once again a Republic was proclaimed. A National Assembly elected by universal direct suffrage was convened by the provisional Government to draft yet another Constitution. The only feature in

that Constitution which is of any importance in the present connexion was the structure of the Legislature. This was to consist of a single Chamber containing 750 paid members elected by the Departments and the Colonies by universal direct suffrage, and subject to dissolution every three years. The initiation of laws was shared between the Chamber and the President, who was further endowed with a suspensive veto. A special machinery was provided for the revision of the Constitution, but as the Constitution itself was overthrown by the Coup d'État of December 2, 1851, the details need not detain us.

Under the new Constitution promulgated by Louis Napoleon on January 14, 1852, the legislative power was confided to the President of the Republic and a bi-cameral Parliament. The Upper House, or Senate, was to consist of not more than 150 members, who were to include the Cardinals, Marshals, and Admirals of France, and a certain number of citizens nominated for life by the Executive, i. e. the Prince-President. The functions of the Senate, which was to deliberate in secret, were exceptionally important.

The right of initiation was indeed vested in the President alone, but the Senate had a concurrent right of legislation, and in addition the quasi-judicial function of deciding, on appeal, the constitutionality of all laws. It had the further important right of issuing ordinances, subject only to the approval of the President, for the government of Algeria and the Colonies; for supplying any laches in the Constitution itself, and for deciding the interpretation of the Articles of the Constitution. Finally, the Senate alone had the right of proposing amendments to the Constitution. Such amendments, if approved by the President, were published in a *Senatus-Consultum*, and were then, if they

affected the fundamental bases of the Constitution, submitted to a *plébiscite*.

The decree of December, 1852, which re-established the hereditary Empire, conferred upon the new Emperor the presidency of the Senate, and by diminishing the powers of the *Corps Législatif* enhanced those of the Senate.

During the last decade of the Second Empire, various amendments were introduced by decree of the Senate. The two Chambers were instructed to vote an Address at the opening of each session in response to the speech from the throne, after the English manner; full and official reports of debates in both Houses were authorized; ministers without portfolio were specially appointed to recommend, in both Chambers, legislative projects, and both Chambers were endowed with the privilege of interpellating ministers. The Emperor further decided to share with both Chambers his right of initiating legislation; permitted the Senate to debate in public, and conferred upon both Chambers the exclusive right to determine their own rules of procedure.

The Franco-German War brought the Second Empire to the ground. MacMahon was defeated at Sédan on September 1, 1870, and on the following day Napoleon III surrendered himself and his army of 90,000 men to the King of Prussia. On September 4, the Republic was once more proclaimed. A Government of National Defence was hurriedly organized, and after the capitulation of Paris convened a National Assembly, which met at Bordeaux on February 8, 1871. This Assembly confirmed the dismissal of Napoleon III and his dynasty—a sentence already pronounced by *plébiscite*; entrusted the executive power to Thiers, and ultimately drafted the

Republican Constitution of 1875, under which France is still governed.

The first Article of the new Constitution declares that 'the legislative power shall be exercised by two Assemblies: the Chamber of Deputies and the Senate'. It further declares that 'the composition, the method of election, and the powers of the Senate, shall be regulated by a special law'. Special laws were in fact enacted on February 24 and August 2, 1875, and December 9, 1884. To the detailed analysis of their provisions we may now proceed.

In the first place, we may observe that between the laws mentioned above there is a broad distinction: that of February 24, 1875, is a *Constitutional Law*, unalterable except by a special process; the other two are *Organic* or ordinary statutes, which, like any English statute, can be amended or repealed without recourse to special machinery. The only important amendment of the Constitutional Law was that effected by the Constitutional Act of August 13, 1884.

As regards the Senate, the general result is that its existence and powers rest on Constitutional Law; its Constitution only on Organic Law.[131]

The Senate consists of 300 members, the Chamber of Deputies of 591. Of the original 300 Senators 75 were elected for life by the National Assembly, and the remaining 225 by the Departments and Colonies of France. Under the revised law of 1884 all will be elected and will serve for a term of nine years, one-third of the number retiring every three years. The election is indirect, being vested in an electoral college in each Department and Colony, and is conducted by *scrutin de liste*. The College is composed of (1) the Deputies for the

Department; (2) the Conseil Général (General Councillors of the Department); (3) the Arrondissement Councillors, and (4) Delegates elected from among the voters of the Commune by each municipal council. The Senators are distributed among the Departments on a population basis: the Department of the Seine returns ten; that of the Nord eight; others five, four, three, and two apiece, down to the territory of Belfort, the three Departments of Algeria, and the Colonies of Martinique, Guadeloupe, Réunion, and the French Indies, which return one each. A Senator must be a French citizen; forty years of age; in the enjoyment of civil and political rights, and must (like a Deputy) have complied with the law regulating military service. Members of families which have reigned in France are ineligible for election. Senators, like Deputies, receive 9,000 francs a year for their services.

The Senate, conjointly with the Chamber of Deputies, elects the President of the Republic, who is 'responsible' to them only in case of high treason. In such a case he may be impeached by the Chamber of Deputies only, and must be tried by the Senate. The previous assent of the two Chambers is essential to the declaration of war. To the President belongs the negotiation and ratification of treaties, but he must give information regarding them to the Chambers, 'as soon as the interest and safety of the State permit.' Treaties of peace and commerce cannot be ratified until after they have been voted by the two Chambers. Apart from this measure of treaty-making power which it shares with the Chamber of Deputies, the Senate has one executive function which it shares with the President. Only with the advice of the Senate can the President dissolve the Chamber of Deputies before the legal expiration of its term. This prerogative attaching to the Senate is obviously one of immense importance.

In a sense it puts the Executive at the mercy of the Second Chamber. There are parliamentary contingencies under which, as every Englishman knows, it is incumbent upon a Cabinet to appeal to the electorate for a fresh mandate. There are other contingencies, not more remote, under which it may be of supreme importance to a House of Commons to force a dissolution upon the Cabinet. In France neither the Ministry nor the Chamber of Deputies possesses command of this most effective weapon. Nor, indeed, does the Senate. The Ministry can wield it, but only if it possesses the confidence of the Senate.

It may be well, at this point, to add that apart from the power thus confided to the Ministry in conjunction with the Senate, there is no provision in the Constitution for the solution of a deadlock between the two Houses.

The Senate may be constituted a Court of Justice to try either the President of the Republic or the Ministers on an Impeachment by the Chamber of Deputies; and it may be called upon by a decree of the President, issued in the Council of Ministers, to try persons accused of attempts upon the safety of the State. It acted thus in 1889 for the trial of Boulanger, Rochefort, and Dillon, and again in 1899 in the case of the Nationalist outrages. M. Yves Guyot declares that 'all Republicans consider that in these two instances the Senate rendered great service to the Republic, and greatly increased its own prestige'.[132]

In regard to ordinary legislation the Senate has concurrent power with the Chamber of Deputies to initiate, to amend, to pass, and to reject laws. In regard to money Bills the right of initiative belongs solely to the Deputies; the Senate has

admittedly power of rejection, and has claimed and unquestionably has exercised the power of amendment, but not, it would seem, without protest from the Deputies. M. Yves Guyot reminds us that an attempt was made by Gambetta in 1882 to revise the powers of the Senate in this matter; but Gambetta was unsuccessful, and the generally accepted opinion of the best French jurists is that the Senate possesses the right of 'viewing, controlling, and examining' the budget.[133]

The rules governing the relations of the two Houses are at once exceedingly precise and entirely respectful to the Senate.

In regard only to one matter, but that a very important one, is there any ambiguity. To whom is the Ministry responsible? Article 6 of the Constitutional Law on the organization of the Public Powers (February 25, 1875) declares: 'The Ministry shall be collectively responsible to the Chambers for the general policy of the Government, and individually for their personal acts.' Article 6 of the Law of July 16, 1875, enacts that 'the Ministers shall have entrance to both Chambers and shall be heard when they request it'. The law would seem to be explicit enough; but even in France convention is not without effect, and according to many jurists the tendency in unitary Parliamentary Constitutions to make the Executive responsible only to one Chamber has proved itself irresistible in France.[134] M. Yves Guyot argues vigorously in favour of the view that convention and law are in unison on this important point, and he writes with intimate personal knowledge of the facts, which he cites with overwhelming effect. 'On March 15, 1890,' he says, 'the Tirard Cabinet resigned on account of a vote passed by the Senate refusing to accept a treaty with Greece.' 'I was,' he adds, 'a member of that Cabinet, and not one of us questioned the Senators' right. It is impossible for a Cabinet to govern in

opposition to the Senate.' Again, on April 20, 1896, the Senate passed a vote of 'no confidence' in the Bourgeois Ministry. The Ministry paid no heed to the vote, and consequently on the following day 'the Senate refused to sanction credits for sending troops to Madagascar, thus forcing the Ministry to resign'. In 1879, 1897, 1899, 1900, and 1905, the Ministries of the day appealed to the Senate for a vote of confidence.[135] To what purpose, we may fairly ask, if the confidence of the Senate is unessential?

The right of the Senate is, as we have seen, concurrent with and, except in regard to the initiation of money Bills, equal to those of the Chamber. In one important respect the Senate is placed in a secondary position by reason merely of its numerical inferiority. I refer to the revision of the Constitution itself. Article 8 of the Constitutional Law of February 25, 1875, declares;

> 'Article 8. The Chambers shall have the right by separate resolutions, taken in each by an absolute majority of votes, either upon their own initiative or upon the request of the President of the Republic, to declare a revision of the constitutional laws necessary.
>
> After each of the two Chambers shall have come to this decision they shall meet together in National Assembly to proceed with the revision.
>
> The Acts effecting revision of the constitutional laws, in whole or in part, shall be passed by an absolute majority of the members composing the National Assembly.'

Twice only has this machinery been actually set in motion for the purpose of amending the Constitution: in 1879, when the seat of Government, fixed at Versailles in 1875, was transferred to Paris, and again in 1884, when important changes were effected in the position of the Senate.[136] Article 8, quoted above, does not, as will be seen, decide whether the Chambers are simply in general terms to declare the need for revision or whether they are to specify the nature of the amendment desired. This omission, as Mr. Lowell points out, has given rise to lively debates. As a matter of fact, on the only two occasions when amendment has been called for, the two Chambers passed identical resolutions specifying the articles which required revision.[137] In this important matter the latest Constitution of France departs widely from precedent. For if there is one thing which more than another is a distinguishing characteristic of French Constitutions, it is the tendency to draw a sharp line of 'distinction between the constituent and legislative power, the former being withdrawn to a greater or less extent from the control of the Parliament.[138] The Constitution of 1875 marks an entirely new departure, and has established in France a Parliament almost as unquestionably sovereign as that of England. It must, however, be observed that before revision can even be entertained the assent of the Senate, no less than that of the Chamber of Deputies, is essential. Once in Joint Session, it is true, the Senators can be outvoted; but except with the consent of a majority of their own number they can never be placed in such a situation.

It remains to consider the general position of the Senate in the working of the French Constitution. On this point there is a sharp conflict of opinion. M. Yves Guyot, in the interesting study already quoted, maintains that the personnel of the Senate is

superior to that of the Chamber of Deputies, and that it has 'acquired a pre-eminence which it does not owe to the Constitution, but to the bad habits and weakness of those Deputies who theoretically should be most disposed to oppose it'. In support of his conclusion he points to the fact that, although a majority of the Cabinet Ministers must be Deputies, the Senate contains a far larger proportion of Ministers and ex-Ministers than the Chamber. In the latter there are less than four per cent., in the former more than ten. Moreover, 'the greater number of men—not only ex-Ministers, but men who have any political reputation in Parliament—have sought to migrate from the Palais Bourbon to the Luxembourg. The result is that the Chamber of Deputies has not ceased to suffer from a species of inverse selection.' This was a tendency by no means foreseen by the authors of the Constitution, but it is none the less indisputable. Even Mr. Lowell, though differing widely from M. Guyot as to the relative pre-eminence of the two Chambers, confirms his judgement of the personnel of the Senate. 'It contains at least as much political ability and experience as the other House, and, indeed, has as much dignity, and is composed of as impressive a body of men as can be found in any legislative Chamber the world over.' Mr. Lowell admits, moreover, that the Senate 'does very valuable work in correcting the over-hasty legislation of the Chamber, and in case of disagreement often has its own way or effects a compromise'. But on the whole he insists that it is 'by far the weaker body of the two'. The point at issue between these distinguished publicists is one on which it is peculiarly difficult for an Englishman to form a judgement, and still more hazardous for him to express it. M. Guyot of course writes with the more intimate knowledge; Mr. Lowell with greater detachment. The former contends that the Senate is far stronger in fact than in

theory, and that its increasing influence is due to the timidity of the Deputies and their evasion of those legislative responsibilities imposed upon them by the Constitution. The Chamber, he insists, deliberately accept proposals which are both illusory and dangerous, in the confident hope and belief that they will be rejected by the Senate. 'It doesn't mean anything,' they explain in answer to remonstrance; 'don't attach any importance to it; the Senate will arrange all that.' That he declares is 'the consecrated sentence': 'The Senate will arrange all that.' Frequently they do, and all is well. Sometimes, on the other hand, the 'Senators become so conservative for themselves that they forget to be conservative of the principles and interests which they are expected to defend'. In the occasional exercise of mistimed caution, the French Senate is certainly not alone among the Second Chambers of the world.

Into the history of the Second Chamber in France I have entered in some detail, partly because the experiments tried in France have been exceptionally varied, and partly because France may be regarded as in some sort typical of the Unitary States of modern Europe. But the variations afforded by the other Latin States, still more by the Dual Monarchy, by Russia, and by Turkey, are sufficiently noteworthy to demand separate though summary investigation.

XI

SOME CONTINENTAL SECOND CHAMBERS

> 'There is much reason to believe that the British House of Lords would have been exclusively or much more extensively copied in the Constitutions of the Continent, but for one remarkable difficulty. This is not in the least any dislike or distrust of the hereditary principle, but the extreme numerousness of the nobility in most continental societies, and the consequent difficulty of selecting a portion of them to be exclusively privileged.'—Sir Henry Maine.

> 'The necessity of a Second Chamber . . . has acquired almost the position of an axiom. . . . On the whole these Chambers in the continental Constitutions have worked well, though they have in general not yet had a very long experience, and most of them—especially those of a composite character—have included a large proportion of the chief elements of weight and ability in their respective countries.'—Lecky.

To estimate critically the working of the bi-cameral system in every European State would involve a discussion disproportionately lengthy, even if I possessed the first-hand knowledge of continental politics essential to the task. To such omniscience I make no pretence: but for the purpose of reference and comparison I propose, in this chapter, to present

in summary form those provisions of the chief continental Constitutions dealing with the composition and powers of the Second Chamber. I shall note in particular the competence of the Upper House in regard to money Bills; its control, where such exists, over the Executive; and the machinery, if any, for the solution of deadlocks between the two Houses.

The first point which emerges from this comparative study is that there is no Second Chamber in the world precisely similar to our own. For this Sir Henry Maine, as will be seen, suggests a curious and interesting reason. The divergence is due not to any dislike or distrust of the hereditary principle, but to the superabundance of the continental nobility. He quotes Siéyès to show that the fatal obstacle to the engrafting of a House of Lords on to the French Constitution of 1791 was the 'number and theoretical equality of the nobles'. Siéyès calculated that France contained 110,000 noblemen, and Brittany alone 10,000. Maine himself points out that the combined Diet of the two small States of Mecklenburg-Schwerin and Mecklenburg-Strelitz consisted of 731 members, of whom 684 were persons of knightly rank, holding land by knightly tenure.[139] The principle of hereditary legislators, we are to surmise, owes its survival in England to the fact that we have only 'one fool in each family'.

Of all the continental Chambers, the three least unlike our own are those of Prussia, Austria, and Hungary. With the first I have dealt elsewhere.[140] The Austrian Herrenhaus, and the Hungarian Table of Magnates, demand some detailed description. The Second Chamber of the Austrian Reichsrath consists of 266 members distributed among the following categories:—Princes of the Blood, being of full age (15); Hereditary Nobles of high rank qualified by the possession of large estates and nominated to an hereditary seat by the Emperor

(74); Prince-Archbishops (5); Prince-Bishops (8); Archbishops (5); and persons nominated by the Emperor for life in recognition of some special service rendered to the State or the Church, to Science or Art. The last, and much the largest, category, which at present includes 159 members, may not fall below 150, nor exceed 170; within these limits the power of the Emperor to create what may be termed Life Peers is absolute, and it is freely used to secure the passage of Bills through the Upper House. The powers of the Herrenhaus are co-ordinate with those of the Abgeordnetenhaus; the assent of both houses being required to all legislative projects, and to all treaties which involve questions affecting the trade of the country; which concern an alienation or extension of territory; which lay any economic burden on the State; or which may affect its legal constitution. Money Bills, and Bills affecting military recruitment, must originate in the House of Representatives (Abgeordnetenhaus). The assent of the Upper House is necessary to their validity; but should irreconcilable difference of opinion manifest itself between the two Houses, the rule is that the smallest figure, or number, voted by either House is to be considered as adopted. Ordinary differences of opinion between the two Houses are referred for adjustment to a joint committee. Ministers are responsible indifferently to both Houses, and can be impeached or interpellated by either.

The Hungarian Table of Magnates enjoys the distinction among continental Chambers of being the only important one whose numbers ever exceeded those of the House of Lords. Formerly consisting of some 800 members, it has now been reduced to 394, distributed in the following categories:—(1) Princes of the Blood owning landed estates in Hungary (24); (2) Hereditary Counts and Barons possessing a high property

qualification; these now number 235; (3) the higher Ecclesiastical dignitaries of the Roman Catholic and Greek Churches together with certain Ecclesiastical and Lay representatives of the Protestant Churches; (4) Life Peers nominated by the King (at present 66); (5) certain *ex-officio* members, such as the Presidents of the Royal Curia, the Presidents of the Administrative Court, the President of the Royal Table of Buda-pesth, and the Governor of Fiume; and (6) three delegates representing the Croatian Slavonic Diet. The Table of Magnates, it will be observed, combines the principles of hereditary right, official qualification, royal nomination, and (in the case of three members) secondary election. The powers of the Table of Magnates are in practice strictly subordinate to those of the Lower Chamber, to which ministers are exclusively responsible. Since 1848 there has been no provision for settling disputes between the two Houses.

The Spanish Cortes now consists of two legislative Chambers: the Senate, and the Congress of Deputies. The Senate is composed of (1) Senators in their own right, who include the sons of the King, and of the Heir-Presumptive to the Throne, on the attainment of their majority; Grandees of Spain in their own right who are not subjects of another Power, and have an ascertained yearly income of 60,000 pesetas derived from real property; the Captains-General of the Army and the Admiral of the Navy; a Patriarch of the Indies, and the Archbishops, and certain official members, namely, the President of the Council of State, of the Supreme Court, of the Court of Accounts of the Kingdom, and of the Supreme Councils of War and of the Navy; (2) Life Senators appointed by the Crown; and (3) Senators elected by the corporations of the State and the larger taxpayers. The two first categories together are never to include more than

180 members; the third category must also number 180. Both life Senators and elected Senators must be selected from certain categories, such as: Ministers of the Crown; Bishops; Lieutenant-Generals of the Army; Vice-Admirals of the Navy; Ambassadors; Deputies who shall have belonged to three different Congresses, or have served during eight sessions; Presidents or Directors of the Royal Academies, &c. Under the law of February 8, 1877, the 180 Elected Senators are chosen as follows: (1) one by the Clergy of each of the nine Archbishoprics; (2) one by each of the six Royal Academies; (3) one by each of the ten Universities; (4) five by the Economic Societies of the friends of the Country, and (5) the remaining 150 by Electoral Colleges in each Province, These Colleges are composed of members of the Provincial deputations, and of representatives chosen from among the Municipal Councillors and largest taxpayers of the several towns and Municipal districts.[141]

The composition of the Spanish Senate is of interest as approximating more nearly than any other Second Chamber in Europe to the proposals for a reconstituted House of Lords put forward by various reformers. The powers of the Senate and the Congress of Deputies are strictly co-ordinate; but laws relating to taxation and to the public credit must in the first instance be presented in the Congress of Deputies. If either House rejects a Bill, or if the King refuses his sanction thereto, no other Bill upon the same subject may be introduced in that session. Ministers can speak in both Houses, but vote only in that to which they belong. The King has power to dissolve either simultaneously or separately the elective part of the Senate and the Congress of Deputies. Bills commenced in one session may be taken up again in the next if no dissolution has intervened.

The Italian Senate consists exclusively, apart from Princes of the Blood Royal, of members nominated by the King for life; these members, of whom there are now 390, must be nominated from 21 categories of notables; but there is no limit of numbers. The categories include: Archbishops and Bishops; Deputies who have served in three legislatures, or for not less than six years; Ministers of State; Ambassadors; various Judges and Law officers; General officers of the Land and Naval Forces; Members of the Royal Academy of Science of seven years' standing, and any persons who by their services or eminent merit have done honour to their country, or who for at least three years have paid direct property or business taxes to the amount of 3,000 lire. The Cabinet as a whole is responsible only to the Lower House, though there have been occasions on which a minister has resigned in consequence of an adverse vote in the Senate. But the general subordination of the latter body is amply secured by the fact that the Crown has power to create Senators in unlimited numbers. Not infrequently this power has been used in a dramatic fashion to alter the political complexion of the Upper House: thus in 1886, 41 Senators were appointed in a single batch; in 1892, 42; and in 1890, as many as 75.[142] The Senatorial power of amendment is freely exercised, but according to Dupriez[143] the amendments have usually a legal, rather than a political importance. Apart from its legislative functions, the Senate may be constituted a High Court of Justice by decree of the King to try crimes of high treason and attempts upon the safety of the State, and to try ministers impeached by the House of Deputies. Senators, like English Peers, can be tried only by the Senate. As regards legislation, it is provided that all Bills shall, in the first instance, be submitted for preliminary examination to committees elected by each House. The Houses have equal rights of initiation, and no Bill rejected by either

House or vetoed by the King can again be introduced during the same session. Ministers may be heard in either House; but cannot vote unless they are members.

The Constitution of Portugal is still based upon the Constitutional Charter of 1826, amended in 1852, 1885, and 1896, and possesses, therefore, a special interest for English students as having been avowedly modelled upon that of England. It must, however, be confessed that the institutions thus transported have not thriven too well upon alien soil. The Cortes is composed of two Houses: a House of Peers, and a House of Deputies. The House of Peers will in future be composed of Princes of the Blood Royal; the Patriarch of Lisbon and the archbishops and bishops of the continental territory of the kingdom; and ninety life Peers nominated by the King. Those who were hereditary Peers of the Kingdom at the time of the promulgation of the constitutional amendment of 1885 retain their seats for life, and the privilege extends to their immediate heirs who were living at the time; but this element will gradually disappear. Fifty elective peerages were established under the same Act of 1885, but were abolished in 1896. The appointment of a Peer of the Kingdom must be officially communicated to the House of Peers, and may be objected to, should the appointment not conform to the provisions of the Constitution. The House of Peers has the exclusive right to take cognizance of personal offences committed by members of the Royal Family, Ministers of State, Councillors of State, and Peers, and of the offences of Deputies during the existence of the Parliament; to take cognizance of matters involving the responsibility of Secretaries and of Councillors of State; and upon the death of the King to convene the Cortes for the election of a Regency, if a Regency has to be

elected, and if the provisional Regency has not already convened it. The House of Deputies has the exclusive right to impeach Ministers of State and Councillors of State; but they must be tried by the House of Peers. As regards legislation, it is provided that both Houses shall have the right to initiate, reject, and approve Bills, with the exception of Bills concerning taxes or military recruiting, which must originate in the House of Deputies. There is a further provision that projects of law promoted by the Executive shall not be converted into Bills until they have been examined by a Committee of the House of Deputies; thus a ministerial measure must practically originate in the Lower House; but the Upper House has full powers both of amendment and rejection. By Article 54 of the Constitution, amended so recently as 1896, detailed machinery is provided for the solution of difficulties which may arise between the two Houses. In such a case a Committee consisting of an equal number of Peers and Deputies may be appointed and may decide by a majority vote whether the project shall be reduced into a Decree of the general Cortes, or whether it shall be rejected; in the event of an equality of votes, a joint session of the two Houses may be held. Ministers may sit in either House; but a Deputy on accepting office must submit to re-election.

The Second Chamber of the Netherlands is generally regarded as constitutionally the least powerful of any Second Chamber in Europe. It was made elective when the Constitution was revised in 1848, and now consists of fifty members elected from among the largest taxpayers by the Provincial Estates for a period of nine years. The entire initiative of legislation, both general and financial, belongs to the Lower House; the Upper House has the power of rejection, but no power of amendment. The Heads of the Ministerial Departments have seats in both

Houses; but unless they have been elected to the House in which they sit, they have only a deliberative voice. Much of the work of the States-General is done in joint sessions of the two Houses, but the power of the Upper House when sitting alone is reduced to a minimum.

The Belgian Senate is composed of: (1) Members elected according to the population of each Province for a term of eight years; (2) Members elected by the Provincial Councils, to the number of two for each Province having less than 500,000 inhabitants, of three for each Province having from 500,000 to 1,000,000 inhabitants, and of four for each Province having more than 1,000,000 inhabitants. By an amendment of the Constitution effected in 1893, it is provided that the number of Senators to be elected directly by the voters shall be equal to one-half the number of Members of the House of Representatives. As a rule half the Senators retire every four years; but the Senate, like the House of Representatives, may be dissolved, and in that case is renewed *en bloc*. The directly elected Senators besides possessing the ordinary qualifications of citizenship must pay at least 1,200 francs in direct taxes, or possess considerable real estate. In addition to the elected Senators, Princes of the Blood become Senators by right at the age of eighteen, but have no vote until they reach the age of twenty-five. Ministers may sit in either House, and may be heard in either House whether they are members of it or not.

In Denmark the Rigsdag consists of two Houses: the Landsthing, and the Folkething. The former consists of sixty-six members, of whom twelve are appointed by the King for life; seven are elected in Copenhagen, forty-five are elected by the larger electoral districts, one by Bornholm, and one by the Lagthing of the Faroe Islands. The elected members of the

Landsthing are elected according to the principles of proportional representation. The King's nominees must be selected from among those who are, or have been, elected members of the existing, or of former representative assemblies of the kingdom. Members of the Landsthing are paid at the same rate as members of the Folkething. Except in regard to money Bills, which must originate in the Folkething, both Houses have equal rights of legislation; should the two Houses disagree, it is provided that on the request of either House a Committee may be appointed consisting of an equal number of members of the two Houses; but each House has the final power of decision in regard to the recommendations of the Committee. The two Houses may meet in joint session.

The Swedish Legislature down to 1866 retained its original form of four Houses representing the four Estates; but by the Amendment of 1866 a bi-cameral legislature was adopted. The Upper House consists of 150 members elected, for a term of nine years, by Provincial Assemblies in the rural districts, and by the Municipal Councils in the larger towns. No one is eligible for election to the Upper House who has not possessed, for a period of at least three years previous to the election, property of the taxable value of 22,000 dollars, or an annual income of at least 1,100 dollars. The two Houses have equal authority in regard to legislation, which is under the general direction of a joint Committee of both Houses. In the event of a disagreement on financial matters, a decision is reached in joint session; each House votes separately upon the matter in dispute, but the opinion which receives the majority of votes of the two Houses is deemed to be the decision of the Riksdag.

Norway, as we have seen, is sometimes regarded as affording one of the few exceptions to the bi-cameral rule; but

even this exception is disputed. Article 73 of the Constitution of 1814 provides that the Storthing shall select one-fourth of its members to constitute the Lagthing; after such selection, which must take place at the first regular session of the Storthing after a general election, the two Houses deliberate apart. The sole right of initiation belongs to the Lower House, or Odelsthing; the Lagthing may either approve or reject a Bill; if rejected it must be returned with the objections urged against it to the Odelsthing; the latter has then the alternative of dropping the Bill, or sending it up again to the Lagthing with or without amendment; should the Lagthing reject a Bill sent up by the Odelsthing a second time, the whole Storthing meets in joint session and decides the question by a two-thirds vote. The King has the right of rejecting Bills passed by the Storthing; but if a Bill is passed without amendment by three Storthings convened after three separate and successive elections, it becomes law even without the approval of the King.

There now remain to be considered only the Upper Chambers of the two most recently constituted legislatures in Europe: those of Russia and Turkey. According to the Russian Constitution of 1906, the power of legislation is vested jointly in the Emperor, the Council of the Empire, and the Imperial Duma. In regard to fundamental or constitutional laws, the sole right of initiation is reserved to the Emperor; ordinary legislation either House has the right to initiate. The Council of the Empire, or Upper House, consists partly of members nominated by the Emperor, and partly of members chosen by election; but it is provided that the Imperial nominees must not exceed the number of elected members. The latter are chosen as follows: 6 by the Clergy of the Greek Orthodox Church; 1 by each of the Provincial Zemstvos; 18 by the Assemblies of the

Nobility; 6 by the Imperial Academy of Science and the Imperial Universities; 12 by the Council of Trade and Commerce, together with the Local Committees of Commerce and Boards of Trade. In each case the election is indirect and is in the hands of Electoral Colleges for each of the five classes of electors.[144] The elected Members of the Council of the Empire sit for nine years, but one-third of each class retires every third year. In matters of legislation the Council of the Empire and the Imperial Duma enjoy concurrent rights. Both Houses have the right to demand explanations from the ministers, and from the Heads of Independent Departments; but such ministers may vote in the Councils of the Empire and in the Imperial Duma only if they are members of those bodies respectively.

The General Assembly of the Turkish Empire is composed of two Houses: a House of Lords, or Senate; and a Chamber of Deputies. The President and Members of the Senate are nominated for life directly by the Sultan[145]; but the number of Senators must not exceed one-third of the members of the Chamber of Deputies. A Senator must be at least forty years of age, and must be a man worthy of public confidence, or have rendered signal services to the State.

The dignity of a Senator may be conferred on any one who has exercised the functions of Minister, Governor-General (Vali), Ambassador, Patriarch, or has held a high command in the army or navy. The initiative in legislation belongs to the Ministry, but either the Senate or the Chamber of Deputies can demand a new law or the modification of an old law, in regard to any matter pertaining to their several jurisdictions. The demand is then submitted by the Grand Vizier to the Sultan, and the Council of State is thereupon charged in virtue of an Imperial Iradé to prepare a project of law designed to carry out

the wishes of Parliament. Such projects, after being drafted by the Council of State, are submitted in the first place to the Chamber of Deputies, and subsequently to the Senate. No Bill which has been definitely rejected by one or other Chamber can be reintroduced during the course of the same session. The Chamber of Deputies has, with the Ministry, exclusive control over finance. Ministers have the entrée to both Houses, or may be represented there by one of the superior officers of their departments.

This brief and catalogic sketch will suffice to demonstrate the variety of types presented by the European Second Chambers. Not less apparent is the difficulty which the framers of artificial Senates have encountered in discovering a basic principle which shall be at once sound, intelligible, and differentiating. The hereditary principle—at least as an exclusive principle—has been on every hand abandoned. Austria, Hungary, Spain, Russia, and Prussia retain it in conjunction with others, but Hungary is the only State except England where the hereditary Peers command a majority. The nominee system, pure and simple, has been adopted in Turkey, [146] Italy, Portugal, and Canada; and in part, in Austria, Hungary, Spain, Denmark, and South Africa; the elective system *sans phrase* in France, Belgium, the Netherlands. Sweden, Norway, the Australian Commonwealth, the United States of America, and the South American Republics. Several Upper Houses, such as those of Spain and Prussia, combine the elective principle with one or both of the others.

In the States which have adopted frankly and exclusively the elective principle, the difficulty has been to differentiate the Second Chamber from the First. This notwithstanding, Mr. Henry Sidgwick expresses a distinct preference for this type, if

it is desired to obtain a co-ordinate authority.

> 'A Second Chamber in order to be able to maintain a really co-ordinate position against the pressure of a popularly elected assembly must itself be also in some way, though perhaps indirectly, the result of popular election.'[147]

But if this method be adopted a further precaution is, according to the same writer, indispensable.

> 'In order to get the full advantages of the system of two Chambers, with co-ordinate powers, it seems desirable that they should be elected on different plans, in respect both of extent of renewal and of duration of powers; so that while the primary representative Chamber being chosen all at once for a comparatively short period may more freshly represent the opinions and sentiments of the majority of the electorate, the Senate, elected for a considerably longer period, and on the system of partial renewal, may be able to withstand the influence of any transient gust of popular passion or sentiment.'[148]

Any one who has followed with attention the foregoing pages will have perceived that this precaution has not been neglected by the framers of modern Constitutions. Elective Second Chambers are, as a rule, differentiated from the First in one or more of the following ways: (1) Indirect or secondary election—a device adopted, for example, in the United States, France, and the Netherlands; (2) a difference in the length of the period for which election is made; thus in France a Senator is elected for nine years; a Deputy only for four; in the United

States the terms are six years and two respectively; (3) ‘continuous existence’: secured by the device of partial periodic renewal—a device almost universally adopted; and (4) a differentiation in the electoral area or in the mode of election, or both. Thus in the Australian Commonwealth Senators are, it will be remembered, elected by *scrutin de liste*, and the electoral unit is the whole State.

These and similar devices are beyond all question the refuge of constitutional jurists convinced that a strong Second Chamber is indispensable, but confronted by the obvious fact that nominee Chambers have lent themselves too readily to party convenience, and compelled by the absence of a genuine aristocracy or by the domination of democratic formulæ to base their Senates upon the elective principle. Moreover, all the Upper Chambers whose composition we have analysed are, with the exception of that of Hungary, modern and manufactured. Some of them, like those of Sweden and the United States, have history behind them, and may be regarded as the products of evolution rather than of revolution. But in no case, always excepting Hungary, have historical traditions played any important part in the moulding of modern institutions. It is wholly different in the case of the one really historical Second Chamber in the world. To a consideration of the present and future position of the House of Lords we now turn.

XII

SOME COMPARISONS AND CONCLUSIONS:

CONSTITUTIONAL REVISION IN ENGLAND.

'If a Senate be intended as a check on kings or on multitudes, it follows that to have all its members appointed either by the prerogative of the King or by the election of the multitude is to recur to that very power which it was wished to control.'—STANHOPE.

'Of all the forms of government that are possible among mankind I do not know any which is likely to be worse than the government of a single omnipotent democratic Chamber.'—W. E. H. LECKY.

'The main end for which a Senate is constructed [is] that all legislative measures may receive a second consideration by a body different in character from the primary representative assembly, and if possible superior or supplementary in intellectual qualifications.'—HENRY SIDGWICK.

§ I. SOME CONCLUSIONS

After an excursion, somewhat prolonged, we return to the

English House of Lords and to a consideration of the demand for a revision of the British Constitution. That demand proceeds from many quarters, some of them friendly, others implacably inimical to the very existence of a Second Chamber. But before proceeding to discuss this question I must attempt to gather up the conclusions towards which the preceding investigation may seem to point.

One conclusion emerges, on the threshold, irresistibly: that no modern State, whatever be its form and government, whether federal or unitary, monarchical or republican, presidential or parliamentary, constitutionally flexible or constitutionally rigid, is willing to dispense with a Second Chamber. Of the Constitutions analysed in the foregoing pages, only Greece, Norway, and some of the Canadian provinces disclose any approximation to the uni-cameral system. The Canadian provinces are not 'States', and, though extensive in area, contain as yet small populations; the Constitution of Norway is ambiguous in classification, while Greece, the only European State which by its exceptional parliamentary arrangements has long served both logically and politically to prove a rule, is now (February, 1910) considering the revision of a Constitution, the working of which has been admittedly a failure. It is not impossible that, before these words see the light, Greece will have ceased to provide the solitary European example of a single-chambered legislature, and will have added one more to the lengthening list of abandoned experiments in uni-cameral organization.

And this conclusion leads to a second, which it may be well at this stage to emphasize. The preceding pages disclose the fact that, of the great States of the modern world, three of the greatest have actually tried and abandoned the experiment of a single

legislative Chamber. It must be admitted that in no one of the three cases were the circumstances normal. In England and France the system was tried in a time of constitutional dislocation and social disorder. In the United States the times were eminently transitional. Too much importance must not, therefore, be attached to these cases; but it is not impertinent to note that they all ended in the same way; that while the settled order, on its restoration, accepted much from the revolutionary period, it rejected this device, and that never was there the slightest disposition to renew the experiment when the political temperature returned to the normal.

A third conclusion which can hardly be resisted by any one who is at the trouble to master the facts presents itself: that whatever be the case with unitary States, the bi-cameral system is essential to the successful working of a genuinely federal system. Of that system the American Republic, the German Empire, and the Australian Commonwealth[149] are the most conspicuous examples in the modern world. In each case, as we have seen, the Second Chamber embodies and enshrines the federal principle of the Constitution; the same observation holds good of Canada and Switzerland; and had the scope of this treatise permitted a further excursion, the argument would have been strengthened. In Argentina, for example, the Second Chamber is known in contradistinction to the House of Deputies *of the Nation*, as the House of Senators *of the Provinces and of the Capital*. The Senate consists of two Senators for each Province elected by a plurality of votes in the respective Provincial Legislatures, and of two Senators for the Capital. The United States of Brazil, under the federal Constitution of 1891, also possesses a Senate of a federal character, though not in this respect so sharply differentiated from the other House as

is the case in Argentina or the United States of America. The prevalence of the device in federal Constitutions suggests a further conclusion of considerable significance. The suggestion is not infrequently made that the framers of modern Constitutions, confronted with the difficulty of devising a Second Chamber based upon a differentiated principle, but lacking courage for the frank adoption of the uni-cameral system, have eagerly seized upon the federal idea as affording an escape from the dilemma. But the suggestion, though ingenious, inverts the actual historical order. The American Senate, as I have attempted to show, owes its existence not to the anxiety of the Convention to adopt bi-cameralism, but to its anxiety to avert disruption. A Second Chamber, based not upon the principle of population but upon that of equality of representation for States of very unequal size and importance, was the condition precedent to the formation of a union. The Senate, therefore, in the United States, is not merely an intelligible makeshift, nor does it represent merely the ingenious effort of bi-cameral enthusiasts: it is based upon an impregnable historical fact—the fact that, but for the provision of such a guarantee for the rights of the smaller States the original English Colonies in North America would, on the consummation of the great schism, have formed a congeries of independent and possibly antagonistic republics, united only in opposition to the common mother. In brief, the great American nation was cradled in institutions which, by the ingenious adaptation of existing models, satisfied the centrifugal not less than the centripetal tendencies which manifested themselves so strongly at its birth.

What is true of the United States is not less true of Germany and of the Australian Commonwealth. The German Bundesrath and the Australian Senate do not owe their existence to an *a*

priori preference for the bi-cameral form of legislature. A federal Second Chamber, if not indeed the only, was certainly the readiest and most convenient, means of satisfying the centrifugal sentiment of the Sovereign States of Germany. Prussia might have found it impossible to effect her German mission, but for the existence of the Diet of the old Empire containing a germ which it was easy to cultivate into the Bundesrath of the modern Empire. And similarly in the case of Australia. The Senate, with its equal state representation, was the condition precedent to federation, and is the pledge of the security of state rights.

We are, then, entitled to conclude that bi-cameralism is an essential attribute of federalism.

Is it equally indispensable to the unitary State? It is clear that so far as the foregoing argument holds good its utility must be demonstrated by a different method, and based upon a different plea.

But before proceeding to this demonstration, there is another point which it seems appropriate to raise. Must we assume that the British Empire is to remain unitary both in essence and form? Unitary it clearly is at present, since the whole constitutional edifice rests upon the base of the unquestioned sovereignty of the King in Parliament. But is this form to be regarded as permanent? Can the present arrangement be expected to endure as, in process of time, the Dominions expand in population, develope in resources, and claim, more and more as of right, to be allowed to assume the burden of imperial defence?

> 'Daughter no more but sister, and doubly
> daughter so.'

To expect that the existing relations between the sister-lands will permanently endure passes the limits of human credulity. The patience and self-restraint of the Responsible Colonies have been amazing; but the opinion grows, that while on the one hand they are bound to develope their individual nationalism, on the other they may properly demand some more clearly 'defined position in the Imperial Economy'.

More than twenty years ago the late Sir James Service wrote somewhat bitterly of 'the very anomalous position which these Colonies (the Australias) occupy as regards respectively local government and the exercise of Imperial authority. In regard to the first, the fullest measure of Constitutional freedom and Parliamentary representation has been conceded to the more important Colonies; but as regards the second, we have no representation whatever in the Imperial system. *The weakness of this position has at times been most disadvantageously apparent, and its humiliation keenly felt. . . . Colonial interests are sufficiently important to entitle us to some defined position in the Imperial economy, to some tangible means of asserting if necessary our rights.*' The intervening years have assuredly not weakened the force of the plea put forward by Sir James Service. He had New Guinea in his mind, and Lord Derby's inaction in regard to its partition. With his not less outspoken successor it may be a question of the New Hebrides. But the immediate cause of the irritation is unimportant; the fact remains, as the words which I have ventured to italicize unquestionably indicate, that to the Colonies the weakness of their position is at times 'disadvantageously apparent and its humiliation keenly felt'.

In what direction may we look for the satisfaction of this Imperial or federal sentiment? Britons have not been apt in the

past to seek abroad the sources of their constitutional inspiration, and I am very far from suggesting that we should hastily abandon a tradition so deep rooted and in the main so wholesome; still less that we should adopt from foreign Constitutions particular provisions incongruous with the spirit of our own. But I do venture to urge with emphasis that at a moment when the future constitution of the Second Chamber is under discussion the opportunity should be seized to consider the question whether in a reconstituted Upper House it would not be possible to satisfy, in some degree, the desire of the Dominions for a more 'defined position in the Imperial Economy'.[150]

This obvious and pregnant opportunity Lord Rosebery's Committee on the Reform of the House of Lords seem to have wilfully neglected. It may have been beyond the scope of their reference 'to design a new and symmetrical Senate, representative, for example, of all the various parts of the Empire'.[151] Nevertheless they appear to have had under consideration the urgent recommendation of some of their own number that opportunity should be taken in any reform of the House to introduce into it the Imperial element by providing for the direct representation of the great self-governing British communities outside these Islands and of India.[152] But their actual recommendation on the point is halting and impotent in the extreme. Lord Rosebery and his colleagues were obviously much impressed by 'the danger of the representatives of the King's subjects outside the United Kingdom being drawn within the arena of British party politics', and in the end they contented themselves with the timid proposal that the 'official representatives of Canada, Australia, New Zealand, and South Africa' should be admitted during their tenure of office 'to the

deliberations of the House of Lords'. Whether these words are to be taken to imply that these official representatives should be entitled only to speak and not to vote is not clear. Assuming, however, the larger interpretation, the recommendation still falls lamentably short of the hopes entertained by those who would fain have given to the House of Lords a strong Federal and Imperial character. The admission of Colonial representatives to the House of Commons would, no doubt, as things are, raise many awkward questions. Such representatives would inevitably be drawn into the party net; they would become supporters or opponents of the Executive of the day; they would be called upon to vote on some financial proposals with which their constituents were not concerned, and would have little power to influence other decisions in which colonial interests were at stake. Some of these difficulties would no doubt confront them, even in the serener atmosphere of the House of Lords, but less frequently and in a modified degree. And the most formidable difficulty would there be conspicuously absent. Colonial Peers would have no power to impose taxation either upon their own or upon other people's constituents. That the danger foreseen by Lord Rosebery's Committee is entirely visionary I do not suggest. But on what grounds is it imagined that Agents-General would be immune from dangers to which unofficial representatives of the Colonies would be obnoxious? Most people who desire to see a closer union between the mother-country and the great self-governing British communities beyond the seas will cordially concur in the belief that 'the presence of these high officials in the House of Lords would be of great advantage both to the House itself and also to the communities which they represented'. But if that be so, why should it be thought advisable to restrict within such extraordinarily narrow limits this advantageous infusion?

Against one possible misconception it is necessary to guard. The transformation of the House of Lords into an Imperial Senate would be at best only a partial solution of an immense problem. I venture, however, to claim for the proposal one or two not inconsiderable advantages. The change could be effected with the least possible dislocation of existing institutions. It follows the line of least resistance. It would not offend against the admirable political precept *Festina lente*. The step, moreover, might be regarded as purely tentative. If found in practice to be cumbrous or unworkable, it could be retraced without danger, and, probably, without serious friction. Many loyal disciples of Adam Smith would welcome the presence of Colonial representatives in the House of Commons. Sir Wilfrid Laurier has, however, admitted that the ardent hopes of his political youth have in this direction been chilled by advancing years and increased experience. If so convinced an advocate of Imperial unity is compelled to forgo such hopes, their realization must, though with regret, be put beyond the pale of immediate practical politics. The larger scheme must be postponed. But is that any reason why no step in the desired direction should be taken? To begin with the admission of Colonial Senators to the House of Lords, rather than Colonial representatives to the House of Commons, seems to present the maximum of advantage with the minimum of difficulty. The admission of Colonial representatives to the House of Commons, even if practicable on other grounds, must necessarily involve the Colonies in financial responsibility, and must logically result in the imposition of Imperial taxation. One need not be a coward to shrink from the possibilities of friction to which this proposal might lead. No such disadvantage attaches to the proposal which I venture to press. The House of Lords has no direct financial responsibility, and the presence of

Colonial Peers or Senators would not, therefore, compromise the constituent States. But on the other hand, it would give to the Colonial representatives much that they ought to have, and at present have not. Primarily it would give them a 'defined position in the Imperial economy', a position at any rate superior in dignity to the ante-room of the Colonial Office. It would give them a political Ποῦ στῶ [Greek: Pou stô]—a platform from which to address their warnings to the people of the mother-country. The system of representation by Agents-General or High Commissioners was considered by Colonial statesmen to be inadequate and undignified twenty years ago. The intervening years have not added to its adequacy or dignity. That the representatives of Colonial Governments should be 'outside petitioners' at the doors of the Colonial Office is hardly decorous. The creation of a brand new Imperial Council—if the proposition were cordially adopted by all the self-governing Colonies—might do something to remedy the graver defects of the existing system. But evolution is preferable to creation, and is more germane to the spirit of British institutions, and the moment is opportune.

If, then, it be admitted that uni-cameralism and federalism are mutually inconsistent, and if it be essential for the stability of the Empire that some steps, however tentative, should be taken without delay in the direction of federalism, would it not be the height of folly to scrap machinery which can easily be adapted to this new and important function. But if we elect to maintain the unitary character of the British Constitution, is there any special reason why we should hesitate to adopt the uni-cameral system?

There would seem to be two. The constitutions analysed in the present work are without exception written; most of them are

rigid. The British Constitution is, as a whole, unwritten, and it is extraordinarily flexible. But if constitutions which are written and rigid require the safeguard of a Second Chamber, how much more does a constitution which rests largely upon conventions and can be fundamentally altered by the use of the same machinery as is habitually employed for the least important legislation? In the German Empire, as we have seen, any constitutional amendment can be rejected by fourteen negative votes in the Bundesrath. In the United States not only is Congress incompetent to alter the Constitution, but even in its ordinary legislation it works with the fear of the Supreme Court for ever before its eyes. For the Court is not only, like our English Courts, the interpreter of the law, but also the interpreter of the Constitution. It has to decide not merely whether a given law is or is not applicable to a given case, but whether the law itself is legal; whether, in fact, it was within the constitutional power of the Legislature to enact it. Apart from the Supreme Court, the most elaborate precautions have been devised against hasty or ill-considered amendment of the Constitution. No such amendment can even be proposed without the assent of a two-thirds majority in both Houses of Congress, or, alternatively, of two-thirds of the State Legislatures; and before such amendment in its approved form can become part of the constitutional law of the United States it must be ratified by the Legislatures in three-fourths of the States, or by an equal number of State Conventions summoned for this specific purpose. It is not, under the circumstances, remarkable that for sixty years (1804-64) there was no amendment at all of the Federal Constitution, and that during the first century of the existence of the United States only fifteen such amendments were enacted. In France, as we have seen, revision must be demanded by both Chambers, and the specific amendment must be approved by a National

Assembly, that is, by the two Chambers assembled in joint session. In Sweden constitutional amendments require the direct sanction of the electorate; they must be proposed in one Riksdag and then submitted to the next. This device amounts almost, though not quite, to a referendum. A similar rule obtains in Norway. In Switzerland—the classical home of the Referendum proper—no constitutional change can be effected without the directly ascertained assent of the electors. The Constitution of the Australian Commonwealth is, next to that of the United States, perhaps the most rigid in the world. To become law any proposed amendment of the Constitution must fulfil three conditions: (i) it must pass both Houses of the Federal Legislature by an absolute majority, or must pass one House twice, after a three-months interval; (ii) must obtain the assent of the people, expressed by means of a Referendum in a majority of the constituent States; and (iii) must be approved by a majority of the voters actually casting their votes in the Commonwealth as a whole. Not even with these precautions can the federal representation of the several States be altered except with the assent of the States affected. The Constitutions of Italy, Spain, and United South Africa, though written, are not rigid.

The English Constitution is neither. Based upon no single Instrument, it is unwritten and also in the highest degree flexible.

If the civilized world has decided with unanimity that the safeguarding even of a Constitution technically rigid shall not be entrusted to a single Legislative Chamber, can it conceivably be the part of statesmanship to confide to a single Chamber a Constitution which is at once the most delicately equipoised and the most easily altered in the world?

Of the foregoing chapters no less than three have been

devoted to an analysis of the Constitution and powers of Second Chambers in British dominions beyond the sea. The three youngest and greatest communities under the British flag—Canada, Australia, and South Africa—have, in the framing of their constitutional Instruments, not only decided in favour of a bi-cameral Legislature, but have endowed the Second Chamber with large though limited powers. In the two latter cases, moreover, special provision has been made for the solution of constitutional deadlocks. To this point, already sufficiently emphasized, it is unnecessary to revert.

The foregoing argument makes no pretence to substantiate the case in favour of the English House of Lords. It suggests, certainly, considerations tending to demonstrate the utility of a Second Chamber, but none in favour of that particular form with which we in this country are familiar.

Incidentally, moreover, it may have suggested certain points of comparison between other Second Chambers and our own. The House of Lords is at once the largest, the most purely hereditary, and the least powerful among the Second Chambers which have passed under review. The Hungarian Table of Magnates contains just under 400 members; the Italian Senate about the same number; the Spanish, 360; the French, 300; the Prussian Herrenhaus, about 300; the Austrian, 266; the Swedish Upper House, 150; the American Senate, 90; the Canadian, 87; the Danish Landsthing, 66; the German Bundesrath, 58; the Netherlands Upper House, 50; the Swiss Ständerath, 44; the Australian, 36; the South African, 32. With the exception, therefore, of the Hungarian and the Italian, no Second Chamber in any important State is much more than half as big as the House of Lords, and the size of the Second Chamber in most States falls far short of that proportion.

But the House of Lords is not only the largest Second Chamber in existence, it has also become the most exclusively hereditary in composition. But this attribute, as we have seen, is relatively modern.[153] Originally the hereditary element was subordinate to the official. Only in the last three centuries have the hereditary lay Peers come to outnumber the spiritual Peers in a proportion so overwhelming. The Second Chambers of Austria, Hungary, and Prussia most nearly resemble our own; but all these contain, besides hereditary members, considerable official and nominated elements. The Second Chambers of France, the United States, the Australian Commonwealth, the Swiss Republic, the Netherlands, Sweden and Norway, not to mention the South American Republics, are composed entirely of elected representatives—that of Belgium is purely elective save for the presence of Princes of the Blood. Some Upper Houses, like those of Denmark, South Africa, and Russia, combine the nominee and elective principles; some, like that of Spain, the hereditary and the elective; some, like those of Canada, Italy, and Turkey, consist entirely of nominees.[154] The official and selected elements are not, as I have shown, entirely absent from the House of Lords, but in voting, if not in debating power, are entirely swamped by the mass of hereditary Peers.

Is it true that the House of Lords is one of the least effective Second Chambers in the world? And, if so, can the lack of effectiveness be connected either with its unwieldy bulk, or with its predominantly hereditary character? It may be doubted whether it is within the competence of any man to answer with assurance the former question; it is certainly not within mine. Diligent research may disclose the paper powers of written Constitutions: but even in the most elaborate and detailed of Instruments, not one half is told in writing; even in the most rigid

of Constitutions convention plays no unimportant part. But to estimate aright the influence of conventions; to gauge the reaction of custom upon Constitution, an intimate personal knowledge is required, which few men can pretend to possess of many countries, and no man can possess of all. But judging as best one may, from available sources of information, I am forced to the conclusion that the House of Lords is, among the Second Chambers of the greater States, one of the weakest.

Its judicial powers I need not discuss: they belong only in theory to the House of Lords, being, in effect, exercised by a small staff of professional judges. Besides, many Second Chambers possess similar, though none possesses identical, functions. As regards ordinary legislation, it is a rule almost universal for Second Chambers to enjoy rights concurrent with those of the First. The Upper House of the Netherlands is, so far as I know, the only exception to this rule: it can neither initiate laws nor amend the proposals sent up to it from the Lower House. Its sole function in legislation is to approve or to reject. In theory, the legislative powers of the House of Lords are precisely parallel with those of the Commons; in practice, fewer and fewer Bills originate in the Upper House, while those sent up to them from the Commons arrive at a period of the session when it is difficult to secure for them that careful and detailed scrutiny which ought to be the proper function of a revising Chamber. It is true, of course, that this result is far from being accidental; and that despite the increasing reluctance of the Commons to allow to the Lords the exercise of their unquestioned rights, a large amount of revising and amending work is actually accomplished; but by no straining of phrase could the legislative functions of the two Houses be described as in practice co-extensive.

As regards Finance, the powers of the English Upper House are inferior to most and superior to few. In the German Empire, Prussia, Austria, and Switzerland, money Bills may be introduced indifferently in either House, and, according to M. Morizot-Thibault, the same is true of no less than twenty-one States of the American Union.[155] The federal Senate, though it has no power of initiation, has the right not only to reject but to amend money Bills; and the right is freely exercised. In France a Bill 'concerning the opening of a Budget or the creation of a tax' must originate in the Chamber of Deputies, but the Senate has complete powers of rejection, and may even originate a 'Bill bearing on Budgetary expenditure'.[156] Every Continental Second Chamber has the power of rejection, several have the power of amendment as well. The power of the Australian Senate is somewhat curtailed, and that of the South African still more so. But no Second Chamber, except the last, has less authority over Finance than our own.

Control over the Executive is closely connected with financial authority. Lord Salisbury, as we have seen, deprecated the interference of the Lords with finance on the specific ground that they could not dislodge a Ministry. In France the fall of ministers may be due to the Senate; and in other cases there is some ambiguity in the matter. At least it may be said that in this respect the power of the House of Lords is no greater than that of similar institutions elsewhere. In most Continental countries ministers have the right to speak (though not to vote) in either House, an expedient which might advantageously be imitated in England.

But limited as are the practical activities of the House of Lords, there is notoriously in some quarters a desire still further to restrict them; and not only in quarters hostile to its existence

and authority. Mr. Lecky, one of the most uncompromising opponents of the uni-cameral system, desired the limitation of the Lords' veto, in the belief that it would strengthen not weaken its revising and, still more, its suspensory authority: 'the very magnitude of the power theoretically vested in the House of Lords is an obstacle to its moderate exercise. A veto defined and limited by law would be more fearlessly exercised and more generally accepted.'[157] The point is an ingenious one, but it must not detain us, for we must now proceed to examine the nature and extent of the demand for a fundamental revision of the Constitution.

§ 2. The Demand for Revision

This demand proceeds from several quarters and assumes various forms. These may be provisionally summarized as follows:—

(i) The entire abolition of a Second Chamber and the institution of a uni-cameral system, with or without 'constitutional' safeguards and guarantees;

(ii) The statutory restriction of the powers of the existing House of Lords;

(iii) A radical alteration in the constitution and composition of the House of Lords;

(iv) A combination of (ii) and (iii), i.e. a simultaneous restriction of powers and alteration of structure; and

(v) the adoption of a brand new constitutional device such as a Referendum.

The first suggestion one might be inclined to describe as 'unthinkable', but for the indisputable fact that it is thought. More than that: it is an accepted plank of the platform of a party new, indeed, to English political life, but already exercising an influence out of all proportion to its parliamentary representation. Of this party I desire to speak with all the respect compatible with candour. But it is difficult to believe that those who advocate a uni-cameral system can have calculated the weight either of historical facts, or of contemporary experience, or of *a priori* speculation. It is of course conceivable that the whole world may be wrong, and that English uni-cameralists may be alone in possession of the pearl which is beyond price; that philosophers have been groping blindly, and that politicians have been guilty of crass stupidity alike in the perpetuation and the resuscitation of bi-cameral arrangements. And yet Burke's warning seems peculiarly apposite in this connexion: 'Great critics,' he wrote in 1791, 'have taught us one essential rule. . . . It is this, that if ever we should find ourselves disposed not to admire those writers or artists, Livy and Virgil for instance, Raphael or Michelangelo, whom all the learned had admired, not to follow our own fancies, but to study them until we know how and what we ought to admire; and if we cannot arrive at this combination of admiration with knowledge, rather to believe that we are dull, than that the rest of the world has been imposed on.'

But considerations of this kind would appear to cause as little misgiving to the present leaders of the Labour party as to politicians of the type of Mr. Henry Labouchere, who during the decade 1884-94 was persistent in his efforts to induce the House of Commons to abolish the 'veto' of the Lords. Thus in 1907, as an amendment to Sir Henry Campbell-Bannerman's

famous resolution, Mr. Henderson moved that 'the Upper House being an irresponsible part of the Legislature and of necessity representative only of interests opposed to the general well-being is a hindrance to national progress and ought to be abolished'. The terms of that amendment still, it would seem, reflect the mind of the party on whose behalf it was moved by Mr. Henderson. That the terms betray some lack of political perspective, and perhaps even some oblivion of historical facts, is hardly to be denied; but a back-bench amendment moved without hope of success is a very different thing from a constructive proposal reduced to statutory form. The prediction may be risked that if ever the representatives of Labour were to acquire in England the parliamentary position which they have attained in Australia they would be the first to ignore, if not to repudiate, the pious opinions of 1907. Anyway, the annihilation of the existing Second Chamber, despite the attractive simplicity such solution offers, is not within the sphere of practical politics and need not be further discussed.

Hardly less repugnant to the settled judgement of the world is the limitation of the so-called 'veto' of the Lords as suggested in the resolution passed by the House of Commons at the instance of Sir Henry Campbell-Bannerman in June, 1907. That resolution affirmed the belief of the Lower House that the power of the Upper ought to be 'so restricted by law as to secure that within the limits of a single Parliament the final decision of the Commons shall prevail'. This points, be it observed, to statutory restriction; and it may be presumed that an attempt would be made to give to this restriction something of a fundamental or constitutional character. Were this not done its repeal at the hands of the next Conservative majority would be a matter of course; and on a third and a fourth turn of the wheel of political

fortune the dreary performance would have to be repeated. Such an enactment could, in fine, mean nothing less than an attempt to embody the English Constitution in an instrument or code of binding validity. But it appears to have escaped notice that such a revolution, though it may begin with the House of Lords, cannot end there. It would be impossible to embody in a fundamental instrument the relations of the two Chambers of the Legislature, and to leave to the caprice of each successive Parliament other parts of the Constitution not less important. If there has been encroachment on the part of either branch of the Legislature, has there been none on the part of the Executive as against both? If we are to have a real *Instrument of Government*, or a series of Fundamental Statutes, it is childish to imagine that they can be concerned only with the position of the Legislature. The whole Constitution must be thrown into the melting pot. That it might emerge better and stronger than the existing hotch-potch of 'Treaties', Statutes, and Conventions, is clearly conceivable; but it is indisputable that it would emerge in a shape very different from the imaginings of the political witches who presided over the cauldron. Except during the revolutionary period of the mid-seventeenth century the English people have hitherto betrayed little partiality for written Constitutions. With Arthur Young, we have been curiously mistrustful of 'Constitutions made, like a pudding, from a receipt'. But the sentiment has not reappeared among the Britons of the daughter-land. All the great Colonial Dominions, to say nothing of the United States, are working out their political salvation within the four corners of Constitutional Instruments, and there are unquestionably many things more to be dreaded in English politics than the drafting of such a code. But the larger question is not within the sphere of my immediate argument. I am, for the moment, concerned only to insist that, if the relations

of the two branches of the Legislature are to be defined by an 'organic' Statute, it must be the beginning of a process which has no natural term save a complete constitutional code. Whether the country is or is not prepared to embark upon a task so novel and gigantic it were premature to say; that there is a party anxious to go some way upon a road which can have no other ultimate destination is certain; that they are unmindful of the destination is likely enough. But that is the last reason why a student of Politics, who is remote from the maelstrom of Party, should refrain from a warning word. *Respice finem* is an injunction of varied applicability. To plunge into a path careless whither it leads may not violate the accepted rules of party strategy; but it is not consonant with the canons of sound philosophy, nor even with the maxims of sagacious statesmanship.

Assuming, however, that there is no insuperable objection to the substitution of a written *Instrument* for the existing medley of Laws and Conventions which make up the British Constitution, there are various methods by which, either severally or in combination, the powers of the Lords might be defined and limited. It would be possible to differentiate, as many foreign Constitutions do, between three kinds of legislative projects: (i) Constitutional amendments; (ii) finance Bills; (iii) ordinary legislation; and to prescribe different methods of procedure appropriate to each kind. Or, again, it would be possible to require a certain majority in either or both Houses before Bills of a specified character could pass into law; or to devise, after the Australian method, a joint session of both Houses, either before or after an appeal to the electorate, for the purpose of adjusting differences between them; or a joint session, after the manner of the National Assembly in France,

for the consideration of Constitutional amendments. None of these expedients is outside the range of practical politics, but not one of them could be adopted, with any hope of success, by a mere legislative process and without a change in the whole character of the Constitution itself far more fundamental than anything which the advocates of these several changes appear to have realized.

We enter a different atmosphere when we proceed to examine the third alternative—a radical reform in the constitution or composition of the House of Lords. Such reform may or may not be desirable, but at least the proposal runs counter neither to the teachings of world-wide experience nor to the traditions of the English polity.

Nor is the demand for constitutional revision in this sense the outcome of recent agitation. The refusal of the Lords to permit Sir James Parke, who had been created by Letters Patent a Peer 'for and during the time of his natural life', to sit and vote in Parliament has been already mentioned, as also the consequent legislation of 1876 and 1887, enabling the Crown to appoint a limited number of Lords of Appeal in Ordinary as Peers for life. But with the exception of these appellate Jurisdiction Acts and an Act of 1871 'for disqualifying bankrupts from sitting and voting in the House of Lords', there has been no change in its constitution since the passing of the Act of Union with Ireland in 1800 and its partial amendment in 1869.

In 1869, Earl Russell, who a generation earlier had been mainly instrumental in reforming the House of Commons, tried his hand on the House of Lords. He introduced a Life Peerage Bill, to empower the Crown to create twenty-eight life Peers,

not more than four of whom were to be created in any one year. The Bill was supported by Lord Salisbury, ‘as founded on a sound principle,’ and obtained a second reading; but after considerable amendment in committee, it was rejected on the third reading by 106 to 76 votes. The same year witnessed an attempt on the part of Lord Grey to amend the laws relating to the election of representative peers for Scotland and for Ireland. But the matter was for the time being shelved by reference to a Select Committee. In 1874 a Select Committee under the chairmanship of Lord Rosebery recommended various changes in regard to the Scotch and Irish Peerages; but no legislative action was taken, and for the next ten years no further attempt at reform was made. In 1884 Lord Rosebery moved for the appointment of a Select Committee ‘to consider the best means for promoting the efficiency of the House’. To this end he advocated—

> (1) The enlargement of the quorum in the Upper House;
>
> (2) The introduction of a system of joint Committees of the two Houses of Parliament for the consideration of both public and private Bills;
>
> (3) The representation in the House of Lords of the Churches, of the professional, commercial, and labouring classes, of Science, Art, and Literature, and of the Colonies; and
>
> (4) The extension of the system of life Peerages.

Lord Rosebery also suggested the possibility of establishing the principle of summoning to the House of Lords consultative and temporary representatives or assessors, to deliberate and

advise. The motion was rejected by 77 to 38 votes, but four years later he returned to the attack. In moving once again, in 1888, for the appointment of a Select Committee, Lord Rosebery laid down certain definite lines upon which reform might be carried into effect. He recommended:—

(1) That any reform should respect the name and ancient traditions of the House;

(2) That the whole body of Peers, including Scottish and Irish Peers without seats in the House, should delegate a certain number of members to sit for a limited period as representative Peers; a minority vote necessary;

(3) That a reconstructed House of Lords should also contain a large number of elected Peers, 'elected either by the future County Boards or by the larger Municipalities, or even by the House of Commons, or by all three';

(4) That life and official Peerages should form a valuable element in a reformed House;

(5) That the proportions of these various elements should be definitely fixed;

(6) That the great self-governing Colonies should be invited to send their Agents-General, or representatives delegated for the purpose, to sit, under certain conditions, in the House of Lords;

(7) That any person should be free to accept or refuse a writ of summons to the House of Lords; and

(8) That any Peer who had refused or had not received a writ of summons to the House of Lords, should be capable of being elected to the House of Commons.[158]

Lord Rosebery also suggested that in cases of dispute between the two Houses the Lords and Commons should meet together, and then by certain fixed majorities carry or reject any measure which was in dispute between them.

Lord Rosebery's motion was again rejected, and a similar fate awaited the attempt of Lord Dunraven to embody in a Bill the principles advocated by Lord Rosebery. In the same session Lord Salisbury carried to a second reading a Bill empowering the Crown to appoint as a life Peer any person who had been (*a*) for not less than two years a Judge of the High Court; (*b*) a Rear-Admiral or Major-General or of some higher naval or military rank; (*c*) an Ambassador; (*d*) in the Civil Service and a member of the Privy Council; or (*e*) for not less than five years a Governor-General or Governor in the Over-sea Dominions, or a Lieutenant-Governor in India. It was provided that not more than three such persons should be appointed in any one year, but that the Crown should be further empowered to appoint two other Life Peers on account of any special qualification other than the afore-mentioned. In no case was the total number of Life Peers created under the Act to exceed fifty at any time. In the same session Lord Salisbury introduced a Bill empowering the Crown, on an Address from the House of Lords itself, either temporarily or permanently to cancel writs of summons to Peers.

It is very greatly to be regretted that Lord Salisbury did not persevere in his efforts to make a real beginning with the reform

of the Constitution of the House of Lords. He had an opportunity such as few Prime Ministers have enjoyed. He was not merely autocrat of the Lords, but commanded a large majority in the House of Commons. It is not too much to say that the short-sighted negligence of the Tory party in the matter of structural repairs has tempted their opponents to undertake the work of demolition. The strength of a chain depends on its weakest link: the reputation of the House of Lords depends on the character of its least reputable members. It is true that the latter do not often obtrude themselves on its divisions; still less, if ever, on its debates. But they exist. Hence comes the paradox that while the individual opinions of the leading members of the House of Lords command the respectful attention of every serious-minded citizen, the collective opinion of the House counts for little. Had Lord Salisbury brought his views to legislative fruition, this anomaly would no longer perplex. The House of Lords would have been both purged and reinvigorated. That the abandoned Bills of 1888 would have done all that is now required is not contended; but they would have done something, and have opened the way for more.

So matters remained until the introduction of Lord Newton's Reform Bill of 1907. The details of his Bill it is unnecessary to set forth, as most of the principles reappear in the Report of the Select Committee which, on the withdrawal of Lord Newton's Bill, was appointed 'to consider the suggestions which have from time to time been made for increasing the efficiency of the House of Lords in matters affecting legislation.'[159]

This Committee sat under the chairmanship of Lord Rosebery, and included the Archbishop of Canterbury, the Dukes of Norfolk, Bedford, Devonshire, and Northumberland, and Lords Lansdowne, Jersey, Cawdor, Selby (a former

Speaker of the House of Commons), St. Aldwyn, Midleton, Newton, Curzon of Kedleston, Courtney of Penwith, Lytton, Halsbury, and others. The published minutes of the proceedings show that in regard to its main proposals the Committee was, but for the redoubtable opposition of Lord Halsbury, practically unanimous.

The Report of this Committee, published in December 1908, forms an epoch in the history of the House of Lords. For the first time the leading members of that House showed themselves to be unanimously of opinion that a radical reform of its constitution was urgently required, and to be further agreed as to the main lines on which such a reform should proceed.

The Committee explicitly disavowed the intention 'of designing a new and symmetrical Senate'. They pointed out that 'even if such a body could be brought into being, its creation would involve a complete and revolutionary change in the Constitution'. Experience, moreover, teaches that 'it is difficult to impart to a new-born body of this description that authority which has resulted from the immemorial sanction of history and tradition'. The Committee, therefore, endeavoured in their recommendations 'to preserve, as far as possible, the fabric and position of the House of Lords within the Constitution, with such modifications only as the circumstances of the age and the needs of efficiency seem to require'. After this emphatic avowal of a spirit of reverent conservatism—an avowal which confronts us on the threshold of the Report—it is perhaps a little startling to learn that the Committee 'at an early stage in their proceedings came to the conclusion that, except in the case of Peers of the Blood Royal, it was undesirable that the possession of a Peerage should of itself give the right to sit and vote in the House of Lords'. It follows from this recommendation that 'in

future the dignity of a Peer and the dignity of a Lord of Parliament would be separate and distinct. The latter would carry with it the right to sit and vote in the House of Lords, which the former would not.'

On what grounds did this fundamental—if not revolutionary—change commend itself to a Committee largely Conservative in composition? The question is obviously a delicate one for a Committee of Peers, and their answer is a model of discretion and tact. They suggest (i) that the numbers of the House within recent years have increased so largely that some reduction for legislative purposes is expedient; (ii) that it is desirable to relieve from their Parliamentary duties Peers to whom such work is irksome and ill-suited, but to whom it has come inevitably by inheritance; and (iii) that it is necessary in the interests of the House itself to eliminate by a process of selection Peers whom it is inexpedient for various reasons to entrust with legislative responsibilities.'

The point is one on which all who desire to increase the legislative efficiency of the House of Lords are substantially agreed. The first essential step towards reform must be a rigorous curtailment of members. During the last century and a half the creation of Peerages has been on a most lavish scale. On the accession of George III the House included less than 200 lay Peers; on that of Queen Victoria, this figure had risen to 423; the next thirty years brought only 17 new Peers into the House; the succeeding forty years added 66; while during the last ten years no less than 71 new Peerages have been created.[160] To add a number of 'qualification' Lords of Parliament or life Peers to the existing House of over 600 members would by general consent be a piece of mere futility. They would necessarily be outnumbered and outvoted by 'gentlemen with

titles', to adopt Mr. Asquith's description, 'beaten up from all quarters of the horizon'.

And this is the root difficulty, not to say the scandal, of the existing situation. If the voting work of the House of Lords were done by the same batch of Peers to whom the conduct of its business is ordinarily entrusted, and to whom in practice its debates are confined, there would be little call and less reason for reform. It is a commonplace of political criticism to say that the general level of debate and the conduct of business in the House of Lords contrast favourably with those of any legislative assembly in the world. It is in the division lobbies that its weakness is revealed.

But how is the necessary curtailment of numbers to be effected? On this point there was considerable difference of opinion among the members of the Committee. Some would have preferred merely to ask the hereditary Peers 'to delegate their powers to representatives from among themselves' and to allow these representatives, together with a limited number of life Peers, to constitute the reformed House. Eventually, however, the Committee decided, but only 'after long and anxious deliberation', to adopt the much more drastic principle already indicated. They accepted, indeed, the inclusion of delegates from the hereditary Peerage, and of life Peers; but they resolved that in future *qualification* 'should be the main test for admission to the reformed House of Lords'. Some of them went even further, and avowed their conviction 'that the best guarantee for the satisfactory performance of legislative duties lay in the experience of affairs derived from the tenure of high and responsible office or from active service in public life'. Obviously, the principle of 'qualification', once accepted, will act as a ground of exclusion no less effectively than as one of

inclusion.

Of whom, then, shall the future 'House of Lords' consist? Should the proposals of the Committee be adopted, it will include six distinct elements: (1) Peers of the Royal Blood; (2) Lords of Appeal in Ordinary; (3) a considerable body (200) of representatives elected by the hereditary Peers; (4) hereditary Peers possessing certain specified qualifications; (5) Spiritual 'Lords of Parliament'; and (6) Life Peers.

The first two categories alone remain entirely unaffected by the proposals of the Committee. The third is an adaptation of a principle which has been for two hundred years recognized in our Constitution. Henceforward the Peers of the United Kingdom will be placed in a position similar to that occupied by the Scotch Peers since 1707, and by the Irish Peers since 1801. That is to say, they will be required to delegate their legislative functions to two hundred of their own number, elected for each new Parliament by a cumulative vote. The future position of the Scotch and Irish Peerage demands, in this connexion, a word of explanation. The Committee wisely anticipated that a question might be raised as to the infraction or modification of the Acts of Union with Scotland and Ireland respectively.

By the former the Scotch Peers are entitled to elect sixteen Peers to represent them for the duration of each Parliament; by the latter the Irish Peers elect twenty-eight Peers who hold their seats for life. But since the Irish Union striking changes have occurred in the distribution of population as between the three constituent parts of the United Kingdom. In the year 1801 the population of Ireland was only some two millions less than that of England, and was more than four times as great as that of

Scotland.[161] To-day, the population of Ireland, instead of being nearly four-fifths that of England is little more than one-eighth, and is almost exactly the same as that of Scotland, instead of being four times as large. Under these circumstances the draft report of the Committee suggested that the representation of the Scotch and Irish Peerage should be equalized, and that each should be represented in the reformed House by not less than twenty of their own number. If by some mischance the irreducible minimum of forty was not automatically obtained, the election was to be invalidated. Before the Report was finally adopted, wiser counsels prevailed, and this clumsy contrivance disappeared. It was proposed that the Peerages of the three kingdoms should be fused into one electoral body which would comprise about 665 Peers, of whom 173 would be holders of Irish and 87 holders of Scotch Peerages. Of the total number of 200 Peers to be elected as Lords of Parliament, it was calculated that if the cumulative vote or any other scheme of proportional representation were adopted, it would be in the power of the Irish Peers to elect 51 representatives and for the Scotch Peers to elect 26. Most people will concur in the opinion expressed by the Committee that in this way ‘a natural and adequate representation of the separate divisions of the kingdom would be secured, and the provisions of the Acts of Union to all intents and purposes would be observed’. But be this as it may, the device suggested is infinitely preferable to the cumbrous machinery which the Draft Report proposed to set up.

Would the cumulative vote be likely to give rise to political manipulation? This obvious criticism was anticipated by the Committee. They were, however, sufficiently optimistic to believe that ‘although official lists of candidates might be supplied by party authorities, the independence of the Peers

would assert itself, and secure the election of the most suitable representatives'. Outsiders may or may not share the confidence expressed by the Peers in the wisdom and integrity of their Order; but it is tolerably safe to assume that the 200 representative Lords of Parliament would include all the members of the existing Peerage who have any title to be regarded as heaven-born legislators, apart from those who would obtain admission to the new House by 'qualification'.

For it must be noted that the 'Representative' Lords would form little more than a moiety of the reconstituted Chamber. The main principle of admission was to be 'qualification'. Among the 'qualified' Lords of Parliament would be found all Peers who held or had held any of the following offices: Cabinet Minister, Viceroy of India, Governor-General of Canada or Australia, High Commissioner of South Africa, Lord-Lieutenant of Ireland; or who had been Speaker of the House of Commons; or who had attained to the highest offices in the public service, as soldiers, sailors, administrators, or diplomatists; or had held 'high judicial office', or the office of Attorney- or Solicitor-General for England, Lord Advocate for Scotland, or Attorney-General for Ireland. Peers holding certain specified political or Court offices would be entitled to a writ of summons for the duration of the Parliament. Any Peer, by hereditary succession, who had served for ten years in the House of Commons, and any created hereditary or life Peer who had served for twenty years, would be entitled to sit for life in the House of Lords. It was calculated that about 130 of the existing hereditary Peers would find in one or other of the above qualifications an avenue to the new House.[162]

There remain two other elements: life Peers and Bishops. In regard to the latter, the Committee were at pains to make it clear

that ‘they had not overlooked the fact that a large section of the community would be glad to relieve the Bishops of their legislative duties and give them the opportunity of devoting themselves exclusively to the charge of their dioceses’. The point is delicately put. Eventually it would seem that antiquarian considerations were for once allowed equal weight with those of a purely utilitarian character. The Committee, ‘having in mind the immemorial position of the Bishops in the House of Lords, and the special authority with which they are able to speak on many subjects,’ decided to apply the same principle to the spiritual as to the lay Peerage. The two Archbishops are to sit ‘by right during the tenure of their Sees’; the rest of the Bishops are to elect eight of their number to represent them for the duration of each Parliament. The proposal is one which will probably commend itself to most reasonable men, though some perhaps will be disappointed that the Committee found themselves unable to formulate any scheme for the inclusion of ‘representatives of the other great Churches of England, Scotland, and Ireland’—despite sympathetic and hospitable views on the subject.

As to life Peerages, the Committee pertinently pointed out that the whole aspect of this much-disputed question is changed by the proposals already made for modifying, and indeed abolishing, the hereditary constitution of the House. They recommended, however, that the Crown should be empowered to summon annually four Peers for life, as Lords of Parliament. Of the four, three must possess one of the ‘qualifications’ enumerated above, and the total number existing at any one time must not, exclusive of the Lords of Appeal in Ordinary, exceed forty. The position of the latter, as already pointed out, was not to be in any way affected.

The new House would, under the arrangements suggested, consist in all of something less than 400 members. Of these, 200 would be representative hereditary Peers, elected by their fellows; 130 would be qualified hereditary Peers; 10 would be Spiritual Lords of Parliament; and the total would be made up by 5 Lords of Appeal in Ordinary, 3 Peers of the Blood Royal, with a possible maximum of 40 life Peers.

A difficult question remained to be considered. Ought hereditary Peers to be eligible for election to the House of Commons? On this question the Committee expressed a decided opinion, that it is 'contrary to public policy that it should be possible for persons to hover between the two branches of the Legislature'. They would therefore render any person who had once sat in the House of Lords ineligible for election to the other House. On the other hand, they would permit Peers 'who have never occupied seats in the House of Lords, or offered themselves for election, or become qualified to sit as Lords of Parliament, to be eligible for election to the House of Commons 'without any restriction as to constituency'. This would seem to be a fair compromise on a point of admitted delicacy, but it may be doubted how far it is likely to commend itself to those members of the other House who would be subjected to this new and formidable competition.

Before proceeding to criticize the conclusions of this Report, it may be well to notice one or two points in regard to which the Committee themselves obviously anticipated criticism. The first is that their proposals contain nothing—apart from the cumulative vote by which the delegated Peers are to be elected—which could meet the difficulty as to the permanent preponderance of one party within the House. 'The Committee have fully considered various proposals which have been laid

before them with the object of readjusting the political balance in the House of Lords.' So runs Section 32 of the final Report. But on this point the Draft Report is much more illuminating.

Thus in Section 37 of the latter we find a recommendation that each administration should 'for the purpose of government'—a somewhat ambiguous phrase—'have the right on its accession to power to summon forty Lords of Parliament from among hereditary Peers and persons possessing the qualifications of life Peers'. Further reflection seems to have substantially modified the views of the Committee. Only four Peers, Lords Midleton, Belper, Newton, and Courtney, voted for the retention of this paragraph, and the Committee ultimately agreed to report as follows:

> 'Within recent years the House of Lords has been criticized not so much for any alleged incapacity to perform efficiently its legislative functions as on account of the uneven distribution of political parties within its walls.
>
> It is obvious that difficulties between the two Houses must arise when a Government is in power which is supported by a large majority in the House of Commons, and only by a small minority in the House of Lords.
>
> The Committee do not wish to imply that, in their opinion, the majority in the House of Lords should be made mechanically to correspond with the majority in the House of Commons, but they feel that the party in power in the elected Chamber should be able to count upon a substantial following in the House of Lords.

> The Committee have come unanimously to the conclusion that the existing evil could not be remedied by flooding the House with permanent Peerages, which do not by any means imply permanent politics, and thus not unfrequently help to defeat the objects which they were created to promote, and to increase the disproportion they were intended to diminish.
>
> They are also unable to recommend that a certain number of Peers chosen because they are supporters of the Government of the day, should be summoned to sit and vote in the House of Lords for the duration of a Parliament, or of a Government. They consider that such Lords of Parliament would be in a position anomalous as regards the House, and unsatisfactory as regards themselves.'

Another question which sharply divided the Committee was that of the admission of 'outside' and popularly elected representatives.

Thus in the Draft Report we read: 'The Committee at an early stage of its proceedings resolved that it was desirable that a new element from outside the present House of Lords should form part of the reformed House. . . . They believe that an element from outside, not overpowering, but to some extent leavening and refreshing, would be of appreciable use in giving weight to the deliberations of the House and a periodically renewed contact with the aspirations of the nation.' They recommended, therefore, the direct representation of large urban communities—but not of rural County Councils—in the House of Lords. These proposals disappeared from the final Report,

and the only reference to them is contained in the following paragraph:

> 'In order to bring the House more into harmony with changes of political opinion in the country, some members of the Committee desired that persons experienced in local or municipal administration should be introduced from outside at each General Election to sit and vote in the House of Lords for the duration of the Parliament. To effect this object various proposals to admit to the House elected representatives from County Councils and Municipal Corporations, whether Peers or not, were discussed. On this capital question the Committee were almost equally divided, and are, therefore, unable to make any recommendation.'

But even had this suggestion been adopted it would not necessarily have done much to solve another problem which to some members of the Committee at least appeared the most vital of all. Their reluctance to present a Report without any specific reference to the adjustment of the constitutional relations of the two Houses may be judged from the sentence with which the original draft concludes.

> 'Although it is, perhaps, beyond their province, they desire to offer an opinion with regard to the real difficulty that underlies all this subject, the difficulty of adjusting the relations between the two Houses in case of a conflict of opinion. They believe that it is best to proceed, as at present, by Messages and by Conferences, but, in case of a

failure to agree, they think that a Conference should have the power, by a majority of its members, to take the sense of the constituencies on the matter at issue by means of what is known as the Referendum.'

In the final Report, however, there is no recommendation on this subject, which is summarily dismissed as follows: 'though much might be said in favour of such a proposal (the Referendum) the majority of the Committee felt that to discuss it, or formulate an opinion upon it, would be beyond the limits imposed upon them by their Order of Reference.'

Since the Report was issued—little more than a year ago—events have moved rapidly, and it will no longer be possible to evade consideration of the points which the Committee discreetly declined to touch.

With their inadequate appreciation of Colonial aspirations, and their puerile provision for meeting them, I have already dealt. But a word or two must now be said of their positive proposals. It is agreed that one of the primary impediments in the path of efficiency is the unwieldy bulk of the existing House. Lord Rosebery's Committee propose to reduce it by more than one-third—to about 400 members. But does the proposal go far enough? Any Upper Chamber must, of course, represent a variety of interests: still more so the Second Chamber of a Parliament which claims to be Imperial. But cannot adequate representation be procured in a Senate of less than 400 members? Federal America is content with 90; federal Germany with 58. Such a diminution of numbers would be impossible in our case, but is the 300 of the French Senate an unattainable ideal? And are not the categories needlessly multiplied? Might

it not be possible at least to combine the Lords of Parliament by 'qualification' with the Lords by delegation? If the principle of delegation be admitted—and to me it seems entirely sound—might not the Peers be trusted to delegate their very responsible functions to Peers who whether within or without the somewhat artificial categories suggested by the Committee are none the less 'qualified' in the largest sense? If, however, it were thought well to regard official qualification as conferring an indefeasible right to membership of the Second Chamber, it would, almost certainly, be necessary to curtail materially the number of Lords by delegation—perhaps from 200 to 100. On the computation of the Committee this would start the new House with 230 members. To these would certainly have to be added some 40 or 50 nominated life Peers: the oversea Dominions ought not to be asked to be content with less than 40 or 50 elected representatives; the Bishops and Judges would contribute 10 more—in all about 320 members. And this it will be observed makes no allowance for the inclusion of any elected or outside element towards which a large minority of the Committee inclined, which Lord Rosebery himself recommended in 1888, and of which more is quite certain to be heard.

These observations are offered in no captious spirit. The Report of the Committee seems to me to afford not merely an admirable basis for discussion, but a safe starting-point on the path of practical reform. The scheme suggested is at once simple and coherent, drastic and conservative; it looks hopefully and confidently to the future, without breaking gratuitously with the past. As such the Report claims respectful consideration, if not uncritical and unquestioning assent.

It is, however, seriously open to question whether restriction

of the powers or alteration of the structure of the House of Lords, or both in combination, will now suffice to compose the constitutional differences which have arisen. There is at any rate a considerable party which favours, either in place of or in addition to, the above expedients, the adoption of a brand-new constitutional device—the Referendum.

§ 3. The Referendum

The idea of a Referendum, or poll of the people on a particular issue, was first familiarized to English students of Politics by Sir Francis Adams,[163] Sir Henry Maine,[164] and Mr. A. V. Dicey.[165] The last named described the Referendum as 'the people's veto'; and that, as far as one form of Referendum is concerned, is an accurate description: but it is neither accurate nor adequate as a description of the Referendum as it is worked in Switzerland, nor as it is proposed by some for adaptation to our own Constitution.

The native home of the Referendum is Switzerland, and as discussion—more or less informed—on the subject is certain to take place in this country before long, it may be as well to set forth with precision the nature and meaning of this constitutional device, and its complex mode of operation in its original home. In the Constitution of the Swiss Confederation as adopted on May 29, 1874, and revised in this particular on July 5, 1891, there are two forms of Referendum: the 'Facultative' or 'Optional'; and the 'Obligatory'. The former *may* be invoked in ordinary legislation; the latter *must* be applied in constitutional amendment. By Article 89 it is provided that: 'Federal laws, decrees, and resolutions shall be passed only by the agreement of the two Councils. Federal laws shall be submitted for

acceptance or rejection by the people if the demand is made by 30,000 voters, or by eight Cantons. The same principle applies to federal resolutions which have a general application, and which are not of an urgent nature.' It will be observed that in this case the application of the device is purely optional, and that the effect of it is merely to give to the people or to the Cantons a veto on laws which have already passed both Houses. This is veto in the strictest sense.

The obligatory Referendum is something entirely different, and the difference is so important that it will be well to quote *in extenso* those Articles of the Constitution which define the method of its operation.

'Article 119. Total revision shall take place in the manner provided for passing federal laws.

Article 120. When either Council of the Federal Assembly resolves in favour of a total revision of the Constitution and the other Council does not consent thereto, or when 50,000 Swiss voters demand a total revision, the question whether the Federal Constitution ought to be revised shall be in either case submitted to a vote of the Swiss people, voting yes or no.

If in either case the majority of those voting pronounce in the affirmative, there shall be a new election of both Councils for the purpose of undertaking the revision.

Article 121. Partial revision may take place either by popular initiative or in the manner provided for the passage of federal laws.

The popular initiative shall consist of a petition of 50,000 Swiss voters for the adoption of a new Article or for the abrogation or amendment of specified articles of the

Constitution.

When several different subjects are proposed by popular initiative for revision or for adoption into the Federal Constitution, each of them must be demanded by a separate initiative petition. The initiative petition may be presented in general terms or as a completed proposal of amendment.

If the initiative petition is presented in general terms, and the federal legislative bodies are in agreement with it, they shall draw up a project of partial revision in accordance with the sense of the petitioners, and shall submit it to the people and the Cantons for acceptance or rejection. If, on the contrary, the Federal Assembly is not in agreement with the petition, the question of partial revision shall be submitted to a vote of the people, and if a majority of those voting pronounce in the affirmative, the Federal Assembly shall proceed with the revision in conformity with the popular decision. If the petition is presented in the form of a completed project of amendment, and the Federal Assembly is in agreement therewith, the project shall be submitted to the people and the Cantons for acceptance or rejection. If the Federal Assembly is not in agreement with the project, it may prepare a project of its own, or recommend the rejection of the proposed amendment, and it may submit its own counter-project or its recommendation for rejection at the same time that the initiative petition is submitted to the vote of the people and Cantons.

Article 122. The details of procedure in cases of popular initiative and popular votes on amendments to the Constitution shall be determined by federal law.

Article 123. The amended Federal Constitution or the revised portion of it shall be in force when it has been adopted

by a majority of Swiss citizens voting thereon, and by a majority of the Cantons. In making up the majority of Cantons the vote of a half Canton shall be counted as half a vote.

The result of the popular vote in each Canton shall be considered as the vote of the Canton.'

It will not escape attention that to the two forms of Referendum already mentioned—the 'Facultative' and 'Obligatory'—these Articles add a third, which is known as the Constitutional Initiative, and which again bifurcates into two forms. The amendment thus initiated may be in general terms, or it may be in the form of a specific and formulated amendment. The last or 'formulated initiative' is the extremest form of legislation by popular mandate; for under its operation a Bill, involving constitutional changes of the most elaborate, complicated, and fundamental character, may actually become law, without amendment, and in the teeth of the opposition of both Houses of the Legislature.

Mr. McKechnie has lately subjected the argument in favour of the Referendum to a critical and singularly searching analysis; but (unless I misapprehend his meaning) he ignores entirely the complications of the machinery provided by the Swiss Constitution. 'The Referendum in Switzerland,' he writes, 'is a weapon placed in the people's hands to prevent the passing of Bills of which both Houses have already approved. The Referendum as proposed for Great Britain would be a weapon placed in the people's hands for compelling the enactment of measures of which one House has finally disapproved. The one is a people's veto for preserving the *status quo*; the other would be a people's goad for hustling Bills through Parliament that would otherwise be rejected. The one is

a weapon of defence; the other of aggression; the one entirely negative, the other entirely positive. The effect of the Referendum in Switzerland is to add a third Chamber (to wit, the people in their masses) to the two ordinary Chambers of the Legislature. Its effect in England would be to reduce the Second Chamber to impotence. In Switzerland there are three bulwarks against innovation. In England there would be for practical purposes only one. The difference between the two systems is thus as emphatic as that between black and white.'[166]

It is perfectly true that the analogy between the position of Switzerland and that of Great Britain is, in a multitude of ways, imperfect; or rather that, as Mr. McKechnie puts it, the distinctions between the two Constitutions 'are so vital as to invalidate all arguments founded upon analogy'. But it is very far from the case that the Referendum is merely 'a weapon placed in the people's hands to prevent the passing of Bills of which both Houses have already approved'. It is that; but it is much more. Combined with the 'formulated initiative' it is a weapon of immense potency, by the employment of which the authority of the Legislature can be entirely set aside. Mr. McKechnie dreads lest the Referendum should reduce 'the Second Chamber to impotence'. In Switzerland it may reduce both Chambers to that condition. Nor is the weapon allowed to rust in the scabbard. On the contrary, according to the testimony of a writer in the current number of the *Edinburgh Review*, the tendency is to sharpen the blade. 'The people's appetite for legislation has grown with what it fed on. . . . By a sort of legal fiction, or by open connivance at an illegal evasion of the Constitution it has become the regular practice to allow this Constitutional Initiative to be applied to any legislative measures whatsoever, no matter how remote their substance may

be from constitutional phenomena. Any Bill, if it only pretends to be a constitutional Bill, that is if its framers couch it in the form of a constitutional article, may be forced through by means of the so-called Constitutional Initiative.'[167]

It is somewhat alarming to contemplate the prospect which might be opened out by the introduction of such a device into our constitutional machinery. To concede to any given number of voters—however large—the right of passing into law any legislative fad, subject to no criticism, to no debate, to no amendment, is almost unthinkable. It may be objected that no such expedient is proposed by those who advocate the introduction of the 'Referendum' into this country. That is quite true. The Referendum is proposed primarily as a convenient method of adjusting differences between the two Chambers of the Legislature, and is advocated (e.g. by Mr. Dicey[168]) mainly on the following grounds: (i) that it would serve to discriminate between amendments of the Constitution and ordinary legislation; (ii) that on constitutional questions it would enable a plain and simple issue to be submitted to the electorate, and would elicit a clear and straightforward answer; (iii) that it would give 'due weight to the wishes of all voters'; (iv) that it would 'place the nation above parties or factions' and would 'greatly diminish the importance of merely personal questions'; and (v) that it would permit the sense of the nation to be taken on a particular issue without involving a change of Ministry. Many of these propositions are, it will be perceived, highly disputable. Budget proposals are in practice withheld from the Referendum in Switzerland under the plea of 'urgency';[169] but is it imaginable that a Ministry could, under the Cabinet system, retain office after the rejection by the people of a really important measure? Mr. Gladstone submitted with such grace as

he could command to the defeat of his second Home Rule Bill at the hands of the House of Lords; could he have retained office after its rejection by the electors?

But it is not within the scope of this work to argue in detail the case for or against the Referendum. Those who seek an answer to the argument of Mr. Dicey will find it in the work already cited of Mr. McKechnie, who has stated his case with great force. His argument may be briefly summarized as follows: (i) that the proposal cannot be supported for Great Britain on the analogy of Switzerland, a point which will be generally admitted; (ii) that a simple 'yes 'or 'no' would decide little, and that a more complicated form of reference would hopelessly confuse the illiterate voter—a result, it may be suggested, not entirely to be deprecated; (iii) that much would depend upon the drafting of the reference, and that it would not be easy to decide who should draft it; (iv) that the electors 'aware that some Bill was imperative' would accept a bad Bill rather than none. But how many Bills can be described as 'imperative'? urgent Bills, might, on the Swiss analogy, be withdrawn from the referendal category, and very few Bills, not urgent, are 'imperative'; (v) that it would make the executive omnipotent; (vi) that it would paralyse the sense of responsibility under which Parliament at present does its work, and would deprive the nation of the educational discipline derived from Parliamentary debates. (This is to my mind the most serious argument against the proposal; but it may be urged that the debates which would inevitably precede the taking of a poll in the constituencies would be at least as 'real' and perhaps not less educative than those which the ordinary voter has the opportunity of following to-day.) (vii) that constant Referendums would become an intolerable nuisance—a

proposition not to be denied; (viii) that it would render inevitable some form of Home Rule for Scotland, Ireland, and Wales; (might it not tend rather by means of a provincial or partial Referendum to avert it?) and (ix) that it would tend to a 'narrow and metallic conception of the Commonwealth'. For the elaboration of these arguments the reader must be referred to Mr. McKechnie's own work and to the singularly lucid and effective article, already cited, in the *Edinburgh Review* A formal discussion of the points thus summarized is beyond the scope of this work. But so much reference to the matter has seemed unavoidable in order to enforce my contention that any attempt to throw the existing Constitution into the melting-pot must necessarily raise issues much wider and graver than those which immediately inspire the demand for revision.

'Fundamentals' are questioned to-day as they have not been questioned for two hundred and fifty years. A frontal attack upon the Upper House delivered by the Lower, especially if it be successful, is not likely to leave the latter where it stood. To those who have ears to hear, the warnings afforded by the history of the Puritan Revolution are full of significance. One branch of the Legislature—itself purged and emasculated by an irresistible army—was able, supported by that army, to sweep away the Monarchy and the House of Lords. But no sooner was that consummation effected than awkward questionings arose as to the source of political authority. Doctrinaire democracy found expression in *the Agreement of the People*. Questionings were hushed and dogmas swept aside by the rough common sense of Cromwell. But the authority of the Commons did not survive. That went the way of the Monarchy and the Lords. Cromwell, genuinely anxious to conceal the sword under the toga, did his best to revive parliamentary government, and even to

reconstruct the bi-cameral system. How and why he failed I have attempted already to show.[170] I recur, for an instant, to the experience then gained in order to lend emphasis to my sense of the extreme danger of touching with rash and inexperienced hands the fundamentals of the polity. We must look to the rock whence we are hewn. Men who will not look back to their ancestors cannot be expected to look forward to posterity. Pygmies, as Mirabeau said, can destroy; it takes giants to build. 'With the overwhelming power that is now placed in the hands of the House of Commons, with the liability of that House to great and sudden fluctuations, with the dangerous influence which, in certain conditions of politics, small groups, or side-issues, or personal dissensions or incapacities, may exercise on the course of its decisions; with the manifest decay of the moderate and moderating elements in one of the great parties of the State, and with a Constitution that provides none of the special safeguards against sudden and inconsiderate organic change that are found in America and in nearly all continental countries, the existence of a strong Upper Chamber is a matter of the first necessity. It is probable that the continuance, without a great catastrophe, of democratic government depends mainly upon the possibility of organizing such a Chamber, representing the great social and industrial interests in the country, and sufficiently powerful to avert the evils that must, sooner or later, follow from the unbridled power of a purely democratic House of Commons.'[171]

Thus did Mr. Lecky diagnose the disease of the body politic in 1895. The intervening years have not impaired the accuracy of the diagnosis, nor invalidated the efficacy of the remedy prescribed. Is the patient more likely to adopt it now than then? No student of politics—at once fair-minded and well-informed

—is likely to maintain that the existing Second Chamber is either ideal in theory or effective in practice. The hereditary element is entirely disproportionate; its numbers are excessive, and its impartiality questionable. Under a Conservative administration it tends to abdicate its functions, under a Liberal Government to exercise them indiscriminately. But the obstacles in the way of revision are neither few nor insignificant. Yet who would willingly commit the destinies of the nation, still less of the Empire, to a single popularly elected Chamber, even though its decisions were made subject to the ultimate veto of a Referendum? Experience, no less than philosophy, has declared unmistakably in favour of the bi-cameral system.

But to devise a good Second Chamber; to discover for it a basis which shall be at once intelligible and differentiating; to give it powers of revision without powers of control; to make it amenable to permanent public sentiment and yet independent of transient public opinion; to erect a bulwark against revolution without interposing a barrier to reform—this is a task which has tried the ingenuity of constitution-makers from time immemorial. Fortune has provided this country with a Second Chamber which fulfils some but not all of the conditions enumerated above, and has many merits and some obvious defects. Putting mere party tactics on one side, is it the part of political wisdom either to endeavour to destroy, or to refuse to amend? Should this question evoke an affirmative answer, the argument of this book will have been elaborated in vain. But I venture to submit that it is in reality impossible to resist the conclusion to which that argument points. The world, by a sober and considered and unanimous verdict, has affirmed its belief in the necessity of a Second Chamber. Uni-cameral experiments have been tried and failed.

That the Second Chamber should necessarily assume the form familiar to us in this country was never affirmed by philosophy, and has long been negatived by experience. But in favour of the House of Lords there is at least one solid argument which Englishmen of all peoples in the world are least likely to undervalue: it exists. More than that: its roots strike deep in historic soil: its branches are intertwined with those of the nation at large. Adopting another metaphor, we may assert that 'even in its defects the House of Lords has, since it ceased to be a house of feudal Peers, been a not unfaithful mirror of the country—not, indeed, of all the country's fleeting moods, but of the country's matured decisions and accomplished deeds'.[172] That the time has come for drastic reform I am not prepared to deny; but at least let us be assured that the task is committed to those who can approach it in no iconoclastic spirit and with informed minds; who are anxious to amend, not eager to destroy; to those who conscientiously hold with Milton that 'there is no civil government that hath been known, . . . more divinely and harmoniously tuned, more equally balanced as it were by the hand and scale of justice, than is the Commonwealth of England, where, under a free and untutored monarch, the noblest, worthiest, and most prudent men, with full approbation and suffrage of the people, have in their power the supreme and final determination of highest affairs'.[173]

APPENDIX A

RETURN TO AN ORDER OF THE HOUSE OF LORDS, DATED MARCH 8, 1910

1. (*a*) The number of Temporal Peers who hold or have held any of the following offices is:—

High Judicial Office, within the meaning of the Appellate Jurisdiction Acts, 1876 and 1887—16.

The Office of Cabinet Minister, Head (not being a permanent Civil Servant) of any other Government Department, or Speaker of the House of Commons—43.

The Office of Lord Lieutenant of Ireland, Viceroy of India, Governor-General of the Dominion of Canada, Governor-General of the Commonwealth of Australia, or Governor-General of the Union of South Africa—20.

The Office of High Commissioner of South Africa, Governor of the Presidency of Madras or Bombay, Lieutenant-Governor of any Province in India, or Governor of any Dominion or Colony—24.

The Office of Parliamentary Under-Secretary, Parliamentary Secretary, or permanent Under-Secretary in any Government Department, or Lord of the Treasury, or Civil Lord of the Admiralty—51.

The Office of Minister or any Higher Office in His Majesty's Diplomatic Service—2.

(*b*) The number of Temporal Peers who are Privy Counsellors is 112. (This number does not include Peers of the Blood Royal.)

(*c*) The number of Temporal Peers who have been elected to sit in the House of Commons before becoming members of the House of Lords is 148.

(*d*) The number of Temporal Peers who have attained the rank of Vice-Admiral in the Royal Navy or of Lieutenant-General in the Army is 7.

NOTE.—The total number of Peers included in the lists (*a*), (*b*), (*c*), and (*d*) is 222, and not 423 as might appear by adding up the various figures given above. This is accounted for by the fact that the same Peer often figures in two or more of the specified categories.

2. The total number of Peers on the Roll at the beginning of the Session, at various dates between 1765 and 1909:—

1765	202	1898	586
1775	201	1899	591
1805	318	1900	593
1835	423	1901	592
1845	455	1902	590
1855	445	1903	592
1865	454	1904	594
1875	491	1905	591
1885	524	1906	613
1895	571	1907	616
1896	575	1908	615
1897	580	1909	618

3. The number and rank of the members of the House of Lords at the present time:—

Royal	4	
Archbishops	2	
Dukes	21	
Marquesses	23	
Earls	140	
Viscounts	47	
Bishops	24	
Barons	361	5 Life Peers.
	622	

Peers of United Kingdom	552		
Archbishops	2		
Bishops	24		
Representative Peers of Scotland	16		
Representative Peers of Ireland.	28		
		10	
	622	{	Minors. 14

		———	Peeresses.
Peers of Scotland, 85.			
Representative	16 [174]		
With English, British, or United Kingdom Peerages	50		
Peers and Peeresses not sitting in Parliament	19		
	———		
	85	{	Minor, 1. Peeresses, 3.
	———		
Peers of Ireland, 172.			
Representative	28		
With English, British, or United Kingdom Peerages	81		
Peers not sitting in the House of Lords	63		
	———		
	172		Minors, 5.
	———		

4.[175] The number of Temporal Peers who (1) did not attend, or (2) attended less than ten times in the Sessions of 1902, 1906, and 1909, is as follows, viz.:—

	Session 1902	1906	1909
(1) Did not attend[176]	141	88	81
	188	130	168

(2) Attended less than ten times			
Total number of Temporal Peers	566	590	589

APPENDIX B

LIST OF ACCESSIBLE AUTHORITIES

(*a*) Texts

Dareste: Les Constitutions modernes: Recueil des Constitutions en vigueur dans les divers états de l'Europe, d'Amérique et du monde civilisé.

Demombynes: Les Constitutions européennes.

Dodd: Modern Constitutions.

(Dodd's valuable collection (1909) contains the texts of all the important Constitutions cited, save those of Turkey and South Africa.)

(*b*) On the House of Lords

Pike: Constitutional History of the House of Lords.

Erskine May: Constitutional History of England (1760-1860).

—— Parliamentary Practice.

—— Democracy in Europe.

Anson: Law and Custom of the Constitution.

Bagehot: English Constitution.

Low: Governance of England.

Charley: Crusade against the Constitution.

M Reform of the House of Lords.

Hearn: Government of England.

Maitland: Constitutional History.

Journals of the House of Lords and House of Commons.

Dicey: Law of the Constitution.

—— Articles in *Contemporary* and *National Reviews*.

Firth: Last Years of the Protectorate.

(*c*) British Dominions Over Sea

Jenkyns: British Rule and Jurisdiction beyond the Sea.

Keith: Responsible Government in the Dominions.

Egerton: British Colonial Policy.

—— Canada.

Egerton and Grant (ed.): Evolution of Canadian Self-Government.

Goldwin Smith: Canada and the Canadian Question.

Bourinot: Federal Government in Canada.

—— Parliamentary Procedure and Practice (Canada).

—— Parliamentary Government in Canada; ap. Report of American Historical Association (1891).

—— Constitutional History of Canada.

Greswell: History of the Dominion of Canada.

Alphaeus Todd: Parliamentary Government in the Colonies.

Wise: Commonwealth of Australia.

H. de R. Walker: Australian Democracy.

Harrison Moore: Commonwealth of Australia.

Brand: Union of South Africa.

(*d*) General Works

Lecky: Democracy and Liberty.

Maine: Popular Government.

Lowell: Governments and Parties in Continental Europe.

—— The Government of England.

Woodrow Wilson: The State.

—— Congressional Government.

Bryce: Studies in History and Jurisprudence.

—— American Commonwealth.

Burgess: Political Science and Constitutional Law.

Fisher: Evolution of the Constitution of the United States.

Ilbert: Legislative Methods and Forms.

Dickinson: Constitution and Procedure of Foreign Parliaments.

Henry Sidgwick: Elements of Politics.

Dupriez: Les Ministres dans les principaux pays de l'Europe et d'Amérique.

Borgeaud: Établissement et revision des constitutions en Amérique et en France.

ESMEIN: Eléments de droit constitutionnel français et comparé.

GODKIN: Unforeseen Tendencies of Democracy.

APPENDIX C

The following Resolutions were accepted by the House of Lords (March 1910):—

I. That a strong and efficient Second Chamber is not merely an integral part of the British Constitution, but is necessary to the well-being of the State and to the balance of Parliament.

II. That such a Chamber can best be obtained by the reform and reconstitution of the House of Lords.

III. That a necessary preliminary of such reform and reconstitution is the acceptance of the principle that the possession of a peerage should no longer of itself give the right to sit and vote in the House of Lords.

The following is the text of the Resolutions of which Mr. Asquith has given notice to be submitted to the House of Commons:—

I. Money Bills

That it is expedient that the House of Lords be disabled by law from rejecting or amending a Money Bill, but that any such limitation by law should not be taken to diminish or qualify the existing rights of the House of Commons.

For the purposes of this resolution a Bill shall be considered a Money Bill, if in the opinion of the Speaker it contains only provisions dealing with all or any of the following

subjects, viz. 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 guaranteeing of any loan or the repayment thereof, or matters incidental to those subjects or any of them.

II. Bills other than Money Bills

That it is expedient that the powers of the House of Lords as respects Bills other than Money Bills be restricted by law so that any such Bill which has passed the House of Commons in three successive sessions, having been sent up to the House of Lords at least one month before the end of the session, and has been rejected by the House in each of those sessions shall become law without the consent of the House of Lords on the Royal Assent being declared, provided that at least two years shall 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.

For the purpose of this resolution a Bill shall be treated as rejected by the House of Lords if it has not been passed by the House of Lords either without amendment or with such amendments only as may be agreed upon by both Houses.

III. Duration of Parliament

That it is expedient to limit the duration of Parliament to five years.

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Oxford: Printed at the Clarendon Press by Horace Hart, M.A.

FOOTNOTES:

[1] Norway and Servia are sometimes reckoned among uni-cameral legislatures; but Greece is now (1910) considering revision.

[2] Parliamentary Paper (13), March 10, 1910. There are ten Minors and fourteen Peeresses. See Appendix A.

[3] Henry VIII founded the new bishoprics of Bristol, Chester, Gloucester, Oxford, Peterborough, and Westminster, raising the total number to twenty-seven; but that of Westminster is now represented only by a Dean and Chapter.

[4] I borrow the diplomatic language of the Report of Lord Rosebery's Committee.

[5] *Report of Select Committee* (1908).

[6] 154 to 168, according to Maitland, *Constitutional History*, p. 349.

[7] Counting one minor. *Parliamentary Paper* (March 10, 1910).

[8] See *infra*, pp. 20 and 53.

[9] In addition to one ex-Lord of Appeal in Ordinary.

[10] Maitland (*C. H.*, p. 248), who by Middle Ages means, I presume, Prae-Tudor days.

Of the Peers who voted against the Reform Bill in 1832, there were, I believe, only four whose creation was prior to 1790.

[11] *Law and Custom of the Constitution*, i. 168.

[12] See *infra*, c. xii.

[13] *M. C.* § 14.

[14] *Law and Custom of the Constitution*, i. 173.

[15] The terms 'peer' (originally signifying, of course, only 'equal') and 'peerage' came into use in the fourteenth century.

[16] C. iv.

[17] *Cromwell*, p. 235.

[18] Firth, *Last Years of the Protectorate*, i. 9.

[19] *Cromwell*: Speech iii, Carlyle's edition, vol. iv, p. 50.

[20] Quoted by Firth, *Last Years of the Protectorate* (i. 155)—a work to which, as to the same writer's *Cromwell*, this chapter owes much.

[21] *ap.* Firth, *op. cit.* i. 137-8; i. 141.

[22] *ap.* Firth.

[23] *Op. cit.* i. 142, 3.

[24] Henry also was summoned, but was detained by his duties in Ireland.

[25] *ap.* Firth, *op. cit.* ii. 14.

[26] Bristol's case may be held to establish the *collective* privilege of the House of Lords to see that it is properly constituted, rather than the *individual* right of a Peer to receive a writ. Cf. Anson, *Law and Custom of the Constitution*, i. 265.

[27] Robertson, *Select Statutes and Cases*, p. 217-21.

[28] Robertson, *op. cit.* 230-40.

[29] *Constitutional History*, i. 291.

[30] *supra*, pp. 15, 20.

[31] See *supra*, p. 16.

[32] Lowell, *Government of England*, i. 390.

[33] I am pertinently reminded by Sir William Anson that this loss of initiative is comparatively recent, and that during the administrations of both Mr. Gladstone and Mr. Disraeli many important measures were introduced in the House of Lords—a fact which may be ascribed perhaps to the presence of such Chancellors as Lord Selborne and Lord Cairns.

[34] *Governance of England*, pp. 75-6.

[35] Quoted by Low, *op. cit.*, p. 79.

[36] Cf. *Government of England*, vol. I, c. xvii, *passim.* The above figures do not include divisions on the Estimates.

[37] Cf. Ilbert: *Legislative Methods and Forms*, p. 215 et seq.

[38] May, *Parliamentary Practice*, p. 604.

[39] *Constitutional History*, iii. 340.

[40] *Rot. Parl.* iii. 611, quoted by Stubbs, *C. H.* iii. 61.

[41] *L. J.* xi. 328a.

[42] *L. J.* xi. 467-9.

[43] *C. J.* ix. 235.

[44] Cp. *C. J.* ix. 509.

[45] L. O. Pike, *Constitutional History of the House of Lords*, p. 344.

[46] *L. J.* xii. 498 b.

[47] *The Duke of Argyll's Autobiography and Memoirs*, vol. ii, p. 160.

[48] Morley, *Life of Gladstone*, ii. 40.

[49] See *infra*, pp. 173, 190.

[50] *History of England*, iv. 328-9.

[51] *Op. cit.* iv. 330.

[52] *Constitutional History*, iii. 142.

[53] *Op. cit.* iv. 326.

[54] iv. 331.

[55] The situation in 1700 abounds with interesting parallels to the political situation of to-day. In this connexion the curious may care to refer to a brilliant but almost neglected pamphlet of Swift's, *A Discourse of the Contests and Discussions between the Nobles and the Commons in Athens and Rome*, published in 1701 (collected works [ed. 1754] vol. iii, pp. 1-85). The pamphlet, though of course replete with paradox, is replete also with profoundly wise political reflections applicable to all time. The gist of the argument is that the encroachments of the popular element in a State where the constitution rests upon a nice equipoise of checks and balances must be jealously watched; especially is an infraction of the balance to be resisted when there is a powerful and victorious enemy at the gates ready to seize an opportunity of reducing the weakened State to the condition of a subject province.

[56] Both quoted by Mr. Low, *Governance of England*, 252. The present (1910) Foreign Secretary (Sir Edward Grey) is an

apparent exception, but only apparent, since he has practically deserted the House in favour of the Department.

[57] *The Government of England*, i. 409.

[58] *Infra*, c. xii.

[59] *Popular Government*, p. 207.

[60] No. 27.

[61] *The Evolution of the Constitution of the United States* (Philadelphia, 1897).

[62] The German Bundesrath (58) is relatively even smaller.

[63] A. L. Dawes, *How we are Governed*.

[64] *The American Commonwealth*, i. 107.

[65] Constitution, Art. II. § ii.

[66] Woodrow Wilson, *The State*, § 1331.

[67] *The State*, p. 544.

[68] *Op. cit.* i. 106.

[69] Hamilton, *Federalist*, ap. Bryce, i. 108.

[70] *Op. cit.* i. 103.

[71] *Op. cit.*, p. 529.

[72] Hamilton, ap. Bryce, i. 108.

[73] Hamilton.

[74] *Op. cit.* i. 111.

[75] Wilson, *Congressional Government*, pp. 194-5, quoted by Bryce.

[76] *Infra*, chapters vii, viii, ix.

[77] i. 224.

[78] i. 86.

[79] Lowell, *Governments and Parties in Continental Europe*, i. 265.

[80] *Op. cit.* i. 256-7.

[81] *The State*, p. 260.

[82] *Op. cit.* i. 272.

[83] *Infra*, c. xii.

[84] Demombynes, *Les Constitutions Européennes*, II. 625.

[85] *The State*, p. 323.

[86] Constitution of the Swiss Confederation (May 29, 1874), Arts. 84-94.

[87] Reprinted by Methuen & Co., 1902.

[88] Quoted by Sir Henry Jenkyns, to whose work cited above reference should be made for further illustration of this point.

[89] Quoted by Goldwin Smith, *Canada and the Canadian Question*, p. 164.

[90] Amended in letter, but not in spirit, by § 1 of the Canada Parliament Act of 1875.

[91] Keith, *Responsible Government in the Dominions*, p. 118.

[92] British North America Act, § 28.

[93] A. Todd, p. 698.

[94] *Canada and the Canadian Question*, p. 163.

[95] *Op. cit.*, p. 699.

[96] *Op. cit.*, p. 168.

[97] *Op. cit.*, p. 168.

[98] Cf. Keith, *op. cit.* p. 1.

[99] Jenkyns, *op. cit.* p. 67.

[100] Keith, p. 124.

[101] *Ibid.*, p. 127.

[102] Keith, pp. 128-9.

[103] H. de R. Walker, *Australian Democracy*, p. 121.

[104] Keith, pp. 107-8.

[105] Keith, p. 108.

[106] Walker, p. 125.

[107] Keith, p. 111.

[108] Wise, *Commonwealth of Australia*, pp. 202-3.

[109] Wise, p. 103.

[110] Bryce, *Studies in History and Jurisprudence*, i. 469.

[111] *Commonwealth of Australia*, pp. 19-61.

[112] Harrison Moore, p. 98.

[113] pp. 122-123.

[114] Harrison Moore, pp. 124-7.

[115] § 24. 'The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators.'

[116] *Union of South Africa*, p. 67.

[117] ap. Wise, p. 194.

[118] *Op. cit.* p. 209.

[119] That of Dr. Jameson, quoted by Keith, pp. 115, 116.

[120] Letters Patent, December 6, 1906, and June 5, 1907; Keith, p. 131.

[121] R. H. Brand, *The Union of South Africa*, p. 68.

[122] *Op. cit.*, chap. x.

[123] *Op. cit.*, p. 101.

[124] §§ 33, 34, 35, 137.

[125] Brand, pp. 114, 115.

[126] *The Law of the Constitution*, p. 474.

[127] *Constitutional History*, i. 4.

[128] Hélie, *Les Constitutions de la France*; Dicey, *Law of the Constitution*, appendix, note 1; Demombynes, *Les Constitutions Européennes*, ii. 1-6.

[129] Willert, *Mirabeau*, p. 77.

[130] Mirabeau, *Speeches* (September 1, 1789).

[131] Burgess, *Political Science*, i. 97.

[132] *Contemporary Review*, No. 530, p. 152.

[133] M. Milliès Lacroix, quoted by Guyot, p. 145.

[134] Esmein, *Eléments de droit constitutional français*; also Burgess and Lowell, *op. cit.*

[135] Yves Guyot, pp. 143, 144.

[136] *Supra*, p. 210.

[137] Lowell, i. 12, referring to Lebon, *Frankreich*, pp. 74, 75.

[138] Lowell, i. 12.

[139] *Popular Government*, pp. 182-3.

[140] Cf. *supra*, chap. vi.

[141] Dodd, ii. 204.

[142] Lowell, ii. 156.

[143] *ap*. Lowell, ii. 156.

[144] Dodd, ii. 190-91.

[145] It is proposed to make one-third of the Senate elective in future.

[146] See note p. 234.

[147] *Elements of Politics*, p. 474.

[148] *Op. cit.* 475-6.

[149] As an example of *pure Federalism* I have preferred Australia to Canada, for reasons which I hope are made clear in chapters, vi and vii.

[150] I do not ignore the difficulties raised by Lord Lansdowne (cf. speech in House of Lords, March 17, 1910), but are they insuperable?

[151] *Minutes*, July 14, 1908.

[152] *Report*, § 22.

[153] Cf. *supra* chap. ii.

[154] The hereditary element will, should the existing Constitution endure, disappear from the Portuguese Chamber.

[155] *Des Droits des Chambres Hautes en matière de Finances*, p. 82, quoted by Lecky.

[156] Guyot, *op. cit.*

[157] *Democracy and Liberty*, i. 385.

[158] Quoted from *Report of Rosebery Committee*, appendix A.

[159] Report from the Select Committee of the House of Lords. Appendix A (234), December 1908.

[160] To December 1908.

[161] England, 8,892,000; Ireland, 6,800,000 Scotland, 1,600,000. Cf. *Draft* Report §§ 17, 18.

[162] Now (1910) shown to have been an under-estimate: see App. A.

[163] *The Swiss Confederation*, 1889.

[164] *Popular Government*, 1885.

[165] *Contemporary Review*, 1890; *National Review*, 1894.

[166] In his admirable little book, *The Reform of the House of Lords*, p. 94.

[167] *Edinburgh Review*, No. 431, p. 137.

[168] *National Review*, No. 23, p. 67.

[169] Art. 89.

[170] Cf. c. iii.

[171] Lecky, *Democracy and Liberty*, vol. i. 363-4.

[172] Pike, *Constitutional History of the House of Lords*, p. 391.

[173] *Of Reformation in England* (Complete Works, p. 17).

[174] Owing to the death of the Earl of Carnwath, there are at present only 15 Representative Peers (March 10, 1910).

[175] This Return does not include Peers of the Blood Royal.

[176] This includes Peers who were minors and also, of course, others who were necessarily abroad owing to their official or military duties, or kept away on account of ill-health.

[The end of *Second Chambers* by J. A. R. Marriott]